AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
CRIMINAL JUSTICE SECTION
SECTION OF LITIGATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SENIOR LAWYERS DIVISION
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the black letter ABA
Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty
Cases, dated February 2003; and

FURTHER RESOLVED, That the American Bar Association recommends
adoption by death penalty jurisdictions of the ABA Guidelines for the Appointment and
Overview of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter the "Guidelines") were originally approved by the House of Delegates in 1989. Since that time, the Guidelines have been adopted by numerous death penalty jurisdictions and are widely relied upon by the bench and bar as setting forth the minimal requirements for defense counsel in capital cases. The Guidelines are the preeminent nationally recognized standards on this important subject. Countless examples illustrating the failures of defense counsel in death penalty cases have led bar associations, courts, legislators and state officials to speak publicly about the need for the adoption of capital counsel standards ("Maybe it is now time to contemplate defense standards for capital cases," U.S. Supreme Court Justice Sandra Day O'Connor, July 2001).

In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act, which dramatically limited the scope of death penalty appeals. For the first time in history, a one-year statute of limitations was imposed for filing federal appeals. Case law that followed proved confusing and contradictory, highlighting the complicated provisions of the Act. The 1999 version of the Guidelines does not reflect the numerous judicial and legislative developments that have occurred in the intervening years.

In April 2001, the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and the ABA Special Committee on Death Penalty Representation jointly embarked on a project to revise the 1989 Guidelines. An Advisory Committee of experts was recruited to review and identify necessary revisions, and consultants were retained to incorporate their decisions of the Advisory Committee. The Advisory Committee is comprised of representatives from the following ABA and outside entities: ABA Criminal Justice Section; ABA Section of Litigation; ABA Section on Individual Rights and Responsibilities; ABA Standing Committee on Legal Aid and Indigent Defendants; ABA Special Committee on Death Penalty Representation; National Association of Criminal Defense Lawyers; National Legal Aid and Defender Association; Federal Death Penalty Resource Counsel; Habeas Assistance and Training Counsel; and State Capital Defenders Association. The expert consultants provided drafts of the revisions to the Advisory Committee members for discussion and comment at several daylong meetings and follow-up discussions. The attached revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases are the result of these efforts.

Establishing minimum standards for defense counsel in death penalty jurisdictions is essential to ensure effective assistance of counsel for all those charged with or convicted of capital crimes. The revised Guidelines will provide capital litigators and other professionals who

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1 As of December 12, 2002, the following entities have indicated their intention to co-sponsor the revised ABA Guidelines: the Criminal Justice Section, the Section of Litigation, the Section of Individual Rights and Responsibilities, the Senior Lawyers Division, and the Association of the Bar of the City of New York.
work in this field with comprehensive up-to-date guidance that is consistent with the demands of this specialized field of litigation.

The following is a summary of the substantive and organizational changes made to the 1989 Guidelines. Changes that are solely stylistic in nature are not noted.

**Guideline 1.1: Objective and Scope of Guidelines**

The commentary to the original edition of this Guideline stated that it was designed to express existing “practice norms and constitutional requirements.” The statement that the purpose of this document is “to set forth a national standard of practice” has been moved to the black letter in order to emphasize that the Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.

The original edition of this Guideline stated that the objective in providing counsel in death penalty cases should be to ensure the provision of “quality legal representation.” The language has been amended to call for “high quality legal representation” to emphasize that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in noncapital cases.

The Guidelines formerly covered only “defendants eligible for appointment of counsel.” Their scope has been revised for this edition to cover “all persons facing the possible imposition or execution of a death sentence.” The purpose of the change is to make clear that the obligations of the revised Guidelines are applicable in all capital cases, including those in which counsel is retained or is providing representation on a pro bono basis.

The use of the term “jurisdiction” as now defined in the revised Guideline has the effect of broadening the range of proceedings covered to include, for example, federal criminal prosecutions. In accordance with current ABA policy, the revised Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.

In accordance with the same policy, the words “from the moment the client is taken into custody” have been added to make explicit that these revised Guidelines also apply to circumstances in which an uncharged prisoner who might face the death penalty is denied access to counsel seeking to act on his or her behalf (e.g., by the federal government invoking national security, or by state authorities seeking to evade constitutional mandates). This language replaces phraseology in the original Guidelines that made them applicable to “cases in which the death penalty is sought.” The period between an arrest or detention and the prosecutor's declaration of intent to seek the death penalty is often critically important. In addition to enabling an attorney to counsel his or her client and to obtain information through investigation regarding guilt that may later become unavailable, effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty. Thus it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as
possible—well before the prosecution has actually determined that the death penalty will be sought.

