March 17, 2009

Ms. Tammy White  
Office of Attorney Services  
Supreme Court of Ohio  
65 South Front Street, 5th Fl.  
Columbus, OH 43215-3431  
Email: white@sconet.state.oh.us

RE: PROPOSED AMENDMENT TO RULE 20 OF THE RULES OF SUPERINTENDENCE

Dear Ms. White:

On behalf of the American Bar Association’s Ohio Death Penalty Assessment Team which I chaired, and as a law professor teaching and writing in relevant subject areas, I write to support the proposed amendment to Rule 20 of the Rules of Superintendence for the Courts of Ohio.

The ABA Assessment Team’s Report, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report, was released in September 2007. In July of 2007, we received a Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases reflecting the changes it was then proposing to Rule 20, and we made reference to these at several points in our Report. Although not all of those proposed changes are reflected in the proposed Rule now released for Comment, we wholly support the proposed amendments.

The ABA Ohio Death Penalty Assessment Team’s Report recommended, at page vi, recommendation (5):

The State of Ohio should adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction and any other related proceedings so that they are consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines).

The Team’s Report appears at http://www.abanet.org/moratorium/assessmentproject/ohio.html

(Chapter Six contains our recommendations on Defense Services.).
The ABA Guidelines are reprinted at 31 Hofstra L.Rev. 913 (2003), should the Court wish to consult them.

The proposed amendments to Rule 20 “adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal … consistent with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases” as the ABA Assessment Team recommended.

Proposed Rule 20.01’s new section (A), lines 300-333, entitled “Qualifications required for appointment as counsel for indigent defendants in capital cases”, adopts in full the knowledge and skills requirements found in ABA Guideline 5.1(B) (1-2), Qualifications for Appointed Counsel. Assurance that appointed counsel possess these essential skills, commitment, and knowledge will go far to assuring quality representation is afforded all Ohio capital defendants.

Section (B) of the same Proposed Rule 20.01 also adopts a requirement that lead counsel have prior experience as lead or co-counsel “for the defense” that is consistent with the Commentary to ABA Guideline 5.1. That Commentary relates that a person who has not had experience in the defense of capital cases, such as a law professor or former prosecutor, may have adequate knowledge to well-represent a capitally charged person, but advises that the appointing authority must “be satisfied that the client will be provided with the high degree of legal representation by the team as a whole” before making such an appointment. Given that “lead counsel bears overall responsibility for the performance of the defense team and shall allocate, direct, and supervise the [team’s] work” under the newly proposed amendment found in Proposed Rule 20 (II)(D), the requirement that lead counsel have prior experience as a defense counsel in capital cases is quite appropriate.

Proposed Rule 20 (II)(D) is itself consistent with ABA Guideline 4.1 The Defense Team and Supporting Services, and should help to assure that necessary investigative and other support services will be provided in capital cases.

Proposed Rule 20.04’s provision Programs for Specialized Training specifies the subject areas that will be covered in CLE training programs in the defense of capital cases. Its list is identical to that found in ABA Guideline 8.1, and will help to ensure that all relevant practice skills and legal developments will be included.

Proposed Rule 20.02(G)(11) provides that the Committee will “adopt best practices for representation of indigent defendants in capital cases and disseminate those best practices appropriately.” This measure, similar to ABA Guideline 10.1 Establishing Standards of Performance, should likewise help to insure that all counsel provide high quality legal representation in capital cases. As training programs will include discussion of these best practices, under Proposed Rule 20.04(A)(1)(i), all counsel undertaking capital case representation in Ohio will know what providing high quality representation in capital cases entails and requires. We encourage the Rule 20 Committee to ultimately adopt the standards of performance found in ABA Guideline 10.1 as the “best practices” that will be disseminated to all Ohio counsel.
Through all these measures, the new amendments adopt increased attorney qualifications that will enhance the reliability and fairness of the Ohio capital punishment system. We applaud these provisions.

Significantly, the new amendments also adopt the increased monitoring procedures that the ABA Assessment Team recommended. Proposed Rule 20.02(G) Powers and Duties of the Committee, sections (6) and (7) give new authority to the Rule 20 Committee to monitor the performance of attorneys, and investigate and maintain records concerning complaints about the performance of attorneys and take appropriate corrective action. The former provision is identical to a provision found in ABA Guideline 3.1 (E)(5), Designation of a Responsible Agency. The latter essentially repeats ABA Guideline 3.1 (E)(8).

In addition, Proposed Rule 20.03 entitled Monitoring of Counsel; Removal, establishes a procedure consistent with ABA Guideline 7.1 Monitoring and Removal. The new amendment will establish a procedure for investigation of complaints regarding defense representation and provide for an appropriate remedy of removal from the list of qualified attorneys, while providing adequate notice and an opportunity to be heard to the counsel involved, and should removal be ordered, includes a limited opportunity for reinstatement in the event of exceptional circumstances. All of these provisions are consistent with ABA Guideline 7.1 section (B) through (E), and will serve to provide continued assurance that Ohio capital defendants receive the high quality representation they deserve, and that our justice system’s need for reliability requires.

In sum, on behalf of the ABA Ohio Death Penalty Assessment Team, we strongly support and applaud all of the proposed amendments to Rule 20. Consistent with the Team’s recommendation (5), we further encourage the Rule 20 Committee to work toward future adoption of companion qualification and monitoring procedures for those counsel appointed in state post-conviction and related capital case proceedings.

Thank you for this opportunity to comment on the proposed amendments to Rule 20 of the Rules of Superintendence for the Courts of Ohio. If I may be of any assistance, please let me know.

Sincerely,

Phyllis L. Crocker