August 14, 2018

Utah Indigent Capital Defense Trust Funds Board
Division of Finance
2110 State Office Building
Salt Lake City, Utah 84114

Dear Board Members:

On behalf of the American Bar Association, I write at the request of your Chair, Neal Hamilton, who recently contacted the ABA for comment on whether your Board should take the ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases (“Guidelines”) into account in its management of capital cases. I am pleased to provide background about the creation, purpose, and use of the Guidelines, and I strongly urge you to look to the Guidelines to facilitate your management of death penalty cases. The Guidelines are a codification of long-standing, broadly accepted norms of capital defense practice. As such, they have universal relevance and importance throughout jurisdictions in the United States that impose the death penalty, including Utah, and are expressly designed to provide guidance and direction to groups such as yours that are tasked with the heavy responsibility of ensuring effective representation for individuals facing a death sentence.

The ABA is dedicated to the promotion of a fair and effective system for the administration of justice. The ABA takes no position for or against the death penalty per se, but has made the right to effective assistance of counsel in capital cases a priority for more than 30 years. To that end, the ABA adopts standards and guidelines to help facilitate the work of policymakers and practitioners. Although the ABA’s Criminal Justice Standards provide guidance in a number of areas related to the functioning of the criminal justice system, the unique challenges associated with capital cases led to the 1989 adoption of the ABA Guidelines that provide specific standards for death penalty counsel. Those Guidelines were substantially revised and updated in 2003 to reflect changes in the law and capital defense practice.¹

A broad and diverse group of experts, including judges, prosecutors, public defenders, private attorneys, and academics, were involved in drafting the 2003 revision of the Guidelines. The Guidelines were developed as national standards to apply equally in every U.S. jurisdiction that

¹ The ABA Criminal Justice Standards for the Defense Function instruct that counsel in capital cases should comply with the ABA Guidelines. See Criminal Justice Standard 4-1.1 (4th ed. 2015) (“Because the death penalty differs from other criminal penalties, defense counsel in a capital case should make extraordinary efforts on behalf of the accused and, more specifically, review and comply with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.”).
utilizes the death penalty, including states, the federal government, and the U.S. Military. Because they focus on the most basic requirements for adequate defense representation, the Guidelines are not aspirational; rather, they reflect the “current consensus about what is minimally required to provide effective defense representation in capital cases.” See Guideline 1.1, Commentary.

In addition to the drafting committee, several ABA sections and their members participated closely in the development of the Guidelines. Among these was the Criminal Justice Section, which is comprised of both prosecutors and defense attorneys and serves as the unified voice of criminal justice in the profession. This diverse group of authors wrote the Guidelines to reflect their consensus about the most fundamental, well-established norms of capital defense. See Hamblin v. Mitchell, 354 F.3d 482, 487 (6th Cir. 2003) (“the [ABA Guidelines] merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases.”).

After a careful and lengthy drafting process, the Guidelines were formally adopted as Association policy at the 2003 Midyear Meeting. The ABA House of Delegates, which is the policy-making body of the ABA, currently consists of over 600 members, including delegates from every U.S. state and state bar association, with dozens of additional representatives of local bar associations and other affiliated organizations, including delegates from Conference of Chief Justices, the National Legal Aid & Defender Association, the National District Attorneys Association, and the National Association of Attorneys General. This diverse group reflects the composition of the Association as a whole, which has more than 400,000 members that include prosecutors, defense attorneys, judges, and government officials. Notably, the members of the House of Delegates voted to adopt the 2003 Guidelines as Association policy with no one in the House of Delegates speaking against it during the debate on this Resolution.