The revised Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought; the case remains subject to these revised Guidelines until the imposition of the death penalty is no longer a legal possibility. In addition, as more fully described in the Guideline commentary, these revised Guidelines also recognize that capital defense counsel may be required to pursue related litigation on the client’s behalf outside the confines of the criminal prosecution itself.

**Guideline 2.1: Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases**

In the original edition of the Guidelines, the obligation of jurisdictions to develop a formal “Legal Representation Plan” to provide representation in death penalty cases appears as Guideline 3.1. In the revised edition, this topic appears earlier as Guideline 2.1 in order to lay a proper foundation for subsequent Guidelines which detail the content of such a plan. Revised Guideline 2.1 contains overall guidance to jurisdictions in the formulation of a Plan, which should be judicially enforceable in the jurisdiction to be effective.

**Guideline 3.1: Designation of a Responsible Agency**

Revised Guideline 3.1 is based on portions of Guidelines 2.1 and 3.1 of the original edition. The revised Guideline makes it clear that an independent entity, not the judiciary or elected officials, should appoint counsel in death penalty cases. In addition, the revised Guideline contains new subsections describing the acceptable kinds of independent appointing authorities and the duties of the independent appointing authority, including its obligations in the event of a conflict of interest. The revised Guideline emphasizes that the independent appointing authority has the responsibility of ensuring that qualified attorneys are available to represent defendants in death penalty cases. Therefore, it must also promptly investigate complaints about the performance of attorneys and take corrective action without delay so that an attorney who fails to provide high quality legal representation will not be appointed in the future.

**Guideline 4.1: The Defense Team and Supporting Services**

Revised Guideline 4.1 is based on Guideline 8.1 of the original edition. The revised Guideline provides for the assembly of a “defense team” in capital trial and post-conviction proceedings consisting of at least two qualified attorneys, one investigator, and one mitigation specialist. In light of the Supreme Court decision in Atkins v. Virginia, the revised Guideline also requires that at least one team member is qualified to screen for mental or psychological disorders or impairments. The revised Guideline emphasizes that the purpose of providing adequate support services (in the nature of investigators and mitigation specialists) is to further the overall goal of providing high quality legal representation, as opposed to merely an adequate defense. The commentary discusses the important role each team member plays in achieving
this goal. Finally, the revised Guideline includes a requirement that jurisdictions provide expert and investigative services to defendants with retained or pro bono counsel who cannot afford to retain such services.

Guideline 5.1: Qualifications of Defense Counsel

Guideline 5.1 of the original edition is substantially reorganized in the revised edition. In an attempt to focus the inquiry on counsel’s ability to provide high quality legal representation, the revised Guideline places a greater emphasis on qualitative indicia of attorney ability, expertise, and skill, as opposed to quantitative measures such as years of litigation experience and number of jury trials. The revised Guideline also emphasizes that the defense team as a whole must have the necessary qualifications to ensure that the defendant receives high quality legal representation and, to that end, requires each jurisdiction to develop a pool of qualified defense counsel from which such teams may be drawn.

Guideline 6.1: Workload

Revised Guideline 6.1 places an obligation on the responsible appointing authority to ensure that the workload of attorneys representing defendants in death penalty cases does not interfere with the provision of high quality legal representation. The original Guideline stated that attorneys should not accept appointment if their workload would interfere with the provision of “quality representation or lead to the breach of professional obligations.” That admonition has been substantially retained in revised Guideline 10.3.

Guideline 7.1: Monitoring; Removal

Revised Guideline 7.1 provides a stricter standard than in the original edition for when an attorney should not receive additional capital assignments. The original edition provided that counsel should no longer receive additional capital appointments if counsel had “inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client’s case.” The standard is changed in the revised Guideline to apply whenever counsel “has failed to provide high quality legal representation”. The revised Guideline also contains a new subsection dealing with the appointing authority’s responsibility to investigate and maintain records of complaints of counsel performance. Lastly, the revised Guideline clearly indicates that zealous advocacy can never be the cause for an attorney’s removal from either a specific case or a jurisdiction’s list of qualified counsel for appointment.

Guideline 8.1: Training

“Training” was Guideline 9.1 in the original edition. Revised Guideline 8.1 adds a new subsection that emphasizes that the Legal Representation Plan must provide for comprehensive, specialized training of all members of the defense team in order to keep current regarding new developments in the law. This revised Guideline also includes a new list of eleven broad topic areas that must be covered by the comprehensive training programs, these are as follows: (1) an overview of current developments in relevant state and federal caselaw; (2) pleading and motion practice; (3) pretrial investigation, preparation and theory regarding guilt/innocence and penalty;
(4) jury selection; (5) trial preparation and presentation, including the use of experts; (6) ethical considerations; (7) preservation of the record and of issues for post-conviction review; (8) counsel’s relationship with the client and his or her family; (9) post-conviction litigation in state and federal courts; (10) the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic science; and (11) the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18. Attorneys eligible for appointment are required to attend and complete, at least once every two years, an approved, specialized training program focusing on the defense of death penalty cases. All non-attorney team members should also receive continuing professional education.

