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STATE STANDARDS FOR APPOINTMENT OF COUNSEL IN DEATH PENALTY  
CASES

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## **INTRODUCTION**

This memo was prepared by the ABA Death Penalty Representation Project. It contains counsel appointment standards in states with the death penalty (including those that have repealed the death penalty but where prisoners remain on death row). Where practical, we have quoted the relevant language and provided citations. If the cited language does not come from a readily available source or is too long to reprint in full, we have attempted to provide an active link where the standards can be found. These links may become inactive over time, but copies of the documents are maintained separately by the Death Penalty Representation Project. *Every effort has been made to provide complete and current information as of the date of publication, but we urge you to independently confirm that the information is still current before relying on anything contained in this memo.* If you believe that any information in this memo is incorrect or missing, or if you have further questions, please contact the Death Penalty Representation Project at (202) 662-1738 or [deathpenaltyproject@americanbar.org](mailto:deathpenaltyproject@americanbar.org).

## **INDEX**

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<a href="#">Alabama</a>	2	<a href="#">Nevada</a>	29
<a href="#">Arizona</a>	2	<a href="#">New Hampshire</a>	30
<a href="#">Arkansas</a>	4	<a href="#">New Mexico</a>	30
<a href="#">California</a>	5	<a href="#">North Carolina</a>	31
<a href="#">Colorado</a>	8	<a href="#">Ohio</a>	33
<a href="#">Florida</a>	8	<a href="#">Oklahoma</a>	34
<a href="#">Georgia</a>	10	<a href="#">Oregon</a>	35
<a href="#">Idaho</a>	12	<a href="#">Pennsylvania</a>	36
<a href="#">Indiana</a>	17	<a href="#">South Carolina</a>	38
<a href="#">Kansas</a>	18	<a href="#">South Dakota</a>	39
<a href="#">Kentucky</a>	19	<a href="#">Tennessee</a>	39
<a href="#">Louisiana</a>	19	<a href="#">Texas</a>	41
<a href="#">Mississippi</a>	23	<a href="#">Utah</a>	43
<a href="#">Missouri</a>	25	<a href="#">Virginia</a>	45
<a href="#">Montana</a>	26	<a href="#">Washington</a>	47
<a href="#">Nebraska</a>	28	<a href="#">Wyoming</a>	47

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## **Alabama:**

Section 13A-5-54 (2018) of the Code of Alabama states that any person indicted for a capital felony who is unable to afford a lawyer “must be provided with court appointed counsel having no less than five years’ prior experience in the active practice of criminal law.”

Section 13A-5-54 applies only to representation at trial and the “first appeal as of right”:

Clearly, the Legislature, by enacting this provision, intended that an indigent defendant charged with a capital offense have experienced appointed counsel at all critical phases of the initial adjudicative process for which a defendant is entitled to effective assistance of counsel. . . .

Thus, we conclude that a capital defendant is clearly entitled to the representation called for by § 13A-5-54 at all stages of the trial, including sentencing and other critical post trial proceedings. . . .

Based on the plain language of § 13A-5-54 and on the general purpose of the Act from which that Code section was taken, we conclude that the requirements of that Code section apply only to appellate representation for a defendant who has been sentenced to death, upon the first appeal as of right.

*Ex parte Berryhill*, 801 So.2d 7, 10–12 (Ala. 2001).

Where post-conviction remedies are sought pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, section 13A-5-53.1(b) (2017) of the Code of Alabama instructs the trial judge to appoint a separate counsel for the purposes of post-conviction within 30 days of the entry of the order pronouncing the death sentence. Post-conviction remedies must be pursued concurrently and simultaneously with the direct appeal of the case in which the death penalty was imposed. This section applies to defendants sentenced to death after August 1, 2017. Ala. Code § 13-5-53.1(j).

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## **Arizona:**

Section 13-4041(B) of the Arizona Revised Statutes (2014) requires the court to appoint counsel “to represent the capital defendant in the state postconviction relief proceeding.” If counsel cannot be appointed from the state capital postconviction defender office, the court must appoint counsel who meets the following qualifications, per subsection (C):

1. Be a member in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.
2. Have practiced in the area of state criminal appeals or postconviction proceedings for at least three years immediately preceding the appointment.
3. Not previously have represented the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation.

Section 13-4041© provides that the supreme court “may establish by rule more stringent standards of competency for the appointment of postconviction counsel in capital cases than are provided by this subsection.”

In 2017 the Arizona Supreme Court amended Rule of Criminal Procedure 6.8 to require the following qualifications of counsel in a capital case:

**(a) Generally.** To be eligible for appointment in a capital case, an attorney must:

- (1) have been a member in good standing of the State Bar of Arizona for at least 5 years immediately before the appointment;
- (2) have practiced criminal litigation in Arizona state courts for 3 years immediately before the appointment;
- (3) have demonstrated the necessary proficiency and commitment that exemplifies the quality of representation appropriate to capital cases;
- (4) have successfully completed, within one year before the initial appointment, at least 6 hours of relevant training or educational programs in the area of capital defense; and successfully completed within one year before any later appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense;
- (5) be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.

If an attorney is a member in good standing of the State Bar of Arizona, the attorney's practice in a federal jurisdiction or in another state may be considered for purposes of satisfying the requirements of (a)(1) and (a)(2).

**(b) Trial Counsel.**

- (1) *Lead Counsel.* To be eligible for appointment as lead trial counsel, an attorney must meet the requirements of (a) and must have:
  - (A) practiced criminal litigation in Arizona state courts for 5 years immediately before the appointment; and
  - (B) been lead counsel in at least 9 felony jury trials that were tried to completion, and have been lead counsel or co-counsel in at least one capital jury trial.
- (2) *Co-Counsel.* To be eligible for appointment as co-counsel, an attorney must be a member in good standing of the State Bar of Arizona and meet the requirements of (a)(4) and (a)(5).

**© Appellate Counsel.** To be eligible for appointment as appellate counsel, an attorney must meet the qualifications set forth in (a) and the attorney must:

- (1) within 3 years immediately before the appointment, have been lead counsel in an appeal in a case in which a death sentence was imposed (including petitions for review of post-conviction proceedings); and prior experience as lead counsel in the appeal of at least 3 felony convictions; or
- (2) prior experience as lead counsel in merits briefing in the appeal of at least 6 felony convictions, including two appeals from first- or second-degree murder convictions.

**(d) Post-Conviction Counsel.** To be eligible for appointment as post-conviction counsel, an attorney must meet the qualifications set forth in (a) and the attorney must:

- (1) within 3 years immediately before the appointment, have been lead counsel in a trial in which a death sentence was sought or in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and prior experience as lead counsel in the appeal

of at least 3 felony convictions and a trial or post-conviction proceeding with an evidentiary hearing; or

(2) have been lead counsel in the appeal of at least 6 felony convictions, including two appeals from first- or second-degree murder convictions, and lead counsel in at least two felony trials or post-conviction proceedings with evidentiary hearings.

**COMMENT: Rule 6.8(a).** The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases constitute a compendium of effective capital defense representation practices. Counsel should be guided by those practices in exercising independent professional judgment. The guidelines do not, however, impose independent requirements on courts. If, for example, the guidelines recommend resources or services from a court, counsel must show a need for that resource or service based on the facts of the particular case. A deviation from the guidelines is not per se ineffective assistance of counsel. The standard for evaluating counsel's performance continues to be that set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

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### **Arkansas:**

The Arkansas Public Defender Commission has set minimum standards for attorney qualifications to handle capital cases, available at <http://apdc.arkansasadmin.net/news/posts/minimum-standards/>:

#### **Trial Counsel**

##### **Attorney Eligibility Death Cases**

Number of Attorneys per case: In cases where the death penalty is sought, two qualified attorneys shall be assigned to represent the defendant.

##### **A. Lead trial counsel assignments:**

1. Are members of the bar admitted to practice in the jurisdiction.
2. Are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and
3. Have prior experience as lead counsel in no fewer than five jury trials of serious and complex cases where tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. The attorney should have been lead counsel in at least two cases in which the charge was murder or capital murder; or alternatively, at least one was a murder or capital murder trial and an additional two others were felony jury trials; and
4. Are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
5. Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
6. Have attended and successfully completed within one year from the time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually.
7. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

##### **B. Trial co-counsel assignments:**

1. Are members of the bar admitted to practice in the jurisdiction; and

2. Who qualify as lead counsel under paragraph A of this standard or meet the following requirements:
- a. are experienced and active trial practitioners with at least two years litigation experience in the field of criminal defense; and
  - b. have prior experience as lead counselor co- counsel in no fewer than three jury trials, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial; and
  - c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
  - d. have attended and successfully completed within one year from the time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually.
  - e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

Rule 37.5©(1) of the Arkansas Rules of Criminal Procedure (2000) applies only to state post-conviction cases and outlines the qualifications of an appointed attorney in death penalty cases for appeals and post-conviction:

#### Appeals and Post-Conviction Counsel

- (A) Within ten (10) years immediately preceding the appointment, the attorney shall have:
  - (i) represented a petitioner under sentence of death in a state or federal post-conviction proceeding; or
  - (ii) actively participated as defense counsel in at least five (5) felony jury trials tried to completion, including one trial in which the death penalty was sought; and
- (B) Within ten (10) years immediately preceding the appointment, the attorney shall have:
  - (i) represented a petitioner in at least three state or federal post-conviction proceedings, one of which proceeded to an evidentiary hearing and all of which involved a conviction of a violent felony, including one conviction of murder; or
  - (ii) represented a defendant in at least three (3) appeals involving a conviction of a violent felony, including one conviction of murder, and represented a petitioner in at least one evidentiary hearing in a state or federal post-conviction proceeding; and
- (C) The attorney shall have been actively engaged in the practice of law for at least three (3) years; and
- (D) Within two (2) years immediately preceding the appointment, the attorney shall have completed at least six (6) hours of continuing legal education or other professional training in the representation of persons in capital trial, capital appellate, or capital post-conviction proceedings.

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#### California:

Rule 4.117 of the California Rules of Court (2007) provided qualifications for appointed trial counsel in capital cases:

## Trial Counsel

(a) **Purpose:** This rule defines minimum qualifications for attorneys appointed to represent persons charged with capital offenses in the superior courts. These minimum qualifications are designed to promote adequate representation in death penalty cases and to avoid unnecessary delay and expense by assisting the trial court in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether the defendant received effective assistance of counsel.

(b) **General qualifications:** In cases in which the death penalty is sought, the court must assign qualified trial counsel to represent the defendant. The attorney may be appointed only if the court, after reviewing the attorney's background, experience, and training, determines that the attorney has demonstrated the skill, knowledge, and proficiency to diligently and competently represent the defendant. An attorney is not entitled to appointment simply because he or she meets the minimum qualifications.

(c) **Designation of counsel**

(1) If the court appoints more than one attorney, one must be designated lead counsel and meet the qualifications stated in (d) or (f), and at least one other must be designated associate counsel and meet the qualifications stated in (e) or (f).

(2) If the court appoints only one attorney, that attorney must meet the qualifications stated in (d) or (f).