In the years since their publication, the fundamental nature of the ABA Guidelines has resulted in their widespread external use and acceptance by jurisdictions that impose the death penalty. Courts across the country have used the Guidelines to assess capital counsel qualifications and performance in nearly 400 published opinions. Those courts, which include the Utah Supreme Court and the U.S. Supreme Court, have recognized that the ABA Guidelines establish appropriate professional standards for the appointment and performance of competent defense counsel in death penalty proceedings.2

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2 See, e.g., Rompilla v. Beard, 545 U.S. 374 (2005); Florida v. Nixon, 543 U.S. 175 (2004); Wiggins v. Smith, 539 U.S. 510 (2003); Saranchak v. Sec'y, Pa. Dep't of Corr., 802 F.3d 579, 595-96 (3d Cir. 2015); Bemore v. Chappell, 788 F.3d 1151, 1168 (9th Cir. 2015); United States v. Fields, 761 F.3d 443, 453 (5th Cir. 2014) Littlejohn v. Trammell, 704 F.3d 817, 859-60 (10th Cir. 2013); Stephens v. Sec'y, Florida Dep't of Corr., 678 F.3d 1219, 1229 n.2 (11th Cir. 2012); Foust v. Houk, 655 F.3d 524, 534 (6th Cir. 2011); Ortiz v. United States, 664 F.3d 1151, 1163 (8th Cir. 2011); Gray v. Branker, 529 F.3d 220, 229 (4th Cir. 2008); Stevens v. McBride, 489 F.3d 883, 895 (7th Cir. 2007); Canape v. State, No. 62843, 2016 WL 2957130, at *3 n.7 (Nev. May 19, 2016); In re Welch, 61 Cal. 4th 489, 515 (Cal. 2015); Chatman v. Walker, 297 Ga. 191, 202 (Ga. 2015); State v. Ziegler, 159 So.3d 96, 105 (Ala. Crim. App. 2014); State v. Herring, 142 Ohio St. 3d 165, 182-83 (Ohio 2014); Walker v. State, 88 So.3d 128, 137-38 (Fla. 2012); Ward v. State, 969 N.E.2d 46, 57 (Ind. 2012); Wilson v. State, 81 So. 3d 1067, 1092 (Miss. 2012); Council v. South Carolina, 670 S.E.2d 356, 363 (S.C. 2008); State v. Young, 172 P.3d 138, 142 (N.M. 2007); Archuleta v. Galetka, 267 P.3d 232, 266 (Utah 2011); Menzies v. Galotka, 150 P.3d 480, 512-13 (Utah 2006); see also ABA Death Penalty Representation Project, List of Opinions Citing the ABA Guidelines (Jan. 12, 2017),
In addition to judicial recognition at every level, the Guidelines have been implemented as formal policy in numerous jurisdictions. States such as Idaho, Kansas, Louisiana, and Montana all require compliance with the Guidelines by regulation or statute; in other states, such as Texas, state and local bar associations have adopted the Guidelines; and states such as Arizona and Nevada have adopted the Guidelines by court rule.3

The Guidelines are utilized by these jurisdictions to ensure that capital cases are handled in a fair and equitable manner that prioritizes efficiency and accuracy, recognizing that death penalty cases are fundamentally different from other criminal matters and require special procedures to ensure due process. When capital counsel systems function in accordance with the Guidelines, they not only protect the integrity of the criminal justice system, but they also reduce the risk that scarce resources will be wasted due to mistake or reversible error in the conduct of a capital proceeding. The ABA believes it paramount to ensuring justice in capital cases that organizations charged with administering their state’s death penalty representation systems—such as your own—meet the responsibilities enumerated in the Guidelines.

As your Board undertakes its management of capital cases in Utah, I hope that you will look to the Guidelines for direction on the prevailing norms of professional practice in this area. For additional resources and assistance, please feel free to reach out to the ABA’s Death Penalty Representation Project, which regularly provides aid and expertise to courts, practitioners, and indigent defense system administrators. Thank you for your consideration of this information and for your efforts to ensure fairness and justice in our most serious criminal cases.

Sincerely,

Robert M. Carlson

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

3 A full list and descriptions of jurisdictions and associations that have adopted the ABA Guidelines is available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/ImplementationFactSheetJul2018.authcheckdam.pdf (last updated July 2018).