

REPORT OF THE SECTION OF CRIMINAL JUSTICE

RECOMMENDATION

Be It Resolved, That the American Bar Association recommends when attorneys in private practice are appointed to represent defendants in death penalty cases:

1. The appointed attorneys shall have substantial trial experience involving the defense of serious felony cases; and

2. Two attorneys shall be appointed as trial counsel to represent the defendant. One of these persons shall be designated and act as the primary defense counsel, and the other shall be assistant defense counsel.

Report

Introduction

It has been over two decades since the Supreme Court of the United States recognized that counsel must be appointed in criminal cases to assist those persons who cannot afford to retain an attorney¹. "... [U]nless the assistance rendered is 'effective,' however, this guarantee is vacuous. Courts have struggled to find an appropriate standard for determining whether assistance is sufficiently effective to meet constitutional requirements.²

Various tests have been applied to determine if assistance was "effective." The "farce and mockery"³ test predominated for many years. Recently, other tests have been formulated to articulate the acceptable standard.

For example, in *McMann v. Richardson*⁴ it was described as being "... within the range of competence demanded of attorneys in criminal cases." In *Moore v. United States*⁵ it was noted that counsel must ren-

der competence that is customary at the time and place. In *Scott v. United States*⁶ the test for ineffective assistance was described to exist if "gross incompetence blotted out the essence of a substantial defense."

Although these and other tests have been formulated, the courts have been reluctant to flesh out these phrases of generalized language with more specific requirements. In a few instances, however, an effort has been made to define the requirements of effective assistance by delineating the duties of counsel.

For example, the United States Court of Appeals for the Fourth Circuit has formulated a list of duties.⁷ The Wisconsin Supreme Court has adopted the *ABA Defense Function Standards* as a guideline.⁸ Similarly, the California Supreme Court announced a list of duties in *People v. Pope*⁹ that is based on the *ABA Defense Function Standards*. Professor Gary Goodpaster has also suggested a list of duties in his article, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases."¹⁰

A list of specific duties has certain merit in providing more concrete guidance than

¹*Gideon v. Wainwright*, 372 U.S. 335 (1963).

²Easton, "Criminal Procedure II, I: Habeas Corpus." *Annual Survey of American Law* 117, 108-109 (1983).

³*Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).

⁴397 U.S. 759, 771 (1970).

⁵432 F.2d 730 (3rd Cir. 1970).

⁶427 F.2d 609 (D.C. Cir. 1970).

⁷*Coles v. Peyton*, 389 F.2d 224 (4th Cir.) cert. denied, 393 U.S. 849 (1968).

⁸*State v. Harper*, 57 Wis. 2d 543, 205 N.W. 2d 1, 9 (1973).

⁹23 Col. 3d 412, 590 P.2d 859 (1979).

¹⁰58 *N.Y. Univ. L. Rev.* 299 (1983).

existing general standards. However, the Supreme Court of the United States in *Strickland v. Washington*¹¹ made it clear that rigid and inflexible rules for counsel's conduct are not appropriate. The opinion of the Court stated, "A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffective assistance of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules."¹² In providing an explanation for the rejection of "mechanical rules," the Court stated, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."¹³ The Court explained further that, "Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."¹⁴

While it rejected a listing of duties, the Court did not turn its back on "guidelines" which are advisory or act as a checklist or reminder of possible actions to be taken by defense counsel, if believed to be appropriate to a particular case.

The Court did not specifically address the question of the minimal requisite qualifications of counsel. However, certain minimal qualifications would be a logical and even required correlation to implement its pronouncements on the duty of counsel. The Court's perspective on this duty is discussed more fully later in this report. It is, in part, the Court's reference to counsel's duty that leads to this report's recommendation that assurances of effective assistance of counsel in death penalty cases be obtained by establishing certain minimal qualifications for appointed counsel.

Admittedly, quantifying the criteria by which private counsel would be qualified to be appointed as a defense attorney in a death penalty case is not an easy task. In addition, there is no guarantee that a person possessing any specified qualifications would perform his or her duties in a manner to meet the prevailing standard of effective

assistance.¹⁵ However, it does provide a modicum of assurances that the attorney possesses the rudimentary ability to provide effective assistance if he or she is inclined to do so and applies these abilities to the task of defending the accused.

It is for the purpose of achieving this minimal degree of assurance that it becomes important to establish certain fundamental qualifications for appointed attorneys in death penalty cases. However, there is a lack of legal literature, case law or other credible sources that attempt to delineate any appropriate specific qualifications. For this reason the Criminal Justice Section's Defense Function Committee decided to undertake to draft these guidelines.

Substantial Criminal Trial Experience

One of the most fundamental qualifications that should be possessed by appointed defense counsel in a death penalty case is criminal trial experience.