(d) **Qualifications of lead counsel:** To be eligible to serve as lead counsel, an attorney must:

(1) Be an active member of the State Bar of California;

(2) Be an active trial practitioner with at least 10 years' litigation experience in the field of criminal law;

(3) Have prior experience as lead counsel in either:

(A) At least 10 serious or violent felony jury trials, including at least 2 murder cases, tried to argument, verdict, or final judgment; or

(B) At least 5 serious or violent felony jury trials, including at least 3 murder cases, tried to argument, verdict, or final judgment;

(4) Be familiar with the practices and procedures of the California criminal courts;

(5) Be familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence;

(6) Have completed within two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and

(7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

(e) **Qualifications of associate counsel:** To be eligible to serve as associate counsel, an attorney must:

(1) Be an active member of the State Bar of California;

(2) Be an active trial practitioner with at least three years' litigation experience in the field of criminal law;

(3) Have prior experience as:

(A) Lead counsel in at least 10 felony jury trials tried to verdict, including 3 serious or violent felony jury trials tried to argument, verdict, or final judgment; or

(B) Lead or associate counsel in at least 5 serious or violent felony jury trials, including at least 1 murder case, tried to argument, verdict, or final judgment;

(4) Be familiar with the practices and procedures of the California criminal courts;

(5) Be familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence;

- (6) Have completed within two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and
- (7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

Rule 8.605(d)-(e) of the California Rules of Court (2018) set forth qualifications for appointed appellate (d) and post-conviction counsel (e):

#### Appellate and Post-Conviction Counsel

##### **(c) Qualifications for appointed appellate counsel**

An attorney appointed as lead or associate counsel in a death penalty appeal must have at least the following qualifications and experience:

- (1) Active practice of law in California for at least four years.
- (2) Either:
  - (A) Service as counsel of record for a defendant in seven completed felony appeals, including one murder case; or
  - (B) Service as counsel of record for a defendant in five completed felony appeals and as supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service as supervised counsel in a death penalty appeal will apply toward this qualification only if lead or associate counsel in that appeal attests that the supervised attorney performed substantial work on the case and recommends the attorney for appointment.
- (3) Familiarity with Supreme Court practices and procedures, including those related to death penalty appeals.
- (4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense training, continuing education, or course of study, at least six hours of which involve death penalty appeals. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.
- (5) Proficiency in issue identification, research, analysis, writing, and advocacy, taking into consideration all of the following:
  - (A) Two writing samples--ordinarily appellate briefs--written by the attorney and presenting an analysis of complex legal issues;
  - (B) If the attorney has previously been appointed in a death penalty appeal or death penalty-related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;
  - (C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and
  - (D) If the attorney is on a panel of attorneys eligible for appointments to represent indigents in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

##### **(f) Appellate and habeas corpus appointment**

- (1) An attorney appointed to represent a person in both a death penalty appeal and death penalty-related habeas corpus proceedings must meet the minimum qualifications of both (c) or (d) and rule 8.652.
- (2) Notwithstanding (1), two attorneys together may be eligible for appointment to represent a person jointly in both a death penalty appeal and death penalty-related habeas corpus proceedings if

the Supreme Court finds that one attorney satisfies the minimum qualifications set forth in (c) or (d), and the other attorney satisfies the minimum qualifications set forth in rule 8.652.

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### **Colorado:**

Colorado Revised Statutes 16-12-205(2) (2009) states that in appointing new postconviction counsel to represent an indigent defendant, the trial court shall appoint one or more attorneys who, alone or in combination, meet all of the following minimum qualifications:

- (a) Each appointed attorney shall be licensed to practice law in Colorado or be admitted to practice in Colorado solely for the purpose of representing the defendant;
- (b) At least one of the appointed attorneys shall have a minimum of five years' experience in criminal law litigation, including work on trials and postconviction proceedings;
- (c) At least one of the appointed attorneys shall have a minimum of three years' experience in trying felony cases, including having tried at least five felony cases to verdict in the preceding five years or having tried a minimum total of twenty-five felony cases; and
- (d) At least one of the appointed attorneys shall have a minimum of three years' experience in handling appeals of felony cases, having served as counsel in at least five appeals in felony cases.

Pursuant to Colorado Revised Statutes 16-12-205(3), the court may also consider the following factors:

- (a) Whether the attorney under consideration has previously appeared as counsel in a class 1 felony case in which the death penalty was sought;
- (b) Whether the attorney under consideration has tried at least one first degree murder case to verdict;
- (c) Whether, within the preceding five years, the attorney under consideration has taught or attended a continuing legal education course that dealt in substantial part with the trial, appeal, and postconviction review of class 1 felony cases in which the death penalty is sought;
- (d) The workload of the attorney under consideration and how that workload would affect the attorney's representation of the defendant;
- (e) The diligence and ability of the attorney under consideration; and
- (f) Any other factor that may be relevant to a determination of whether the attorney under consideration will fairly, efficiently, and effectively represent the defendant for purposes of postconviction review.

There do not appear to be qualifications for trial counsel.

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### **Florida:**

The Florida Rule of Criminal Procedure 3.112, subsections (e) through (h) and (k), from 2000 outlines the minimum qualifications for trial (f, g), appellate (h), and postconviction (k) counsel:

**(e) Appointment of Counsel.** A court must appoint lead counsel and, upon written application and a showing of need by lead counsel, should appoint co-counsel to handle every capital trial in which the defendant is not represented by retained counsel. Lead counsel shall have the right to select co-counsel from attorneys on the lead counsel or co-counsel list. Both attorneys shall be reasonably compensated for the trial and sentencing phase. Except under extraordinary circumstances, only one attorney may be compensated for other proceedings. In capital cases in which the Public Defender



or Criminal Conflict and Civil Regional Counsel is appointed, the Public Defender or Criminal Conflict and Civil Regional Counsel shall designate lead and co-counsel.

**(f) Lead Trial Counsel.** Lead trial counsel assignments should be given to attorneys who:

- (1) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (2) are experienced and active trial practitioners with at least five years of litigation experience in the field of criminal law; and
- (3) have prior experience as lead counsel in no fewer than nine state or federal jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead defense counsel or co-counsel in at least two state or federal cases tried to completion in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder; or alternatively, of the nine jury trials, at least one was a murder trial and an additional five were felony jury trials; and
- (4) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
- (5) are familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence; and
- (6) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, including but not limited to the investigation and presentation of evidence in mitigation of the death penalty; and
- (7) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

**(g) Co-counsel.** Trial co-counsel assignments should be given to attorneys who:

- (1) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (2) qualify as lead counsel under paragraph (f) of these standards or meet the following requirements:
  - (A) are experienced and active trial practitioners with at least three years of litigation experience in the field of criminal law; and
  - (B) have prior experience as lead counsel or cocounsel in no fewer than three state or federal jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial; and
  - (C) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
  - (D) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, and
  - (E) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

**(h) Appellate Counsel.** Appellate counsel assignments should be given to attorneys who:

- (1) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (2) are experienced and active trial or appellate practitioners with at least five years of experience in the field of criminal law; and
- (3) have prior experience in the appeal of at least one case where a sentence of death was imposed, as well as prior experience as lead counsel in the appeal of no fewer than three

felony convictions in federal or state court, at least one of which was an appeal of a murder conviction; or alternatively, have prior experience as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder conviction; and

(4) are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

(5) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and

(6) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

**(k) Qualifications of Lead Counsel in Capital Postconviction Proceedings.** In order to serve as lead counsel, as set forth in rule 3.851, for the defendant in a capital postconviction proceeding, an attorney shall have:

(1) been a member of any bar for at least 5 years; and

(2) at least 3 years of experience in the field of postconviction litigation; and

(3) prior participation in a combined total of 5 proceedings in any of the following areas, at least 2 of which shall be from subdivision (k)(3)(C), (k)(3)(D), or (k)(3)(E) below:

(A) capital trials;

(B) capital sentencings;

(C) capital postconviction evidentiary hearings;

(D) capital collateral postconviction appeals;

(E) capital federal habeas proceedings.

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### **Georgia:**

The “Unified Appeal” (“UA”) process became effective in January of 2000 by the Supreme Court of Georgia. Standards for attorneys appointed to handle death penalty cases were incorporated in the new UA procedures. Any attorney appointed to serve as either lead or co-counsel is required to meet the following minimum qualifications pursuant to UA Rule II (effective June 6, 2018):

**A. Qualifications of Appointed Counsel.** In order to ensure that persons are adequately represented in death penalty cases, any attorney appointed to serve as either lead or co-counsel is required to meet the following minimum qualifications:

1. *Trial.* Two attorneys shall be appointed to handle matters in death penalty cases:

a. Lead Counsel.

(1) must be a member in good standing of the State Bar or admitted to practice pro hac vice, and must have at least five years criminal litigation experience as a criminal defense attorney or a prosecuting attorney; and

(2) must have been lead counsel on at least one death penalty murder trial to verdict or three capital (non-death penalty) trials to verdict, one of which must have been a murder case, or been co-counsel on two death penalty cases; and

(3) must be familiar with the Unified Appeal Procedure; and

(4) must be familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

(5) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death

penalty defense or, upon appointment agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-recorded instruction and written materials and certifying to the trial court that the materials have been reviewed; and

(6) must have demonstrated the necessary proficiency and commitment that exemplify the quality of representation appropriate to capital cases.

b. Co-counsel.

(1) must be a member in good standing of the State Bar with combined three years of criminal trial experience either as a criminal defense attorney or a prosecuting attorney; and

(2) must have been lead or co-counsel in at least one (non-death penalty) murder trial to verdict, or in at least two felony jury trials; and

(3) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death penalty defense or, upon appointment, agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-recorded instruction and written materials and certifying to the trial court that the materials have been reviewed.

2. *Direct Appeal.* It is recommended that two attorneys be appointed to handle matters on a direct appeal, unless the appointing authority decides for good cause that it is not necessary to have co-counsel.

a. Lead Counsel.

(1) must be a member in good standing of the State Bar or admitted to practice pro hac vice and must have at least five years criminal litigation experience as a criminal defense attorney or a prosecuting attorney; and

(2) must have been co-counsel, or have actively assisted in the direct appeal of at least one death penalty case and have been counsel of record in at least three felony appeals; and

(3) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs relating to post-conviction appeals and appellate procedures relating to post-conviction appeals or, upon appointment, agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-recorded instruction and written materials and certifying to the trial court that the materials have been reviewed.

b. Co-counsel.

(1) must be a member in good standing of the State Bar with combined three years of criminal trial experience either as a criminal defense attorney or a prosecuting attorney; and

(2) must have experience as counsel of record in three felony appeals either as a criminal defense attorney or a prosecuting attorney; and

(3) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs relating to post-conviction appeals and appellate procedures relating to post-conviction appeals or, upon appointment, agree to take ten hours of such

training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-recorded instruction and written materials and certifying to the trial court that the materials have been reviewed.

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## **Idaho:**

Idaho's Public Defense Commission ("PDC") promulgated new Standards for Defending Attorneys in November 2017 that will go into full effect on May 1, 2019. See Emily Olson-Gault, *Idaho Adopts New Capital Defense Standards Based on ABA Guidelines* (2018), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2018/spring/idaho-adopts-new-capital-defense-standards.html](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2018/spring/idaho-adopts-new-capital-defense-standards.html). The standards (revised in November 2018) are available at [https://pdc.idaho.gov/wp-content/uploads/sites/90/2019/05/Standards-for-Defending-Attorneys\\_Edition-2018.pdf](https://pdc.idaho.gov/wp-content/uploads/sites/90/2019/05/Standards-for-Defending-Attorneys_Edition-2018.pdf) on pages 5 through 9:

### **Performance Standard – Capital Counsel Qualifications and Roster**

#### **B. The Defense Team**

1. The defense team shall consist of no fewer than two attorneys qualified in accordance with these standards, an investigator and a mitigation specialist.
2. The defense team shall contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.
3. In a case in which the death penalty may be imposed:
  - a. At the first court appearance after a crime in which a death notice could be filed is charged, two qualified defending attorneys shall be appointed to represent an indigent defendant.
  - b. One counsel shall be designated as "lead counsel" and the second as "co-counsel."
4. As soon as possible after counsel has been assigned to a capital case, lead counsel shall assemble a defense team, in consultation with co-counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:
  - a. At least one mitigation specialist and one fact investigator;
  - b. At least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and
  - c. Any other members needed to provide zealous and effective representation.

#### **C. Requisite Training and Skills required**

1. Defending attorneys seeking to qualify to receive appointments as capital counsel shall complete a comprehensive training program, approved by the PDC, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in capital cases in the following areas:
  - a. Relevant state, federal, and international law and court rules;
  - b. Pleading and motion practice;
  - c. Pretrial investigation preparation and theory development regarding guilt/innocence and penalty;
  - d. Jury selection focused on methods that have proven successful in capital cases, such as the Colorado method;
  - e. Trial preparation and presentation, including the use of experts;

- f. Ethical considerations particular to capital defense representation;
  - g. Preservation of the record and of issues for direct appeal and post-conviction review;
  - h. Counsel's relationship with the client and his family;
  - i. Post-conviction litigation in state and federal courts;
  - j. The presentation and rebuttal of scientific evidence and developments in mental health fields and other relevant areas of forensic and biological science; and
2. Defending attorneys seeking to remain on the roster shall attend and successfully complete, at least once every two years, a specialized training program approved by the PDC that focuses on the defense of capital cases. This program shall consist of at least 12 CLE hours.
  3. Non-Attorneys wishing to be eligible to participate on the defense teams shall receive continuing professional education appropriate to their areas of expertise.

