March 30, 2015

The Honorable John Whitmire
Chairman, Committee on Criminal Justice
Texas Senate
P.O. Box 12068
Capitol Station
Austin, Texas 78711

The Honorable Joan Huffman
Vice-Chair, Committee on Criminal Justice
Texas Senate
P.O. Box 12068
Capitol Station
Austin, Texas 78711

The Honorable Abel Herrero
Chairman, Committee on Criminal Jurisprudence
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768

The Honorable Joe Moody
Vice-Chair, Committee on Criminal Jurisprudence
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768

Dear Chairman Whitmire, Vice-Chair Huffman, Chairman Herrero and Vice-Chair Moody:

We understand that the Senate Committee on Criminal Justice and House Committee on Criminal Jurisprudence will soon hold hearing on legislation regarding notice of execution dates in capital cases. On behalf of the American Bar Association (ABA), I write in support of Senate Bill 1071 and House Bill 2110, which seek to ensure that the attorneys who represent condemned inmates get meaningful notice when an execution date has been sought or has been set for their clients. I hope that this letter will serve as a helpful resource as you consider this simple, but very important legislation.

While the ABA takes no position on capital punishment generally, we have extensively studied the operation of the death penalty in the U.S. criminal justice system and have taken the position that governments should take great care to ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and minimize the risk that innocent persons may be executed. Additionally, the ABA has extensive policies and best practice standards regarding the operation of U.S. courts and criminal cases that support the notion that meaningful and timely notice of motions and decisions of the court helps ensure basic fairness and allows defense lawyers to meet their obligations to their clients. We believe that this proposed legislation would help to ensure that Texas law is in line with the ABA’s best practices and that all Texas courts and prosecutors follow consistent notice practices when seeking an execution date.
More specifically, this legislation helps defense attorneys who represent death row inmates to fully and effectively represent their clients as mandated by the Sixth Amendment in the final stages of a death penalty case. In fact, several critical components of a Texas capital case cannot even begin until an execution date has been set by the court. For example, the Board of Pardons and Paroles must receive a clemency application from a death row inmate no less than twenty-one (21) calendar days prior to the scheduled execution. Additionally, to raise a claim of incompetency for execution, a Texas death row inmate must file a motion in the trial court after the execution date has been set “clearly setting forth alleged facts in support of the assertion that [s/he] is presently incompetent to be executed.” Further, certain claims related to the constitutionality of lethal injection protocols to be used at that particular inmate’s execution cannot be raised until after an execution date has been set, as they may be deemed untimely if raised in earlier stages of the case. Therefore, the period of time between the setting of the date and the actual execution is critical for defense counsel to raise certain significant legal issues and continue to zealously represent his or her client.

If a Texas defense lawyer does not receive prompt notice that a prosecutor has requested or a court has issued an order setting an execution date, he or she cannot comply with the ABA’s Protocols on the Administration of Capital Punishment or the widely-cited Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases surrounding those final stages of advocacy and representation. For example, the Protocols state that “[p]rior to clemency hearings, death row inmates’ counsel should be…provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.” Similarly, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases states that “[i]f an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora,” and also, as the Guidelines and Standards for Texas Capital Counsel also states, clemency counsel should “ensure that clemency is sought in as timely and persuasive a manner as possible.” In order to meet these important standards, counsel must have notice of the execution date as soon as possible in order to complete additional investigation, research, or drafting for timely filings and to initiate proceedings that can only begin after an execution date has been set. Without immediate service from the prosecutor or notice from the court, this

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2 Id. at 387.
3 Id. at 285.
4 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guidelines 10.15.1(B) and 10.15.2. (Emphasis added.); see also, State Bar of Texas Guidelines and Standards for Texas Capital Counsel, Guideline 12.2(C)(3) (2006).
5 The ABA Guidelines have been cited by every death penalty jurisdiction, both federal and state, in close to 500 cases. The United States Supreme Court has described the Guidelines as “well-defined norms” and “guides to determining what is reasonable” defense counsel performance under the Sixth Amendment.
crucial and active period for a Texas death row inmate and his or her counsel is unnecessarily – and unfairly – truncated.

More broadly, the *ABA Standards Relating to Trial Courts* also state that in the prosecution of any criminal case, courts should “provide for adequate notice, opportunity to present legal contentions and evidence, and appropriate procedures for review.”6 Further, under the *ABA Criminal Justice Standards*, defense attorneys in all types of criminal cases have “a duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes.”7 In order for the defense attorney to be able to communicate and keep his client informed of significant developments, it is fundamental that he or she be timely notified of such developments, including the highly significant milestone of seeking or setting of an execution date in a death penalty case.

With a decision as significant and irreversible as imposing the death penalty, it is critical that due process and fairness are ensured at every stage in the process, including in setting the date for execution. To the extent that capital defense counsel in Texas are not consistently receiving immediate notice of execution dates as they are set, or there is any confusion about who or what entity is specifically under a duty to notify the representatives of the condemned, this legislation provides an easy correction and helpful clarification regarding what should happen at this final stage of a capital case in Texas.

For these reasons, the American Bar Association urges you to pass Senate Bill 1071 and House Bill 2110.

Sincerely,

William C. Hubbard

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6 *ABA Standards Relating to Trial Courts* (1992), Standard 2.01(b).
7 *ABA Criminal Justice Standards, Defense Function* (1993), Standard 4-1.3(d).