The trial of a death penalty case is unique and presents some novel procedural and tactical considerations, even to experienced criminal trial attorneys. Trial tactics involved in a case is not one of those elements that can be adequately defined by a list of duties. "A significant problem with the concept of delineating specific duties for defense counsel is the matter of trial tactics. Any checklist of duties must have enough flexibility to take into account the peculiarities of a particular trial."¹⁶ The Supreme Court of the United States recognized the intangible quality of measuring the elements necessary to effective representation when it stated, "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."¹⁷

Appointing defense counsel from the private bar on the basis of his or her criminal trial experience avoids the shortcoming of defining "effective assistance" through a list of duties. It is a way of reducing the formidable nature of obstacles that appointed defense counsel will encounter, because it assures that at a minimum, counsel will be familiar with criminal trials through his or her past participation in them.

The need to appoint as defense counsel a person with criminal trial experience cannot

¹¹104 S.Ct. 2052 (1984).

¹²*Id.* at 2069.

¹³*Id.* at 2065.

¹⁴*Id.* at 2066.

¹⁵*E.g., see, McAuliffe v. Rutledge*, 231 Ga. 745, 204 SE 2d 141 (1974).

¹⁶Bazon, *The Defective Assistance of Counsel*, 42 *Crim L. Rev.* 1, (1973).

¹⁷*Strickland*, 104 S.Ct. at 2067.

be overemphasized. "In spite of the myth that all lawyers are generalists, criminal defense is a specialty. It requires a skilled trial advocate who is familiar with the criminal justice system, including not only the criminal code, but also police and prosecutorial practices, the availability of local experts and private crime labs and the informal norms of the criminal courts."¹⁸

It is the need for "skill and knowledge" that the Supreme Court of the United States referred to in the recent *Strickland v. Washington* decision on effective assistance of counsel in death penalty cases. The Court stated, "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the *ample opportunity to meet the case of the prosecution* to which they are entitled."¹⁹ Again referring to the required "skill and knowledge" the court spelled out counsel's obligation by stating, "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."²⁰

It is difficult to quantify this experience by specifying any numerical gauge by which a desired level of trial experience is measured (*e.g.* number of criminal trials conducted, number of years of experience, etc.). Quantifying trial counsel's qualifications for eligibility to handle a death penalty case is largely subjective, and an elusive concept. It is for this reason that these guidelines are couched in broad terms of "substantial trial experience." The measure of what meets the requirement of "substantial trial experience" necessary for a private attorney's appointment to any particular case is best left to the discretion of the appointing authority.

The "substantial trial experience" criteria is not a precise phrase—but it brings to the issue of "effective assistance" a degree of specific qualifications that has previously been lacking. At a minimum, it will exclude the neophyte from representing defendants in death penalty cases.

The practice of " . . . assigning the most junior members of the bar to criminal appointments . . . is troublesome, as the ABA's Project on Standards for Criminal Justice has recognized. Defense of an indigent is not an extension of law school."²¹

¹⁸Bazon, *supra* note 16, at 12.

¹⁹*Strickland*, 104 S.Ct. at 2063.

²⁰*Id.* at p.2065.

²¹Bazon, *supra* note 16, at 13.

Required Appointment of Two Defense Counsel

The appointment of a co-counsel serves several purposes. First, it lessens the burden on the primary counsel by permitting a portion of the work associated with the defense in a death penalty case to be delegated to the assistant counsel. In addition to serving as a person that makes a substantive contribution to the effort necessary to defend a death penalty case, the assistant counsel is also a resource for primary counsel's emotional support and provides the valuable role of acting as a sounding board upon which primary counsel may rely throughout the case. The defense of a death penalty case is an intense experience for defense counsel because of the potential penalty involved. During this intense experience it is useful to have the availability of another attorney's perspective as a guide in making decisions and maintaining the best possible judgment of situations as they develop.

Second, the assistant counsel provides a different perspective on the case and serves as a resource with whom the primary counsel may consult.

The proper handling of a death penalty case is a complicated matter. The potential sentence alone merits specialized handling and a thorough exploration of all avenues of defense.

In addition, death penalty cases are unique because of the bifurcated procedure involved. Not only is there a trial on the merits, but if the defendant is found guilty, there is a separate proceeding to determine whether a sentence of life imprisonment or death will be imposed. Proper defense of a death penalty case requires the integration of the theory of defense in the trial stage with the theory to be used at the sentencing stage. Assistant counsel can make a valuable contribution toward bringing about the development of the most viable integrated theories that will best serve the interest of the defendant.

It is unrealistic to expect any appointed counsel to shoulder this burden alone. Appointed counsel have obligations to clients other than the indigent defendant in the death penalty case. The attorney must fulfill his or her obligations to those clients, many of whom are "paying" clients providing the income that sustains the attorney's practice.