#### **D. Attorney Qualifications**

##### **1. Trial**

- a. Lead trial counsel assignments shall be made to attorneys who:
  - i. Are experienced and active trial practitioners with at least ten (10) years litigation experience in criminal defense; and
  - ii. Have served as lead counsel in no fewer than ten (10) felony jury trials of cases which were tried to verdict; and have served either as lead or co-counsel in one case in which the death penalty might have been imposed and which was tried through to verdict, or served as lead counsel in the sentencing phase of a capital case; and
  - iii. Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
  - iv. Have attended and successfully completed at least twelve (12) hours of PDC-approved capital training ~~or educational programs which focus on capital cases,~~ within the last two (2) years; and
  - v. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and
  - vi. Have substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases; and
  - vii. Have skill in the management and conduct of complex negotiations and litigation; and
  - viii. Have skill in legal research, analysis, and the drafting of litigation documents; and
  - ix. Have skill in oral advocacy; and
  - x. Have skill in the use of expert witnesses and familiarity with the common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence; and
  - xi. Have skill in the investigation, preparation, and presentation of evidence bearing upon mental status; and
  - xii. Have skill in the investigation, preparation, and presentation of mitigating evidence; and
  - xiii. Have skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and
  - xiv. Have skill in jury selection focused on methods that have proven successful in capital cases, such as the Colorado method.
- vi. Are familiar with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases.

b. Co-counsel assignments shall be assigned to attorneys who qualify as lead counsel under paragraph D.1 of this Performance Standard or meet the following requirements:

- i. Are experienced and active trial practitioners with at least five (5) years litigation experience in criminal defense; and
- ii. Have prior experience as lead counsel in no fewer than five (5) felony jury trials of cases which were tried to verdict; and
- iii. Have attended and successfully completed at least ten (10) hours of PDC-approved capital training, within the last two years; and
- iv. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and
- v. Have substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases; and
- vi. Have skill in the management and conduct of complex negotiations and litigation; and
- vii. Have skill in legal research, analysis, and the drafting of litigation documents; and
- viii. Have skill in oral advocacy; and
- ix. Have skill in the use of expert witnesses and familiarity with the common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence; and
- x. Have skill in the investigation, preparation, and presentation of evidence bearing upon mental status; and
- xi. Have skill in the investigation, preparation, and presentation of mitigating evidence; and
- xii. Have skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and
- xiii. Have skill in jury selection focused on methods that have proven successful in capital cases, such as the Colorado method.
- xiv. Are familiar with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases.

c. Alternate Procedures. Attorneys who do not meet the qualifications in paragraphs D.1.a or D.1.b, may still apply for inclusion on the Capital Counsel Roster. Such attorneys must be in compliance with Indigent Defense Standards, have extensive criminal trial defense counsel experience and demonstrate to the PDC that competent representation will be provided in a capital case. Attorneys under this paragraph shall also meet the following qualifications:

- i. Demonstrated familiarity with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and Performance of Defense Counsel in Death Penalty Cases and Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases; and
- ii. Experience in some stage of death penalty litigation, whether or not the death penalty was imposed, which does not meet the levels required in paragraphs D.1.a or D.1.b above; or
- iii. Attendance within one (1) year of application to a PDC-approved intensive capital training program.

## 2. Appellate/Post-Conviction Counsel

a. Lead Appellate or post-conviction counsel must qualify as "lead trial counsel" under paragraph D.1.a, second chair must qualify as "co-counsel" under paragraph D.1.b, or meet the following requirements:

- i. Be experienced and active post-conviction and appellate practitioners with at least ten (10) years' experience in criminal defense.
- ii. Have served as court appointed or retained counsel in the appeal or the postconviction review of a case in which the death penalty was imposed, or have served as counsel in a habeas corpus death penalty case in Federal Court.
- iii. Have attended and successfully completed at least twelve (12) hours of PDC-approved capital training, within the last two (2) years.
- iv. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and
- v. Have substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases; and
- vi. Have skill in the management and conduct of complex negotiations and litigation; and
- vii. Have skill in legal research, analysis, and the drafting of litigation documents; and
- viii. Have skill in oral advocacy; and
- ix. Have skill in the use of expert witnesses and familiarity with the common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence; and
- x. Have skill in the investigation, preparation, and presentation of evidence bearing upon mental status; and
- xi. Have skill in the investigation, preparation, and presentation of mitigating evidence; and
- xii. Have skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and
- xiii. Have skill in jury selection focused on methods that have proven successful in capital cases, such as the Colorado method.
- xiv. Are familiar with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty cases.

b. Alternate Procedures. Attorneys who do not meet the qualifications in paragraph 2.a, may still apply for inclusion on the Capital Counsel Roster. Such attorneys must be in compliance with Indigent Defense Standards, have extensive criminal trial defense counsel experience or extensive civil litigation experience, and demonstrate to the PDC that competent representation will be provided in a capital case. Attorneys under this paragraph shall also meet the following qualifications:

- i. Demonstrated familiarity with and agree to abide by the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases; and
- ii. Experience with the appeal and/or post-conviction litigation of death penalty cases or cases where the death penalty was sought but not imposed which does not meet the levels detailed in paragraph D.2.a above; or
- iii. Attendance within one (1) year of application to a PDC-approved intensive capital training program.

The Standards for Defending Attorneys are codified at Idaho Administrative Code Rule 61.01.08.004.02 (2017). A process for enrolling attorneys currently on the ISC Capital Counsel Roster on the PDC Capital

Counsel Roster is underway and will end on November 1, 2018. At that time, placement on the PDC Capital Counsel Roster can be achieved only after the approval of a full application.

At this time, the new standards do not replace Criminal Rule 44.3, which continues to control the appointment of counsel through April 30, 2019. The applicable qualifications from Rule 44.3 are included below:

(1) *Trial.*

(A) Lead trial counsel assignments shall be made to attorneys who:

- (i) are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice *pro hac vice*;
- (ii) are experienced and active trial practitioners with at least five years' litigation experience in criminal defense or prosecution;
- (iii) have served as lead counsel in no fewer than four felony jury trials of cases which were tried to completion; and have served either as lead or co-counsel in one case in which the death penalty might have been imposed and which was tried through to completion, or served as lead counsel in the sentencing phase of a death penalty case.
- (iv) are familiar with the rules, practice and procedure of the district courts of the state of Idaho;
- (v) are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence;
- (vi) have attended and successfully completed at least 12 hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two years; and
- (vii) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(B) Co-counsel assignments shall be assigned to attorneys who:

- (i) are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice *pro hac vice*; and
- (ii) qualify as lead counsel under subsection (c)(1) or meet the following requirements:
  - (1) are experienced and active trial practitioners with at least three years' litigation experience in criminal defense or prosecution;
  - (2) have prior experience as lead counsel in at least three felony jury trials of cases which were tried to completion;
  - (3) are familiar with the rules, practice and procedure of the district courts of the state of Idaho;
  - (4) have attended and successfully completed at least six hours of Idaho State Bar approved training or educational programs focusing on capital cases, within the last two years;
  - (5) have demonstrated the necessary proficiency and commitment necessary for the quality of representation appropriate to capital cases.

(2) *Appeal/Post-Conviction.*

(A) Appellate or post convictions counsel must either qualify as "lead trial counsel" under subsection (c)(1)(A) or meet the following requirements:

- (i) be a member in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice *pro hac vice*;
- (ii) be familiar with the rules, practice and procedure of the appellate courts of the State of Idaho[;]



- (iii) be experienced and active post-conviction and appellate practitioners with at least three years' experience in criminal defense or prosecution;
- (iv) have served as court appointed or retained counsel in the appeal or the post-conviction review of a case in which the death penalty was imposed, or have served as counsel in a habeas corpus death penalty case in Federal Court;
- (v) have attended and successfully completed at least 12 hours of Idaho State Bar approved training or educational programs focusing on capital cases, within the last two years; and
- (vi) have demonstrated the necessary proficiency and commitment necessary for the quality of representation appropriate to capital cases.

If the court in its discretion appoints co-counsel for appeal or post conviction, these requirements do not apply to co-counsel.

Because of the statutory change, there are currently two capital counsel rosters in Idaho. One is administered by the Idaho Supreme Court pursuant to Rule 44.3. The second roster is administered by the PDC and will be in full effect starting May 1, 2019. The delay is statutory, in that the PDC cannot enforce compliance with administrative rules until May 1 of the year following legislative approval of those rules. Pursuant to the Standards for Defending Attorneys, at p. 10, item E.4. in Performance Standard—Capital Counsel Qualifications and Roster:

Defending Attorneys serving on the Idaho Supreme Court's Capital Counsel Roster as of May 1, 2018, may apply for immediate inclusion on the PDC Capital Counsel Roster at the same level at which they are currently listed. Attorneys must demonstrate they are actively handling criminal defense cases of some complexity and show proof of attendance at the required level of capital training as approved by the PDC within the last two (2) years for the level of service they will be providing. Such application must be made on or before November 1, 2018. Upon the expiration of the term of eligibility, grandfathered attorneys must show compliance with the requirements of these standards, Indigent Defense Standards, and all applicable professional and ethical responsibility standards. A defending attorney who fails to meet these standards at that time, will be removed from the Capital Counsel Roster.

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### **Indiana:**

Indiana Rule of Criminal Procedure 24(B) (effective January 1, 2021) states that the presiding judge in a capital case must appoint two qualified attorneys to represent an indigent defendant in a trial proceeding in accordance with the following qualifications:

#### **Trial Counsel**

- (1) *Lead Counsel; Qualifications.* One (1) of the attorneys appointed by the court shall be designated as lead counsel. To be eligible to serve as lead counsel, an attorney shall:
- (a) be an experienced and active trial practitioner with at least five (5) years of criminal litigation experience;
  - (b) have prior experience as lead or co-counsel in no fewer than five (5) felony jury trials which were tried to completion;
  - (c) have prior experience as lead or co-counsel in at least one (1) case in which the death penalty was sought; and

(d) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

(2) *Co-Counsel, Qualifications.* The remaining attorney shall be designated as co-counsel. To be eligible to serve as co-counsel, an attorney shall:

- (a) be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience;
- (b) have prior experience as lead or co-counsel in no fewer than three (3) felony jury trials which were tried to completion; and
- (c) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

### Appellate Counsel

If the trial court imposes a sentence of death, the court is instructed to name appellate counsel pursuant to subsection (J). If qualified to serve as appellate counsel, trial counsel shall be appointed as sole or co-counsel for the appeal:

*Qualifications of Appellate Counsel.* An attorney appointed to serve as appellate counsel for an individual sentenced to die, shall:

- (a) be an experienced and active trial or appellate practitioner with at least three (3) years experience in criminal litigation;
- (b) have prior experience within the last five (5) years as appellate counsel in no fewer than three (3) felony convictions in federal or state court; and
- (c) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

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### Kansas:

The Kansas State Board of Indigents' Defense Services is responsible for providing "standards of competency and qualification for the appointment of counsel in capital cases[.]" Kan. Stat. Ann. § 22-4505(d)(1)(B) (2018).

Kansas Administrative Regulations section 105-3-2(a) (2018) sets forth criteria based on the 2003 ABA Guidelines that apply to trial, direct appeal, and post-conviction counsel:

- (1) Each attorney on the voluntary panel representing an indigent defendant shall have completed 12 hours of continuing legal education in the area of criminal law within three years of appointment or have graduated from an accredited law school during the three years immediately before appointment.
- (2) Each attorney assigned to the defense of any felony classified as a non-drug grid offense with severity level of 3 or 4 or any felony classified as a drug grid offense with a severity level of 1, 2, or 3 shall have tried to a verdict, either as defense counsel or prosecutor, five or more felony jury trials.
- (3) Each attorney assigned to the defense of any felony classified as an off-grid offense or a non-drug grid offense with a severity level of 1 or 2 shall have tried to verdict, either as defense counsel or prosecutor, five or more jury trials involving the following:

(A) Non-drug offenses of severity levels 1 through 4 or drug grid offenses of severity levels 1 through 3; or

(B) any off-grid offenses.