Guideline 9.1: Funding and Compensation

Revised Guideline 9.1 is based on Guideline 10.1 of the original edition. Changes include an express disapproval of flat or fixed fee compensation schemes and statutory fee minimums for representation in death penalty cases. The revised Guideline governs “full” compensation of attorneys and the other members of the defense team. The revised Guideline also states that there should be no distinction between the hourly rates of compensation for in-court versus out-of-court services. Lastly, the revised Guideline provides for additional compensation in unusually protracted or extraordinary cases.

General Comment, Guideline 10

All of Guideline 11 in the original edition is renumbered as Guideline 10 in the revised edition, as the content of the original Guideline 8.1 was incorporated into other Guidelines (chiefly those pertaining to the Defense Team in revised Guideline 4.1). The content of the original edition’s Guideline 8.1 was deleted as a separate Guideline in the revised edition. Additionally, several Guidelines have been combined and reorganized in the revised edition.

Guideline 10.1: Establishment of Performance Standards

There are no substantive changes in revised Guideline 10.1, only stylistic changes.

Guideline 10.2: Applicability of Performance Standards

Revised Guideline 10.2 clarifies that counsel’s obligation to provide high quality legal representation continues for so long as the jurisdiction is legally entitled to seek the death penalty.

Guideline 10.3: Obligations of Counsel Respecting Workload

Revised Guideline 10.3 echoes the obligations stated in revised Guideline 6.1 regarding workload, here with respect to counsel’s obligations to limit their caseloads such that each client receives high quality legal representation. This obligation was previously contained in Guideline 6.1 of the original edition.
Guideline 10.4: The Defense Team

This Guideline is new to this revised edition of the Guidelines. This revised Guideline parallels revised Guideline 4.1 but also clearly establishes that it is counsel’s duty to assemble the defense team, demand all resources necessary to provide high quality legal representation, and direct and supervise the work of other members of the defense team.

Guideline 10.5: Relationship with the Client

Revised Guideline 10.5 expressly states that regular client contact is essential throughout all stages of a capital case (not just “preparation,” as Guideline 11.4.2 stated in the original edition). The revised Guideline also expressly notes counsel’s obligation to discuss all matters that might reasonably be expected to have a “material impact” on the case with the client.

Guideline 10.6: Additional Obligations of Counsel Representing a Foreign National

This Guideline is new. It identifies the special obligation of defense counsel to determine whether the client is a foreign national and if so, to advise the client of his or her right to communicate with his or her consular office. This revised Guideline reflects caselaw concerning foreign nationals charged with capital crimes.

Guideline 10.7: Investigation

Revised Guideline 10.7 is based on portions of Guideline 11.4.1 of the original edition. The revised Guideline emphasizes at the outset the scope of investigation that defense counsel should conduct and the critical role of proper and thorough investigation in trial preparation. The revised Guideline notes that the investigation should be conducted regardless of the facts, evidence, or statements by the client. Finally, the revised Guideline indicates that counsel must examine the defense provided to the client at all prior phases of the case, and satisfy himself or herself that the official record of the proceedings is complete.

Guideline 10.8: The Duty to Assert Legal Claims

The title of revised Guideline 10.8 has been changed from “The Decision to File Pretrial Motions” (Guideline 11.5.1 in the original edition) to emphasize that these duties exist at every stage of the proceedings, not just the pretrial phase. In addition, the revised Guideline states that counsel should evaluate each motion in light of the “near certainty” that all available avenues of appellate and post-conviction relief will be sought in the event of conviction and imposition of a death sentence. Further, two new subsections appear in the revised Guideline that deal with: (1) the method of presentation of legal issues; and (2) newly discovered issues and supplementing previously raised issues with new information.

Guideline 10.9.1: The Duty to Seek an Agreed-Upon Disposition

Revised Guideline 10.9.1 is newly titled (changed from “The Plea Negotiation Process”, Guideline 11.6.1 in the original edition) and contains new text to clarify the importance of
pursuing an agreed-upon disposition at every phase of the case, and not just as a substitute for proceeding to trial. The revised Guideline also omits the requirement (which appears in the original edition's Guideline 11.6.1) of client consent to initiate plea discussions, in recognition of the possible unintended consequence of premature rejection of plea options by a suicidal or depressed client. The revised Guideline does require counsel to obtain the client's consent before accepting any agreed-upon disposition, however. The revised Guideline also includes the requirement (which appears in Guideline 11.6.2 of the original edition) that counsel enter into a continuing dialogue with the client about the content of any such agreement, including advantages, disadvantages, and potential consequences of the agreement. Aspects of Guideline 11.6.2 in the original edition have been incorporated in this revised Guideline.