(4) Each attorney assigned or appointed to the defense of any indigent person accused of a capital murder, as defined by K.S.A. 2011 Supp. 21-5401 and amendments thereto, shall be a prequalified death penalty attorney. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person accused of a capital murder, pursuant to "guideline 5.1 qualifications of defense counsel," as published on pages 35 and 36 in the February 2003 edition of the American bar association (ABA) "guidelines for the appointment and performance of defense counsel in death penalty cases" and hereby adopted by reference, except for the history of guideline, related standards, and commentary on page 36. Each attorney who is eligible to serve on the capital appointments panel shall be prequalified by the board as meeting this regulation.

(5) Each attorney assigned or appointed to represent an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment shall be prequalified by the board as meeting this regulation.

(6) Each attorney assigned or appointed to represent an indigent person who has been convicted of capital murder and who is under a sentence of death in postconviction proceedings shall be prequalified by the board as meeting this regulation.

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### **Kentucky:**

The Kentucky Department of Public Advocacy ("DPA") provides and supervises indigent defense in capital cases (as well as other cases) in Kentucky. Pursuant to section 31.030(4) of Kentucky Revised Statutes, the DPA has the responsibility for "[d]eveloping and promulgating standards and regulations, rules, and procedures for administration of the defense of indigent defendants in criminal cases."

The goal of the Kentucky Department of Public Advocacy is to meet the ABA Standard for appointment and performance of counsel in death penalty cases. They have developed a policy and procedure manual that deals with the guidelines they adopted in November 1999 for the handling of capital cases, which states:

The Trial Division formally adopted the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty* cases with the direction that only that portion of the Guidelines that deals with performance of counsel shall be formally adopted. The portion of the Guidelines, which address appointment of counsel in death penalty cases, shall not be formally adopted, but are to be utilized for reference as the standard toward which to strive in representing our clients. Those Guidelines which refer to the appointment of defense counsel in a capital case, though not formally adopted, should nonetheless be considered with the full weight and effect of the operational goals in order to insure the best possible representation for our clients.

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### **Louisiana:**

Louisiana Supreme Court Rule XXXI (2018) sets the standards for indigent defendants. Section (A)(1), regarding capital litigation, states:

(a) In any capital case in which a defendant is found to be indigent, the court shall appoint no less than two attorneys to represent the defendant. At least two of the appointed attorneys must be

certified as qualified to serve in capital cases as provided below. The court shall designate one of the appointed attorneys to be lead counsel, the other(s) as associate counsel. The court shall only designate as lead and associate counsel those attorneys who have either been previously certified by the Louisiana Indigent Defender Board and whose certification is still in good standing or those attorneys who, after December 31, 1997, may be certified by the district court judge handling the case pursuant to Paragraph (b) of Subsection 1 of this Section. The certification of attorneys by district court judges shall remain in effect until such time as the Indigent Defense Supplemental Assistance Board is able to review and evaluate the standards and capital certification procedures for either continuation, discontinuation, or modification.

(b) Until such time as the Indigent Defense Supplement Assistance Board shall address this matter, each district judge, presiding over a capital case, shall maintain and enforce the capital certification procedures previously developed by the Louisiana Indigent Defender Board.

The Public Defender Board's standards for capital defense counsel are set forth in the Louisiana Regulations in title 22, part XV (2018):

§ 911. Assignment of Counsel

A. Assignment of Specific Attorneys to Each Capital Case

1. In each capital case the person or organization responsible for assigning counsel pursuant to §905 shall assign specific attorneys to each case and not an office, organization or group of attorneys. At least one appropriately certified attorney shall be assigned as lead counsel and at least one appropriately certified attorney shall be assigned as associate counsel. Additional counsel may be assigned when necessary or appropriate and assignments may be changed, subject to maintaining continuing compliance with these guidelines.

B. Assignment to be Consistent with Requirement of Guidelines

1. An attorney may only be assigned if he or she is currently certified in the appropriate role, is conflict free, meets the workload requirements of these guidelines and can be compensated in accordance with these guidelines. Assignments of attorneys must be made so as to meet the requirements of these guidelines, including §913.

§ 913. The Defense Team and Supporting Services

A. Minimum Components of the Defense Team

1. For all capital defendants, a defense team that will provide high quality legal representation must be assembled.
  - a. The defense team should consist of no fewer than two attorneys certified in accordance with §915 of these guidelines (with at least one qualified as lead counsel), an investigator, and a mitigation specialist.
  - b. The defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history.
  - c. At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma.
  - d. The two attorneys, investigator and mitigation specialist described above are the minimum components of any defense team. The emphasis in assembling a defense

team is to ensure that the team possesses the skills, experience and capacity to provide high quality representation in the particular case.

- e. Additional team members will be appropriate in many cases in order to:
  - i. reflect the seriousness, complexity or amount of work in a particular case;
  - ii. meet legal or factual issues involving specialist knowledge or experience;
  - iii. ensure that the team has the necessary skills, experience and capacity available to provide high quality representation in the particular case;
  - iv. provide for the professional development of defense personnel through training and case experience; and
  - v. for any other reason arising in the circumstances of a particular case.

## § 915. Qualifications of Defense Counsel

### D. Minimum Experience Requirements for Certification

1. The following minimum required experience levels apply for each of the roles for which certification is available:

- a. Qualified Trial Lead Counsel shall:
  - i. have at least five years of criminal trial litigation experience;
  - ii. have prior experience as lead counsel in no fewer than nine jury trials tried to completion; of these, at least five must have involved felonies or two must have involved the charge of murder; and
  - iii. have prior experience as lead counsel or associate counsel in at least one case in which the death penalty was sought and was tried through the penalty phase or have prior experience as lead counsel or associate counsel in at least two cases in which the death penalty was sought and where, although resolved prior to trial or at the guilt phase, a thorough investigation was performed for a potential penalty phase.
- b. Qualified Trial Associate Counsel shall:
  - i. have at least three years of criminal trial experience; and
  - ii. have prior experience as lead counsel in no fewer than three felony jury trials which were tried to completion, including service as lead or associate counsel in at least one homicide trial.
- c. Qualified Appellate Lead Counsel shall:
  - i. have at least five years of criminal appellate litigation experience;
  - ii. have prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court; and
  - iii. have prior experience within the last three years as lead counsel or associate counsel in the appeal or post-conviction application, in federal or state court, of at least one case where a sentence of death was imposed; and
  - iv. be familiar with the practice and procedure of the Louisiana Supreme Court in the appeal of capital cases; the practice and procedure of the United States Supreme Court in the application for writs of certiorari in capital cases; and the law controlling the scope of and entitlement to state post conviction and federal habeas corpus review.
- d. Qualified Appellate Associate Counsel shall:
  - i. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and either have at least:
    - (a). three years of criminal trial or appellate litigation experience;
    - or

- (b). two years experience as a full time attorney at a capital defense organization in Louisiana.
- e. Qualified Post-Conviction Lead Counsel shall:
  - i. have at least five years of criminal post-conviction litigation experience; and
  - ii. have demonstrated clear competence and diligence in representation provided as:
    - (a). counsel of record for defendant in at least five felony post-conviction relief/habeas corpus proceedings (including at least one murder conviction); and
    - (b). counsel of record for defendant as lead or associate counsel in two death penalty related post-conviction/habeas corpus proceedings in which petition has been filed; and
  - iii. have been lead counsel in a capital post-conviction proceeding which had an evidentiary hearing or been lead counsel in at least two felony post-conviction evidentiary hearings or trials; and
  - iv. be familiar with the substantive law and the practice and procedure of the courts of Louisiana in the review of capital post-conviction applications; and
  - v. be familiar with federal habeas corpus statutory law, practice and procedure, particularly including federal review of state convictions in capital cases.
- f. Qualified Post-Conviction Associate Counsel shall:
  - i. have demonstrated adequate proficiency in post-conviction/habeas advocacy in the field of felony defense and either:
    - (a). have at least three years of criminal trial, appellate or post-conviction/habeas litigation experience; or
    - (b). have at least two years experience as a full time attorney at a capital defense organization in Louisiana.

#### § 1901. Purpose, Findings and Intentions

A. The Standards for attorneys representing indigent defendants in capital cases are intended to serve several purposes. First and foremost, the Standards are intended to encourage public defenders, assistant public defenders, and assigned counsel to perform to a high standard of representation and to promote professionalism in the representation of indigent capital defendants. These standards apply to trial level, appellate, and postconviction representation. It is the intention of these rules to adopt and apply the standards for capital defense set out by the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, its associated commentary, and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.

#### § 1903. General Standards for Capital Defense Counsel

##### B. Training and Experience of Capital Defense Counsel

1. In order to provide high quality legal representation, counsel should have a mastery of any substantive criminal law and laws of criminal procedure that may be relevant to counsel's representation. Counsel should also be familiar with the prevailing customs or practices of the relevant court, and the policies and practices of the prosecuting agency.
2. In providing representation at any stage in a capital case, counsel should be familiar with all applicable areas of law relevant to capital trials, appeals, and state and federal post-conviction relief.

3. Prior to agreeing to undertake representation in a capital case, counsel should have sufficient experience or training to provide high quality representation. Counsel should not accept a capital case assignment unless he or she has been certified for the specific level of representation assigned, and has the necessary knowledge and skills to handle the particular case.
4. If after being assigned a case counsel finds that the case involves particular issues or procedures in which counsel does not have the experience or training necessary to provide high quality legal representation, counsel should acquire the necessary knowledge or skills or request resources for another attorney to provide such services.
5. In providing high quality representation, counsel should consult with and take advantage of the skills and experience of other members of the criminal defense community and certified capital defenders, in particular. Further, where considerations of timing, resources or the interests of the client make it appropriate, counsel should request assignment of an additional attorney(s). Similarly, where appropriate, counsel should request assignment of an additional attorney(s) with specialized experience or knowledge to assist directly in particular aspects of the representation.
6. Capital defense counsel should complete a comprehensive training program in the defense of capital cases as required by the Capital Guidelines. Counsel should, on an ongoing basis, attend and successfully complete specialized training programs in the defense of capital cases. In addition to specific training, counsel should stay abreast of changes and developments in the law and other matters relevant to the defense of capital cases.
7. As a component of acquiring and maintaining adequate training, counsel should consult with other attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, and other court personnel. More experienced counsel should offer to mentor less experienced attorneys.

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## **Mississippi:**

Mississippi Rule of Criminal Procedure 7.4 (effective July 1, 2017) establishes standards for the appointment of trial and appellate counsel in death penalty cases:

### **Trial Counsel**

- (a) In General.** To be eligible for appointment in a death penalty case, an attorney:
- (1) shall have been a member in good standing of the State Bar of Mississippi for at least five (5) years immediately preceding the appointment, or admitted pro hoc vice pursuant to an order entered under Rule 46 of the Mississippi Rules of Appellate Procedure and be a member in good standing of that attorney's home jurisdiction for a like period immediately preceding the appointment;
  - (2) shall have practiced in the area of state criminal litigation for three (3) years immediately preceding the appointment;
  - (3) shall have in the three (3) years before appointment completed twelve (12) hours of training or educational programs in the area of death penalty defense through a program accredited by the Mississippi Commission on Continuing Legal Education or the American Bar Association; and
  - (4) shall have demonstrated the necessary proficiency and commitment to zealous advocacy which exemplify the quality of representation appropriate to death penalty cases.

**(b) Additional Qualification Requirements.** At least one (1) appointed attorney must meet the qualifications set forth in section (a) and the following:

- (1) shall have practiced in the area of state criminal litigation for five (5) years immediately preceding the appointment; and
- (2) shall have been counsel in at least five (5) felony jury trials that were tried to completion, including at least one (1) death penalty murder jury trial that was tried to completion in which the attorney participated.

#### Appellate Counsel

**(c) Appellate Counsel.** To be eligible for appointment as appellate counsel on behalf of a defendant sentenced to death, an attorney must meet the qualifications set forth in section (a) and, within five (5) years immediately preceding the appointment, have been counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as have experience as counsel in the appeal of at least three (3) felony convictions. Alternatively, an attorney must have been counsel in the appeal of at least six (6) felony convictions, at least two (2) of which were appeals from murder convictions.

**(d) Exceptional Circumstances.** In exceptional circumstances enumerated by the trial judge on the record, an attorney may be appointed who does not meet the qualifications set forth in sections (a)(1)-(3), (b) and/or (c), provided that the attorney's experience, stature and record in a different type of practice (e.g., civil litigation, academic work, or work for a court or prosecutor) enable the court to conclude that the attorney's ability meets or exceeds the standards set forth in this Rule.

Following Rule 7.4, the editors commented that:

The purpose of Rule 7.4 is to establish standards for appointment of counsel for indigent defendants in the trial and appellate stages of capital litigation. The provisions of this rule generally parallel the qualifications set forth in Rule 22 of the Mississippi Rules of Appellate Procedure regarding qualifications for capital post-conviction counsel. Rule 7.4(b) establishes elevated standards for at least one (1) of the appointed attorneys. Rule 7.4(c) sets out standards for counsel in appellate proceedings. (Of course, Rule 22 of the Mississippi Rules of Appellate Procedure, not Rule 7.4(c), governs appointment of capital post-conviction counsel.) Rule 7.2(a)(2) requires that co-counsel be appointed in all death penalty trial proceedings; co-counsel should ordinarily be appointed at the appellate stage as well.

Mississippi Rule of Appellate Procedure 22, sections (d) and (e), set forth the standards for post-conviction counsel in a death penalty case:

**(d) Standards and Qualifications for Attorneys Appointed or Retained to Represent Those Under Sentence of Death in Post-conviction Proceedings.** At least one (1) attorney representing those under a sentence of death seeking post-conviction relief shall have primary responsibility for and personally appear at proceedings, and shall,

- (1) Be admitted to practice law in Mississippi, being a member in good standing of the Bar for at least five years immediately preceding the appointment, or admitted pro hac vice pursuant to order entered under M.R.A.P. 46 and being a member in good standing of that attorney's home jurisdiction for a like period immediately preceding the appointment,
- (2) Be admitted to practice in the federal courts of Mississippi and before the Fifth Circuit, or, in the case of attorneys appearing pro hac vice, admitted to the federal district courts and the circuit court of appeals having jurisdiction in their home areas,



(3) Have practiced for three years, in federal or state court, in at least one of the following areas:

- (a) criminal trials or direct appeals before a court of record, and/or
- (b) post-conviction or habeas proceedings.

(4) Have not previously represented the capital petitioner in the case either in the trial court or in the direct appeal, unless the petitioner and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation,

(5) Have substantial knowledge and understanding of the relevant state and federal law, both procedural and substantive, governing capital cases, including completion of the requisite educational training enumerated in subsection (e), and

(6) Have otherwise demonstrated the necessary proficiency and commitment to zealous advocacy which exemplify the quality of representation appropriate to capital cases.

Provided, however, that with the approval of the trial court, an attorney may be appointed who does not meet the stated qualifications in (1)--(3) upon a showing that the attorney's experience, stature and record in a different type of practice (e.g., civil litigation, academic work, or work for a court or prosecutor) enable the trial court to conclude that the attorney has extensive experience in complex cases substantially equivalent to that of a qualified attorney.

**(e) Education and Training of Attorneys Appointed or Retained to Represent Those Under Sentence of Death in Post-conviction Proceedings.** Effective July 31, 2000, an attorney serving as post-conviction counsel in a case wherein the petitioner is under a sentence of death shall have within one year prior to his appointment or employment successfully completed twelve hours training or educational programs in the area of capital defense through a program accredited by the Mississippi Commission on Continuing Legal Education or by the American Bar Association.

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### **Missouri:**

When a motion is filed to set aside a sentence of death following conviction on a plea of guilty or conviction after trial, Supreme Court Rules 24.036(a) (2018) (amended 2020) and 29.16(a) (2018) (amended 2020), respectively, provide that the court shall appoint two attorneys. Rule 24.036(b) (and the identical Rule 29.16(b)) provides that:

**(b)** All counsel appointed as provided in this Rule 24.036 shall be members of The Missouri Bar or shall be admitted to practice in the particular case as provided in this Court's Rule 9. At least one of the counsel shall meet the following qualifications:

(1) Have attended and successfully completed within two years immediately preceding the appointment at least twelve hours of training or educational programs on the post-conviction phase of a criminal case and federal and state aspects of cases in which the death penalty is sought; and

(2) Have at least three years litigation experience in the field of criminal law; and

(3) Have participated as counsel or co-counsel to final judgment in at least five post-conviction motions involving class A felonies in either state or federal trial courts; and

(4) Have participated in either state or federal court as counsel or co-counsel to final judgment in at least:

- (A) three felony jury trials; or
  - (B) five direct criminal appeals in felony cases.
-

## **Montana:**

In Montana, various statutes grant the Public Defender Commission and the Office of Public Defender Standards the authority to create standards for the qualifications and performance of counsel in death penalty cases.

The qualifications are available at <http://publicdefender.mt.gov/Portals/61/Standards/6-0.pdf>.

### **VI. QUALIFICATIONS AND DUTIES OF COUNSEL**

**Goal: Counsel must meet these minimum standards before accepting a case. In order to provide effective representation, counsel must engage in regular and ongoing training.**

A. In order to assure that clients receive the effective assistance of counsel to which they are constitutionally and statutorily entitled, counsel providing public legal representation should meet the following minimum professional qualifications:

- a. Satisfy the minimum requirements for practicing law in Montana as determined by the Montana Supreme Court;
- b. Complete twenty hours of continuing legal education within each calendar year from courses, offered or approved by the Office of the State Public Defender, relating to public defender practice or representing persons whose liberty is at risk as a result of State-initiated proceedings;
- c. Comply with all other training requirements established by the Training Coordinator of the Office of the State Public Defender and approved by the Public Defender Commission; including, but not limited to, mental health disabilities, cultural competency, and drug dependency.
- d. In order to provide quality legal representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the State of Montana. Counsel has a continuing obligation to stay abreast of changes and developments in the law;
- e. The foregoing requirements shall be deemed satisfied if counsel is representing clients pursuant to the Student Practice Rule and is being directly supervised by a supervising attorney who meets the standards required for felony defense set forth below.
- f. All counsel will be evaluated periodically to ensure proficiency in the area(s) in which they practice on behalf of the Office of the State Public Defender.

B. Additional trial attorneys' qualifications according to type of case:

- a. Death penalty representation. Each attorney acting as lead counsel in a death penalty case shall meet the standards for competency of counsel for indigent persons in death penalty cases adopted by the Montana Supreme Court, and those set forth in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003);

....

C. Counsel should only request or accept assignment if counsel is able to provide quality representation and diligent advocacy for the client.

The Montana Supreme Court set forth Standards for Competency of Counsel for Indigent Persons in Death Penalty Cases, which was adopted in 2002. Standard I addresses the trial phase, standard II addresses the appeal phase, and standard III addresses the postconviction phase:

#### **I. Trial phase**

2. Upon establishment of indigency as provided in Title 46, Chapter 8, Part 1, Montana Code Annotated, and identification of a case as one in which the prosecutor believes sufficient evidence exists to show that one or more statutory aggravating factors under § 46-18-303, MCA, can be

proved to the appropriate standard of proof, the district court shall appoint two counsel to represent the defendant.

3. In selecting appointed counsel, the district court shall secure sufficient information from counsel to be appointed, either in writing or on the record, to satisfy the district court that counsel possess the following minimum qualifications:

- a. Both appointed attorneys must be members in good standing of the State Bar of Montana or admitted to practice before the district court *pro hac vice*.
- b. Both counsel must have completed or taught, in the two-year period prior to appointment or within 90 days after the appointment, a continuing legal education course or courses, approved for credit by the appropriate authority under the rules adopted by the Montana Supreme Court, at least 12 hours of which deal with subjects related to the defense of persons accused or convicted of capital crimes.
- c. Counsel, either individually or in combination, must have had significant experience within the past 5 years in the trial of criminal cases to conclusion, including a capital case or a case involving charges of or equivalent to deliberate homicide under Montana law.
- d. The nature and volume of the workload of both appointed counsel is such that they will have the ability to spend the time necessary to defend a capital case.
- e. Counsel are familiar with and have a copy of the current American Bar Association standards for the defense of capital cases. By adoption of this provision, the Montana Supreme Court does not hold that adherence to the guidelines is required as a condition of providing effective assistance of counsel, or that failure to adhere to the guidelines gives rise to an inference of ineffective assistance of counsel.

## **II. Appeal phase**

1. If a defendant is sentenced to death and is determined by the district court to be indigent, the district court shall appoint two attorneys to represent the defendant on direct appeal.

2. In selecting appointed counsel for appeal, the district court shall secure sufficient information from counsel to be appointed, either in writing or on the record, to satisfy the district court that counsel possess sufficient appellate experience to provide adequate representation to the defendant on appeal and the following minimum qualifications:

- a. Both appointed attorneys must be members in good standing of the State Bar of Montana or admitted to practice before the district court *pro hac vice*.
- b. Both counsel must have completed or taught, in the two-year period prior to appointment or within 90 days after the appointment, a continuing legal education course or courses, approved for credit by the appropriate authority under the rules adopted by the Montana Supreme Court, at least 12 hours of which deal with subjects related to the defense of persons accused or convicted of capital crimes.
- c. Counsel, either individually or in combination, must have had significant experience within the past 5 years in the appeal of criminal cases, including a capital case or a case involving charges of or equivalent to deliberate homicide under Montana law.
- d. The nature and volume of the workload of both appointed counsel is such that they will have the ability to spend the time necessary to appeal a capital case.
- e. Counsel are familiar with and have a copy of the current American Bar Association standards for the defense of capital cases[...] By adoption of this provision, the Montana Supreme Court does not hold that adherence to the guidelines is required as a condition of providing effective assistance of counsel, or that failure to adhere to the guidelines gives rise to an inference of ineffective assistance of counsel.

## **III. Postconviction phase**

2. The district court shall appoint two counsel. One of the appointed counsel may be an attorney who has been admitted *pro hac vice*. Lead counsel shall satisfy all of the following:

- a. He or she must be an active member in good standing of the Montana State Bar or be admitted *pro hac vice*.
  - b. He or she must have at least 5 years criminal trial, criminal appellate, or state or federal postconviction experience, which experience may have been obtained in Montana or in another jurisdiction.
  - c. He or she must have completed or taught, in the two-year period prior to appointment or within 90 days after the appointment, a continuing legal education course or courses, approved for credit by the appropriate authority under the rules adopted by the Montana Supreme Court, at least 12 hours of which deal with Subjects related to the defense of persons accused or convicted of capital crimes.
3. In addition, the appointed counsel, either individually or in combination, shall have the following qualifications obtained in Montana or another jurisdiction:
- a. Experience as counsel for either the defendant or the state in the trial of one deliberate homicide case;
  - b. Experience as counsel for either the defendant or the state in the trial of three felony cases;
  - c. Experience as counsel for either the petitioner or the state in three cases involving claims for state postconviction or federal habeas corpus review.

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### **Nebraska:**

In Nebraska, the qualifications for death penalty counsel are established by the Nebraska Commission on Public Advocacy, working in conjunction with the Indigent Defense Standards Advisory Council. Exact standards are not available. *See Nebraska Minority Justice Committee, Report to the Nebraska Supreme Court on Indigent Defense Systems and Fee Structures* 32–33 (2006), available at <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1032&context=publicpolicypublications>. However, section 29-3927 of the Nebraska Statute authorizes the Commission on Public Advocacy and the Indigent Defense Standards Advisory Council to establish the standards:

- (1) With respect to its duties under section 29-3923, the commission shall:
  - (g) Adopt guidelines and standards, for county indigent defense systems, including, but not limited to, standards relating to the following: The use and expenditure of funds appropriated by the Legislature to reimburse counties which qualify for reimbursement; attorney eligibility and qualifications for court appointments; compensation rates for salaried public defenders, contracting attorneys, and court-appointed attorneys and overall funding of the indigent defense system; maximum caseloads for all types of systems; systems administration, including rules for appointing counsel, awarding defense contracts, and reimbursing defense expenses; conflicts of interest; continuing legal education and training; and availability of supportive services and expert witnesses.