Guideline 10.9.2: Entry of a Plea of Guilty

Guideline 11.6.4 in the original edition is revised as Guideline 10.9.2 to clarify that the decision to enter or not enter a plea of guilty must be informed and counseled, yet ultimately lies with the client.

Guideline 10.10.1: Trial Preparation Overall

Guideline 11.7.1 in the original edition is revised as Guideline 10.10.1. There are no substantive changes, only stylistic changes. This Guideline emphasizes counsel's obligation to develop a defense theory that will be effective in both guilt and penalty phases, with minimal inconsistencies.

Guideline 10.10.2: Voir Dire and Jury Selection

Formerly Guideline 11.7.2, revised Guideline 10.10.2 clarifies that jury composition challenges should not be limited to the petit jury but should also include the selection of the grand jury and grand jury forepersons. In addition, the original Guideline is amended to reflect recent scholarship demonstrating that the starker failures of capital voir dire are: (1) the failure to uncover jurors who will automatically impose the death penalty following a conviction or finding of the circumstances making the defendant eligible for the death penalty; and (2) the failure to uncover jurors who are unable to consider particular mitigating circumstances. Lastly, the revised Guideline provides that counsel should consider seeking expert assistance in the jury selection process.

Guideline 10.11: The Defense Case Concerning Penalty

Former Guideline 11.8.3 ("Preparation for the Sentencing Phase") is now revised Guideline 10.11. It contains much of the text of the original edition's Guideline text. The revised Guideline places greater emphasis on the range and importance of expert testimony and the breadth of mitigation evidence in all phases of a capital case. Further, the revised Guideline updates the references to mitigating evidence and arguments that counsel should consider presenting at the sentencing phase.
Guideline 10.12: The Official Presentence Report

The title and subject matter of revised Guideline 10.12 appears in Guideline 11.8.4 of the original edition. The revised Guideline is reorganized and contains a few additional requirements, including the following: (1) counsel should become familiar with procedures governing preparation, submission, and verification of official presentence reports where there is a chance that such a report will be presented to the court at any time; (2) counsel should provide information to the person preparing the report that is favorable to the client; and (3) if counsel deems it appropriate for the client to speak with the person preparing the report, counsel should prepare the client for and attend the interview.

Guideline 10.13: The Duty to Facilitate the Work of Successor Counsel

This Guideline is new. It has been added to emphasize the importance of post-conviction proceedings and the critical role of trial counsel in those proceedings. Specific obligations include: (1) maintaining proper records of the case; (2) providing the client’s files and all other information about the representation to successor counsel; and (3) sharing potential further areas of legal and factual research with successor counsel and cooperating with appropriate legal strategies chosen by successor counsel.

Guideline 10.14: Duties of Trial Counsel After Conviction

Former Guideline 11.9.1 in the original edition is now revised Guideline 10.14. It stresses that trial counsel should take whatever action(s) will maximize the client’s “ability to obtain” appellate and post-conviction review, rather than simply maximizing the client’s “opportunity to seek” such review. Also, the revised Guideline is modified to emphasize that trial counsel should take appropriate action to ensure that the client obtains successor counsel as soon as possible.

Guideline 10.15.1: Duties of Post-Conviction Counsel

This revised Guideline was Guideline 11.9.3 in the original edition. It has been revised to identify additional actions that should be taken by post-conviction counsel, including filing a stay of execution for those with execution dates and litigating all arguably meritorious issues.

Guideline 10.15.2: Duties of Clemency Counsel

The only change made to Guideline 11.9.4 from the original edition as revised Guideline 10.15.2 is the addition of a requirement that counsel take appropriate steps to ensure that the procedural safeguards applicable in clemency proceedings are in place in the jurisdiction and are applied in the client’s case. If they are not in place, counsel must seek judicial review of the clemency process. This addition was made in light of the Supreme Court decision on the duties of clemency counsel, Ohio Adult Parole Authority v. Woodward, 523 U.S. 272 (1998).
Conclusion

The revised Guidelines represent the careful and considerable efforts of highly qualified and experienced capital litigators and constitute the most comprehensive and up-to-date guidance for lawyers, judges, and other experts who work in the field of death penalty litigation. We urge that the ABA confer its imprimatur on these revised Guidelines and make them available to the field as soon as possible.

Respectfully Submitted,

L. Jonathan Ross, Chair
Standing Committee on Legal Aid and Indigent Defendants
February 2003

Lawrence J. Fox, Chair
Special Committee on Death Penalty Representation
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