Regarding felony defendants, courts are instructed, upon a finding that the defendant is indigent, to:

[F]ormally appoint the public defender or, in counties not having a public defender, an attorney or attorneys licensed to practice law in this state, not exceeding two, to represent the indigent felony defendant at all future critical stages of the criminal proceedings against such defendant, consistent with the provisions of section 23-3402, but appointed counsel other than the public defender must obtain leave of court before being authorized to proceed beyond an initial direct appeal to either the Court of Appeals or the Supreme Court of

Nebraska to any further direct, collateral, or postconviction appeals to state or federal courts.

Neb. Rev. Stat. § 29-3903 (2018).

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**Nevada:**

Supreme Court Rule 250 applies to the procedure in capital proceedings in the district courts. Section 2 provides the appointment and qualifications of counsel but gives discretion to the district courts to formulate additional qualifications.

(b) **Trial counsel.** Unless the district court determines pursuant to subsection (2)(e) that defense counsel otherwise has the competence to represent an indigent person in a capital case, an attorney appointed as lead counsel at trial at a minimum must have: (1) acted as lead defense counsel in five felony trials, including one murder trial, tried to completion (i.e., to a verdict or a hung jury); (2) acted as defense co-counsel in one death penalty trial tried to completion; and (3) been licensed to practice law at least three years.

(c) **Counsel in post-conviction proceedings in district court.** Counsel appointed to represent a petitioner for post-conviction relief in the district court must have acted as counsel in at least two post-conviction proceedings arising from felony convictions and must otherwise satisfy the court that counsel is capable and competent to represent the petitioner.

(d) **Counsel on direct and post-conviction appeal.** Counsel appointed to represent an appellant on direct or post-conviction appeal must have acted as counsel in at least two appeals of felony convictions and must otherwise satisfy the court that counsel is capable and competent to represent the appellant.

(e) **Exceptions.** If an attorney does not satisfy the minimum requirements set forth in subsections (2)(b), (c), or (d) of this rule, or if the district court otherwise considers it warranted, the court shall hold a hearing to assess the attorney's competence and ability to act as defense counsel. The court shall thoroughly investigate the attorney's background, training, and experience and consult with the attorney on his or her current caseload. If satisfied that the attorney is competent and able to provide the representation, the court shall make that finding on the record and appoint the attorney.

(f) **Co-counsel.** When the district court appoints defense counsel to provide representation at trial, it shall appoint two counsel, one of whom must be qualified under this rule to act as lead counsel in a capital case. When the court appoints defense counsel to provide representation in a direct appeal, a first post-conviction petition for a writ of habeas corpus, or an appeal from such post-conviction proceeding, the court may only appoint one counsel who is qualified under this rule.

(g) **Appointment of public defender.** When the district court appoints an office of a public defender to provide representation in a capital case, any attorney assigned by the office to act as defense counsel shall prepare and file with the court the application form required by subsection (2)(h) of this rule.

(h) **Application forms and list of qualified counsel.** Each judicial district shall maintain a list of qualified defense counsel and shall establish procedures to ensure that defense counsel are considered and selected for appointment to capital cases from the list in a fair, equal and consecutive basis. The judicial districts shall further arrange for the preparation and distribution of application forms to defense attorneys who wish to be included on the list. The forms must require specific information respecting the attorney's qualifications to act as defense counsel in a capital case and a complete statement of any discipline or sanctions pending or imposed against the attorney by any court or disciplinary body. Before appointing any attorney to act as counsel in a

capital case, the district court to which the case is assigned shall carefully consider the information in the attorney's application form.

The Supreme Court of Nevada adopted standards for counsel in capital cases. The qualification requirements of Standard 2(a) appear to be consistent with the ABA Guidelines, although they are not mandatory. The standards are available at

<http://www.co.washoe.nv.us/repository/files/36/ADKT411.CapPerfStds.pdf>

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### **New Hampshire (Death Penalty Repealed 2019):**

In New Hampshire, in any case in which an indigent defendant is charged with a capital offense, the court may appoint two counsel to represent the defendant. N.H. Rev. Stat. Ann. § 604-A:2(I). The court must appoint a public defender, but in the event the public defender program is unavailable, the court must appoint a contract attorney. *Id.* § 604-A:2(II).

In 2007, the New Hampshire Public Defender sent a letter to the presiding trial court judge confirming that the office complies with the ABA Guidelines, which includes the qualification requirements for capital defense counsel. The letter is available at

<https://www.courts.state.nh.us/caseinfo/pdf/addison/2007/july/AddisonNHPDapp%27tconfirmLTR-KAM.pdf>.

In 2015, the New Hampshire Judicial Council adopted post-conviction performance and eligibility standards, available at <https://www.nh.gov/judicialcouncil/documents/capital-post-conviction-counsel.pdf>. The Eligibility Standards: Capital Post-Conviction Representation section provides that, in order to serve as lead counsel for a defendant in a capital post-conviction proceeding:

- Counsel shall have been a member of any bar for at least 5 years and must possess at least 3 years of experience in the field of post-conviction litigation.
  - Counsel must be familiar with all state and federal appellate and post-conviction options available to clients and must demonstrate a familiarity with legal developments locally and nationally that may be relevant to the persuasive presentation of claims in state post-conviction proceedings.
  - Counsel must provide a written proposal in advance of appointment that shows, based on the volume of the record and the circumstances of the defendant's case, that he or she can reasonably forecast, and meet, the demands of providing high quality representation.
  - Counsel should be familiar with the procedure for setting execution dates and providing notice of them. Counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.
  - Counsel must demonstrate a thorough understanding of how to preserve a client's right to federal review, including ensuring that a client is not time-barred from seeking relief.
  - Counsel must be familiar with the capital post-conviction performance standards promulgated by the New Hampshire Judicial Council.
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### **New Mexico:** (Death Penalty Repealed 2009)

Public defender standards created in 1998 provided that capital defense counsel must comply with National Legal Aid and Defender Association standards for death penalty cases: "Attorneys handling death penalty cases should consult the National Legal Aid and Defender Association's Standards for Appointment and Performance of Counsel in Death Penalty Cases (1987, amended 1988)." These standards were previously

available on the New Mexico public defender's website, but they have since been removed. However, they are available at <http://www.nlada.org/defender-standards/death-penalty/black-letter>.

In 2004, a State Bar of New Mexico Task Force to Study the Administration of the Death Penalty in New Mexico prepared a report that it submitted to the Board of Bar Commissioners, available at <https://www.sbnm.org/Portals/NMBAR/PubRes/Reports/TaskforceDeathPenalty.pdf?ver=zLlE8gkQXB0FT30XosXOQ%3D%3D>. The report recommended enhanced qualification requirements for capital defense counsel on pages 7–9.

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## **North Carolina:**

North Carolina provides detailed standards for counsel at all stages of a capital case, available at <https://www.ncids.org/wp-content/uploads/2021/03/IDS-Rules-Part-2-Appendix.pdf>.

## **Appendix 2A**

### **Standards for Lead and Associate Trial Counsel in Capital Cases**

#### **2A.1 (App.) Trial Qualifications and Experience**

##### **(a) Lead Counsel**

To be eligible to be appointed as lead counsel in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as lead counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2A.1(c) (App.) below.

A candidate for appointment must demonstrate that he or she:

- (i) has at least six years of criminal or civil litigation experience; or has at least four years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a capital defense organization;
- (ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and Supreme Court of North Carolina;
- (iii) has participated as trial counsel in at least ten jury trials to verdict or to hung jury;
- (iv) has tried a capital case to verdict or to hung jury as lead defense counsel; or has tried two capital cases to verdict or to hung jury as associate defense counsel; or has represented to disposition at the trial level defendants in four homicides cases; and
- (v) has substantial familiarity with and experience in the use of expert witnesses and scientific and medical evidence, including mental health, social history, and pathology evidence.

##### **(b) Associate Counsel**

To be eligible to be appointed as associate counsel in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as associate counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2A.1(c) (App.) below.

A candidate for appointment must demonstrate that he or she:

- (i) has at least three years of criminal or civil litigation experience;

- (ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and Supreme Court of North Carolina;
- (iii) has participated as trial counsel in at least four jury trials to verdict or to hung jury; or has spent two years in practice in a capital defense organization; and
- (iv) has substantial familiarity with scientific and medical evidence, including mental health, social history, and pathology evidence.

## **Appendix 2B**

### **Standards for Appellate Counsel in Capital Cases**

#### **2B.1 (App.) Appellate Qualifications and Experience**

##### **(a) Appellate Counsel**

To be eligible to be appointed as appellate counsel on direct appeal in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as appellate counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2B.1(b) (App.) below.

A candidate for appointment must demonstrate that he or she:

- (i) has at least five years of criminal, appellate, or post-conviction experience; or has at least three years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a capital defense organization; or is currently serving as the Appellate Defender or an Assistant Appellate Defender;
- (ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and the Supreme Court of North Carolina;
- (iii) is familiar with practice and procedure in the trial and appellate courts of North Carolina; and
- (iv) has had primary responsibility for the appeal of at least five felony convictions in any state or federal court, at least three of which were on behalf of the defendant, and at least three of which were orally argued by the attorney.

## **Appendix 2C**

### **Standards for State Post-Conviction Counsel in Capital Cases**

#### **2C.1 (App.) State Post-Conviction Qualifications and Experience**

##### **(a) State Post-Conviction Counsel**

To be eligible to be appointed as counsel on a Motion for Appropriate Relief and any appeal therefrom in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as post-conviction counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below.

However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2C.1(b) (App.) below.

A candidate for appointment must demonstrate that he or she:

- (i) has at least five years criminal or civil trial experience; or has at least five years criminal or civil appellate experience; or has at least five years state or federal post-conviction experience; or has at least three years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a public or private capital defense organization; or is currently in practice in a capital defense organization;



- (ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and the Supreme Court of North Carolina;
- (iii) is familiar with the practice and procedure of the trial and appellate courts of North Carolina, including the practice and procedure for filing a Motion for Appropriate Relief, and with the practice and procedure of the federal courts with regard to federal habeas corpus petitions;
- (iv) has had primary responsibility for representing a party in at least three criminal or civil appeals, or criminal post-conviction proceedings; and
- (v) has substantial familiarity with and experience in the use of expert witnesses and scientific and medical evidence, including mental health, social history, and pathology evidence.

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## **Ohio:**

Qualifications for counsel in capital cases appear in the 2015 Rules for Appointment of Counsel in Capital Cases in Section 3, available at <https://www.supremecourt.ohio.gov/Boards/capitalCases/capitalCases.pdf>. These replace the old Rules of Superintendence “Rule 20” standards. The rules are structured to first provide general qualification standards and then specific qualification standards for lawyers at each stage:

### **Appt.Coun.R. 3.01. General Certification Requirements.**

#### **(B) Qualifications**

An applicant for certification under division (A) of this rule shall possess all of the following qualifications:

- (1) Admission to the practice of law in Ohio or admission to practice pro hac vice;
- (2) Demonstrated commitment to providing high quality legal representation in the defense of capital cases;
- (3) Substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases;
- (4) Skill in the management and conduct of complex negotiations and litigation;
- (5) Skill in legal research, analysis, and the drafting of litigation documents;
- (6) Skill in oral advocacy;
- (7) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, arson, forensic pathology, and DNA evidence;
- (8) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- (9) Skill in the investigation, preparation, and presentation of mitigating evidence;
- (10) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

### **Appt.Coun.R. 3.02. Certification Requirement for Trial Lead Counsel.**

#### **(B) Qualifications**

An applicant for certification under division (A) of this rule shall meet all of the following qualifications:

- (1) Possess at least five years of criminal litigation experience in Ohio courts of common pleas or criminal appellate experience in Ohio courts of appeals or the Supreme Court;
- (2) Possess either of the following qualifications:
  - (a) Experience as trial lead counsel in the trial of at least one capital case;

- (b) Experience as trial co-counsel in the trial of at least two capital cases.
- (3) Possess either of the following qualifications:
  - (a) Experience as trial lead counsel in the jury trial of at least one murder or aggravated murder case in the ten years prior to making application;
  - (b) Experience as trial lead counsel in three aggravated or first or second-degree felony jury trials in a court of common pleas in the five years prior to making application.
- (4) Comply with the general certification requirements of Appt.Coun.R. 3.01;
- (5) Comply with the training requirements of Appt.Coun.R. 4.01.

### **Appt.Coun.R. 3.03. Certification Requirement for Trial Co-Counsel.**

#### **(B) Qualifications**

An applicant for certification under division (A) of this rule shall meet all of the following qualifications:

- (1) Possess at least three years of criminal litigation experience in Ohio courts of common pleas or criminal appellate experience in Ohio courts of appeals or the Supreme Court;
- (2) Possess at least one of the following qualifications:
  - (a) Experience as trial co-counsel in one murder or aggravated murder trial in the ten years prior to making application;
  - (b) Experience as trial lead counsel in one first or second-degree felony jury trial in the five years prior to making application;
  - (c) Experience as trial lead or co-counsel in at least two felony jury trials in a court of common pleas in the five years prior to making application.
- (3) Comply with the general certification requirements of Appt.Coun.R. 3.01;
- (4) Comply with the training requirements of Appt.Coun.R. 4.01.

### **Appt.Coun.R. 3.04. Certification Requirement for Appellate Counsel.**

#### **(B) Qualifications**

An applicant for certification under division (A) of this rule shall meet all of the following qualifications:

- (1) Possess at least three years of criminal litigation experience in Ohio courts of common pleas or criminal appellate experience in Ohio courts of appeals or the Supreme Court;
- (2) Have experience as counsel in the appeal of at least three felony convictions in the three years prior to making application;
- (3) Comply with the general certification requirements of Appt.Coun.R. 3.01;
- (4) Comply with the training requirements of Appt.Coun.R. 4.03.

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### **Oklahoma:**

The Oklahoma Indigent Defense System's capital trial counsel application form, available at [https://www.ok.gov/OIDS/documents/ques\\_trl.pdf](https://www.ok.gov/OIDS/documents/ques_trl.pdf), provides that:

The Oklahoma indigent defense system board has adopted the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. This application and questionnaire is designed to facilitate the determination of whether an attorney possesses the minimum necessary qualifications under those guidelines to be included on the roster of attorneys who are willing to accept appointments as either lead counsel or co-counsel to represent an indigent defendant at the trial level in capital murder cases.

This language is particularly relevant because the Oklahoma Indigent Defense System has the statutory authority to set standards for the qualifications of counsel in capital cases. *See* Okla. Stat. §§ 22-1355.1 through 22-1355.7.

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## **Oregon:**

The Oregon Public Defense Services Commission has adopted the ABA Guidelines' requirements for qualifications of counsel in death penalty cases in its Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense. Standard IV provides the minimum qualifications by case type. The standards (revised December 19, 2019) are available at <https://www.oregon.gov/opds/provider/Pages/standards.aspx>.

### **5. Capital Murder Cases in Trial Courts**

A. *Lead Counsel*. The minimum qualifications for appointment as lead counsel in capital murder cases require that an attorney:

- a. Has reviewed and agrees to fulfill the current version of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases;
- b. Meets the qualifications specified in Standard IV, section 4.A;
- c. Has represented clients in major felony cases for at least five years;
- d. Has acted as lead counsel or co-counsel in at least one murder case that was tried to a jury;
- e. Has attended within the last two years at least 24 hours of specialized training on in the management, preparation, and presentation of capital cases through an established training program awarding CLE credits;
- f. Has demonstrated to persons with direct knowledge of his or her practice:
  - (1) A commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases;
  - (2) Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
  - (3) Skill in the management and conduct of complex negotiations and litigation;
  - (4) Skill in legal research, analysis, and the drafting of litigation documents;
  - (5) Skill in oral advocacy;
  - (6) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
  - (7) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
  - (8) Skill in the investigation, preparation, and presentation of mitigating evidence;
  - (9) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and
- g. On request, can demonstrate all of the above by:
  - (1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a capital murder case; and
  - (2) Written statements from those with direct knowledge of the attorney's practice, declaring that they believe that the attorney should be allowed to defend capital murder cases and explaining why the attorney has the qualities required.

Written statements must include at least five letters from persons in at least two of the following three groups:

- i. Judges before whom the attorney has appeared;
- ii. Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; or
- iii. District attorneys or deputies against whom or with whom the attorney has tried cases.

B. *Co-counsel*. Co-counsel in capital murder cases must meet the qualifications in Standard IV, section 5.A, subparagraphs a, b, c, e, f, and g.

### **11. Appeals in Capital Murder Cases**

The minimum qualifications for appointment in appeals in murder and capital murder cases require that an attorney:

- A. Meets the qualifications specified in Standard IV, section 10;
- B. For appointment as lead counsel, is an experienced and active trial or appellate lawyer with at least three years' experience in criminal defense;
- C. Has demonstrated the proficiency and commitment necessary for high quality representation in capital murder cases.
- D. For lead counsel in capital murder appeals, within two years prior to the appointment has attended and completed a legal training or educational program on defending capital cases. A substantial portion of the program must have been directly relevant to appeals in capital cases; and
- E. For co-counsel in capital murder appeals, has attended and completed a legal training or education program on appellate advocacy in criminal cases within two years prior to the appointment.

### **16. Post-Conviction Proceedings in Murder and Capital Murder Cases**

The minimum qualifications for appointment in post-conviction proceedings in murder and capital murder cases require that an attorney:

- A. Meets the qualifications specified in Standard IV, section 4;
- B. Meets the qualifications specified in Standard IV, section 15;
- C. For appointment as lead counsel, has prior experience as post-conviction counsel in at least three major felony cases; and
- D. For capital murder cases, meets the qualifications specified in Standard IV, section 5 for co-counsel in capital cases in the trial courts. If more than one attorney is appointed, only one of the attorneys must meet the qualifications specified in Standard IV, section 5.

### **17. Habeas Corpus Proceedings**

The minimum qualifications for appointment in habeas corpus proceedings require that an attorney meet the qualifications specified in Standard IV, section 2.

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### **Pennsylvania:**

Rule 801 of the Pennsylvania Rules of Criminal Procedure provides qualification requirements for capital defense counsel:

**Rule 801. Qualifications for Defense Counsel in Capital Cases.**

In all cases in which the attorney for the Commonwealth has filed a Notice of Aggravating Circumstances pursuant to Rule 802, before an attorney may participate in any stage of the case either as retained or appointed counsel, the attorney must meet the educational and experiential criteria set forth in this rule.

(1) EXPERIENCE: Counsel shall

- (a) be a member in good standing of the Bar of this Commonwealth;
- (b) be an active trial practitioner with a minimum of 5 years criminal litigation experience; and
- (c) have served as lead or co-counsel in a minimum of 8 significant cases that were given to the jury for deliberations. If representation is to be only in an appellate court, prior appellate or post-conviction representation in a minimum of 8 significant cases shall satisfy this requirement. A “significant case” for purposes of this rule is one that charges murder, manslaughter, vehicular homicide, or a felony for which the maximum penalty is 10 or more years.

(2) EDUCATION:

- (a) During the 3-year period immediately preceding the appointment or entry of appearance, counsel shall have completed a minimum of 18 hours of training relevant to representation in capital cases, as approved by the Pennsylvania Continuing Legal Education Board.
- (b) Training in capital cases shall include, but not be limited to, training in the following areas:
  - (i) relevant state, federal, and international law;
  - (ii) pleading and motion practice;
  - (iii) pretrial investigation, preparation, strategy, and theory regarding guilt and penalty phases;
  - (iv) jury selection;
  - (v) trial preparation and presentation;
  - (vi) presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts;
  - (vii) ethical considerations particular to capital defense representation;
  - (viii) preservation of the record and issues for post-conviction review;
  - (ix) post-conviction litigation in state and federal courts;
  - (x) unique issues relating to those charged with capital offenses when under the age of 18; and
  - (xi) counsel’s relationship with the client and family.
- (c) The Pennsylvania Continuing Legal Education Board shall maintain and make available a list of attorneys who satisfy the educational requirements set forth in this rule.

**Comment**

The purpose of this rule is to provide minimum uniform statewide standards for the experience and education of appointed and retained counsel in capital cases, to thus ensure such counsel possess the ability, knowledge, and experience to provide representation in the most competent and professional manner possible. These requirements apply to counsel at all stages of a capital case, including pretrial, trial, post-conviction, and appellate.

The educational and experience requirements of the rule may not be waived by the trial or appellate court. A court may allow representation by an out-of-state attorney *pro hac vice*, if satisfied the attorney has

equivalent experience and educational qualifications, and is a member in good standing of the Bar of the attorney's home jurisdiction. *See* Pa.B.A.R. 301.

For purposes of the requirements of paragraph (1), experience in the role of either prosecutor or defense counsel should be considered.

An attorney may serve as "second chair" in a capital case without meeting the educational or experience requirements of this rule. "Second chair" attorneys may not have primary responsibility for the presentation of significant evidence or argument, but may present minor or perfunctory evidence or argument, if deemed appropriate in the discretion of the court. Service as a "second chair" in a homicide case will count as a trial for purposes of evaluating that attorney's experience under paragraph (1)(c) of this rule.

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### **South Carolina:**

South Carolina statute section 16-3-26(B)(1) instructs that, when a defendant is charged specifically with murder and the death penalty is sought:

[T]he court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.

Section 17-27-160(B) expands that, in post-conviction relief procedures,

At least one of the attorneys appointed to represent the applicant must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense. The Supreme Court may promulgate additional standards for qualifications of counsel in capital post-conviction proceedings. The court may not appoint an attorney as counsel under this section if the attorney represented the applicant at trial or in a direct appeal unless the applicant and the attorney request appointment on the record or the court finds good cause to make the appointment.

Appellate Court Rule 421 provides that, in death penalty cases:

(a) Classes of Certified Attorneys. There shall be two classes of attorneys certified to handle death penalty cases: lead counsel and second counsel.

- (b) Lead Counsel. Lead counsel shall have at least five years experience as a licensed attorney and at least three years experience in the actual trial of felony cases. The application for certification to act as lead counsel shall be on a form designated by the Supreme Court.
- (c) Second Counsel. Second counsel shall have at least three years experience as a licensed attorney. Second counsel is not required to be further certified to be eligible for appointment.

Rule 608(f)(1) addresses the appointment of lead counsel in trial and post-conviction in death penalty cases:

The appointment of a lead counsel to represent an indigent defendant in a death penalty case shall be made from the list of members specified in (c)(1)(A) above who have been death penalty certified as lead counsel by the Supreme Court; provided, however, that lawyers who are not certified may be appointed as lead counsel in a post-conviction relief action for a death-sentenced inmate if they have previously represented a death-sentenced inmate in a state or federal post-conviction relief proceeding as provided by S.C. Code Ann. § 17-27-160.

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### **South Dakota:**

South Dakota Codified Law section 23A-40-7 provides for appointed counsel in criminal cases:

The board of county commissioners of each county and the governing body of any municipality shall provide for the representation of indigent persons described in § 23A-40-6. The board or body shall provide this representation by any or all of the following:

- (1) Establishing and maintaining an office of a public defender;
- (2) Arranging with the courts in the county to appoint attorneys on an equitable basis through a systematic, coordinated plan; or
- (3) Contracting with any attorney licensed to practice law in this state.

In those counties which have established an office of public defender, any proceedings after judgment may be assigned to the public defender.

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### **Tennessee:**

Rule 13, Section 3 of the Rules of the Tennessee Supreme Court provides minimum qualification requirements for capital defense counsel in trial (c, d), direct appeal (e, f, g), post-conviction (h), and competency hearings (i):

#### **Trial Counsel**

(b)(1) The court shall appoint two attorneys to represent a defendant at trial in a capital case. Both attorneys appointed must be licensed in Tennessee and have significant experience in Tennessee criminal trial practice, unless in the sound discretion of the trial court, appointment of one attorney admitted under Tennessee Supreme Court Rule 19 is appropriate. The appointment order shall specify which attorney is “lead counsel” and which attorney is “co-counsel.” Whenever possible, a public defender shall serve as and be designated “lead counsel.”

(c) Lead counsel must:

- (1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;
  - (2) have regularly participated in criminal jury trials for at least five years;
  - (3) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter;
  - (4) have at least one of the following:
    - (A) experience as lead counsel in the jury trial of at least one capital case;
    - (B) experience as co-counsel in the trial of at least two capital cases;
    - (C) experience as co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of at least one murder case;
    - (D) experience as lead counsel or sole counsel in at least three murder jury trials or one murder jury trial and three felony jury trials; or
    - (E) experience as a judge in the jury trial of at least one capital case.
  - (5) The provisions of this subsection requiring lead counsel to have participated in criminal jury trials for at least five years, rather than three years, and requiring six (6) hours of specialized training shall become effective January 1, 2006.
- (d) Co-counsel must:
- (1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;
  - (2) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter;
  - (3) have at least one of the following qualifications:
    - (A) qualify as lead counsel under (c) above; or
    - (B) have experience as sole counsel, lead counsel, or co-counsel in a murder jury trial.
  - (4) The provisions of this subsection requiring six (6) hours of specialized training shall become effective January 1, 2006.

#### Direct Appeal Counsel

- (e) Attorneys who represent the defendant in the trial court in a capital case may be designated to represent the defendant on direct appeal, provided at least one trial attorney qualifies as new appellate counsel under section 3(g) of this rule and both attorneys are available for appointment. However, new counsel will be appointed to represent the defendant if the trial court, or the court in which the case is pending, determines that appointment of new counsel is necessary to provide the defendant with effective assistance of counsel or that the best interest of the defendant requires appointment of new counsel.
- (f) If new counsel are appointed to represent the defendant on direct appeal, both attorneys appointed must be licensed in Tennessee, unless in the sound discretion of the judge, appointment of one attorney admitted under Tennessee Supreme Court Rule 19 is appropriate.
- (g) Appointed counsel on direct appeal, regardless of any prior representation of the defendant, must have three years of litigation experience in criminal trials and appeals, and they must have at least one of the two following requirements: experience as counsel of record in the appeal of a capital case; or experience as counsel of record in the appeal of at least three felony convictions



within the past three years and a minimum of six hours of specialized training in the trial and appeal of capital cases.

#### Post-Conviction Counsel

(h) Counsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as appointed appellate counsel, or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. Counsel also must have a working knowledge of federal habeas corpus practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts; and they must not have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made, unless the defendant and counsel expressly consent to continued representation.

#### Competency Hearings Counsel

(i) No more than two attorneys shall be appointed to represent a death-row inmate in a proceeding regarding competency for execution. *See Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). At least one of the attorneys appointed shall be qualified as post-conviction counsel as set forth in section 3(h).

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#### Texas:

Pursuant to Article 26.052(d) of the Texas Code of Criminal Procedure (effective January 1, 2017), a local selection committee must adopt standards for attorneys to be qualified to be appointed to represent indigent defendants in capital cases in which the death penalty is sought, at the trial (subsection 2) and direct appeal (subsection 3) proceedings.

#### Trial Counsel

- (2) The standards must require that a trial attorney appointed as lead counsel to a capital case:
- (A) be a member of the State Bar of Texas;
  - (B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;
  - (C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under Subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;
  - (D) have at least five years of criminal law experience;
  - (E) have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second or first degree felonies or capital felonies;
  - (F) have trial experience in:
    - (i) the use of and challenges to mental health or forensic expert witnesses; and
    - (ii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and

(G) have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.

#### Direct Appeal Counsel

(3) The standards must require that an attorney appointed as lead appellate counsel in the direct appeal of a capital case:

- (A) be a member of the State Bar of Texas;
- (B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;
- (C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under Subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;
- (D) have at least five years of criminal law experience;
- (E) have authored a significant number of appellate briefs, including appellate briefs for homicide cases and other cases involving an offense punishable as a capital felony or a felony of the first degree or an offense described by Article 42A.054(a);
- (F) have trial or appellate experience in:
  - (i) the use of and challenges to mental health or forensic expert witnesses; and
  - (ii) the use of mitigating evidence at the penalty phase of a death penalty trial;and
- (G) have participated in continuing legal education courses or other training relating to criminal defense in appealing death penalty cases.

The article further mandates that the judge must appoint two attorneys, at least one of whom is qualified. Tex. Code Crim. Proc. Ann. art. 26.052(e).

#### Post-Conviction Counsel

Article 11.071(2)(c) of the Texas Code of Criminal Procedure (effective September 1, 2015), which governs post-conviction proceedings, requires appointment of counsel from the Office of Capital and Forensic Writs. If that office is not appointed, the convicting court appoints counsel from a list pursuant to Texas Government Code section 78.056(a) (effective September 1, 2011), which requires that attorneys on the list:

- (1) must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases; and
- (2) may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case.

In addition to this statute, the Board of Directors of the State Bar of Texas adopted a version of the ABA Guidelines in 2006. Standing Committee on Legal Services to the Poor in Criminal Matters, *Guidelines and Standards for Texas Capital Counsel*, 69 Tex. Bar J. 966 (Nov. 2006), available at [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/Standards/State/texas-bar-association-adopted-version-of-aba-guidelines.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/Standards/State/texas-bar-association-adopted-version-of-aba-guidelines.pdf)

Guideline 4.1 provides:

- A. Qualification standards for defense counsel in capital cases should be developed and published. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation
- B. In formulating qualification standards, the following principles should insure:
  - 1. That every attorney representing a capital defendant has:
    - a. obtained a license or permission to practice in the jurisdiction;
    - b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and satisfied the training requirements set forth in GUIDELINE 7.1.
  - 2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:
    - a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
    - b. skill in the management and conduct of complex negotiations and litigation;
    - c. skill in legal research, analysis, and the drafting of litigation documents;
    - d. skill in oral advocacy;
    - e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
    - f. skill in the investigation, preparation, and presentation of mitigating evidence;
    - g. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and,
    - h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

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**Utah:**

Rule 8 of the Utah Rules of Criminal Procedure set forth the required qualifications for counsel in capital cases:

- (b)** In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below that appointed counsel is proficient in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:
- (b)(1) at least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total;
  - (b)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or a felony homicide case which was tried to a jury and which went to final verdict;
  - (b)(3) at least one of the appointed attorneys must have completed or taught within the past five years an approved continuing legal education course or courses at least eight hours of which deal, in substantial part, with the trial of death penalty cases; and

- (b)(4) the experience of one of the appointed attorneys must total not less than five years in the active practice of law.
- (c) In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:
- (c)(1) whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;
  - (c)(2) the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;
  - (c)(3) the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;
  - (c)(4) the diligence, competency and ability of the attorneys being considered; and
  - (c)(5) any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.
- (d) In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is proficient in the appeal of capital cases. To be found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:
- (d)(1) at least one attorney must have served as counsel in at least three felony appeals; and
  - (d)(2) at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.
- (e) In all cases in which counsel is appointed to represent an indigent petitioner pursuant to Utah Code Ann. § 78-35a-202(2)(a), the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:
- (e)(1) at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;
  - (e)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;
  - (e)(3) at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;
  - (e)(4) at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and
  - (e)(5) the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.
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## **Virginia (Death Penalty Repealed 2021):**

[2021 Virginia Laws 1st Sp. Sess. Ch. 344 \(H.B. 2263\)](#) repealed § 19.2-163.7

Virginia Code §19.2-163.7 instructs the judge of the circuit court, upon request for the appointment of counsel, to:

[A]ppoint at least two attorneys from the list or lists established by the Supreme Court and the Indigent Defense Commission or as provided in subsection C of § 19.2-163.8 to represent the defendant at trial and, if the defendant is sentenced to death, on appeal. In all cases where counsel is appointed under this section after July 1, 2004, one of the attorneys appointed shall be from a capital defense unit maintained by the Indigent Defense Commission . . . . If the sentence of death is affirmed on appeal, the court shall, within 30 days after the decision of the Supreme Court of Virginia, appoint counsel from the same list, or such other list as the Supreme Court and the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding.

Virginia Code §19.2-163.8(A) directs the Indigent Defense Commission, in conjunction with the Virginia State Bar, to adopt standards for the appointment of counsel in capital cases and take into consideration the following:

(i) license or permission to practice law in Virginia; (ii) general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the requisite court system; (vi) current training in death penalty litigation; (vii) current training in the analysis and introduction of forensic evidence, including deoxyribonucleic acid (DNA) testing and the evidence of a DNA profile comparison to prove or disprove the identity of any person; and (viii) demonstrated proficiency and commitment to quality representation.

Virginia Administrative Code Title 6, Chapter 10 (6 VA ADC 30-10-10) sets forth these qualifications for trial, appellate and habeas counsel:

Pursuant to § 19.2-163.8 E of the Code of Virginia, the Public Defender Commission, in conjunction with the Virginia State Bar, hereby sets forth the following standards for appointed counsel determined to be qualified and possessing proficiency and commitment to quality representation in capital cases. While § 19.2-163.7 of the Code of Virginia, effective July 1, 1992, does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate and habeas proceedings. Thus, the standards often refer to “lead counsel” and “co-counsel.” If a public defender is appointed as either “lead” or “co-counsel,” the other attorney should be appointed from the private bar.

### **A. Trial counsel**

#### **1. Court-appointed “lead counsel” shall:**

- a. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice.
- b. Have at least five years of criminal litigation practice with demonstrated competence.

- c. Have had, within the past two years, some specialized training in capital litigation.
- d. Have at least one of the following qualifications:
  - (1) Experience as “lead counsel” in the defense of at least one capital case;
  - (2) Experience as “co-counsel” in the defense of at least two capital cases;
  - (3) Experience as “lead counsel” (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum sentence of at least five years imprisonment.
- e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default.
- f. Have demonstrated proficiency and commitment to quality representation.

2. Court-appointed “co-counsel” must:

- a. Meet all of the requirements of “lead counsel” except as set forth in subdivisions 1 b and 1 d.
- b. Have at least one of the following qualifications:
  - (1) Experience as “lead counsel” or “co-counsel” in a murder trial;
  - (2) Experience as “lead” or “co-counsel” in at least two criminal jury trials.

**B. Appellate counsel.** Attorneys qualifying as court appointed “lead counsel” under subsection A 1 automatically qualify as “lead” appellate counsel. Other appointed appellate counsel must meet the following requirements:

- 1. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice.
- 2. Have briefed and argued the merits in:
  - a. At least three criminal cases in an appellate court; or
  - b. The appeal of a case in which the death penalty was imposed.
- 3. Have had, within the past two years, some specialized training in capital case litigation and be familiar with the rules and procedure of appellate practice.

**C. Habeas corpus counsel.**

- 1. Habeas corpus “lead counsel” shall satisfy one of the following requirements:
  - a. Be qualified as “lead counsel” pursuant to subsection A 1 and possess familiarity with Virginia as well as federal habeas corpus practice.
  - b. Possess experience as counsel of record in Virginia or federal post conviction proceedings involving attacks on the validity of one or more felony convictions as well as a working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences.
- 2. Habeas corpus “co-counsel” shall satisfy one of the following requirements:
  - a. Service as “lead” or “co-counsel” in at least one capital habeas corpus proceeding in Virginia or federal courts, or both, during the last three years;
  - b. Have at least seven years of civil trial and appellate litigation experience in the Courts of Record of the Commonwealth or federal courts, or both.

## **Washington:**

Washington Superior Court Special Proceedings Rule 2 (effective Jan. 1, 2003) states the requirements for appointment of counsel in death penalty cases “for trial and appeal”:

At least two lawyers shall be appointed for the trial and also for the direct appeal. The trial court shall retain responsibility for appointing counsel for trial. The Supreme Court shall appoint counsel for the direct appeal.

....

All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years’ experience in the practice of criminal law (and) be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant’s interest to appoint otherwise qualified counsel learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

At least one counsel on appeal must have three years’ experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the appointment of counsel.

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## **Wyoming:**

The Wyoming Office of the Public Defender has adopted the 2003 ABA Guidelines with respect to qualifications for the appointment of counsel in capital cases. *See* Office of the State Public Defender, *FY 2018 Annual Report*, [https://drive.google.com/file/d/1bP1lySdvB03USgEDR3-ts\\_51vmoxvgwt/view](https://drive.google.com/file/d/1bP1lySdvB03USgEDR3-ts_51vmoxvgwt/view). The 2018 report, which is the most current available report, writes that:

In order to fulfill ethical and constitutional obligations to provide effective assistance of counsel, Public Defender attorneys must have the necessary time, training and resources. Necessary resources include funding for expert witnesses. In order to be effective and competent, a Public Defender attorney must have the requisite criminal defense knowledge and training . . . . Most of the training provided by the agency is done by mentoring and by hands-on experience. In accordance with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)*, attorneys representing capital defendants received specialized training at various national conferences.