The result of burdening a single attorney with the responsibility of shouldering the defense in a death penalty case could be very detrimental to the interests of the defendant. As Judge David L. Bazon has stated,

From the 'regulars' point of view, any trial is uneconomical: it limits their availability for other appointments. The quickest way to turn over a case is to induce a client to plead guilty and up to 90 percent of criminal cases are disposed of by guilty plea. A recent Georgia case,²² which I hope is unusual, indicated the potential for abuse. The defense attorney was handling some 5,000 cases a year. He had one 10-15 minute interview with his client before pleading him guilty to a capital charge. His only response to three letters from the client suggesting exculpatory witnesses was a warning that an extra fee would be required if the case went to trial. To make his point, the lawyer informed the defendant that copies of his prior records would be circulated among the jury and that the judge had promised the electric chair if the defendant were found guilty at trial. Fortunately, the plea was held involuntary on collateral attack.²³

²²*Coslon v. Smith*, 315 F. Supp. 179 (N.D. Ga. 1970).

Conclusion

This recommendation sets out only what the American Bar Association believes to be *minimal* guidelines to be considered in appointing attorneys in private practice to represent a person who is charged in a death penalty case. Authorities that appoint counsel in these cases should take the initiative to build on them in a way that greater assurances of competent representation will be achieved.

These fundamental guidelines should not be perceived as a panacea to the existing problem of ineffective assistance of counsel in death penalty cases. The merits and quality of representation in cases will have to be continued to be assessed and monitored by the courts on an individual basis. However, it is intended that compliance with these guidelines will lead to better representation for defendants in death penalty cases and enhance the quality of justice provided.

²³Bazelon, *supra* note 16, at 33.

INFORMATIONAL REPORT

Since August, the ABA Criminal Justice Section has:

Worked with staff in both the House and Senate on the Comprehensive Crime Control Act of 1984 during the 98th Congress, to encourage incorporation of ABA-supported measures in such areas as sentencing, RICO forfeiture, crime victim compensation, and state and local criminal justice assistance. The Section has been working closely with Capitol Hill and the Justice Department on implementing certain parts of the far-reaching legislation, making recommendations to them on appropriate membership for the Sentencing Commission created by the legislation. The Section is also putting together two publications—a special issue of its American Criminal Law Review analyzing the bill, and a monograph, being prepared by the White Collar Crime Committee, examining the impact of the crime bill on the business community.

Devoted special attention to lobbying for increased Criminal Justice Act fees in any crime package—an effort which was successful.

Helped facilitate the provision of ABA testimony in Congressional hearings on the

Rules Enabling Act, preventive detention, and computer security and privacy

Initiated through its Defense Function Committee in November, a study on a provision in the federal Deficit Reduction Act of 1984 to require reporting to IRS of cash payments over \$10,000, and the impact on attorney-client confidences if the payment of attorneys fees is subject to this new law.

Worked through its RICO Cases Committee, towards finalizing a model state RICO statute, one section of which will address the complex area of civil RICO.

Finalized plans for a Second Annual Seminar on Criminal Defense & Prosecution pitting defense lawyers against prosecutors in "point/counterpoint" discussions of trial strategies and tactics in modern criminal law practice. This ABA National Institute will be held March 1-2, 1985 in Washington, D.C. Program plans were recently extended to include a half-day segment on March 3 to brief federal trial practitioners on provisions of a comprehensive crime package signed into law by President Reagan in October.

Approved plans proposed by its Grand Jury and White Collar Crime Committees

to cosponsor with the ABA Litigation Section an ABA National Institute on September 27-28, 1985 in Chicago on Representing Corporations in Grand Jury and Agency Investigations.

Worked toward finalizing plans, in conjunction with the Individual Rights and Responsibilities Section as a cosponsor, for a 1985 London Annual Meeting plenary program on The Bill of Rights: Creation or Cremination, as well as companion sessions on the 1st, 4th, 5th, 6th and 8th amendments. Time and place for the programming is July 16-18 at the Park Lane Hotel. The possibility of an open meeting in London on white collar crime practice—with English barristers and solicitors and U.S. trial practitioners exchanging views—is also being explored by the Section's White Collar Crime Committee.

Completed a final draft manuscript for a publication on fee setting and collecting in criminal cases, which the Section is cosponsoring with the ABA Economics of Law Practice Section and hopes to publish this winter.

Continued to develop specific proposals aimed at improving Section membership products and services. The Section's marketing work is being spearheaded by a volunteer committee working in conjunction with staff. A prototype for a new Section membership magazine is being developed as one major result of the Committee's activities thus far, with assistance from the ABA Press.

Raised more than \$80,000 to launch a project in January 1985 to evaluate the range of innovative sanctions for drunk driving now being adopted around the country. The project, which attracted the largest corporate gift in the ABA's history, will be run in conjunction with the Section's Drunk Driving Committee.

Provided briefings to ABA President John Shepherd on the subjects of prison industries and youth involvement with drugs and alcohol, and represented him at a September meeting with the Chief Justice on the former issue. Developed background briefing materials for ABA President-Elect William Falsgraf on the bar's role in addressing the problem of terrorism.

Surveyed federal and state prosecutors through its Grand Jury Committee to ascertain if guidelines exist in some offices on the calling of attorneys before grand juries. The Committee may draft model guidelines in this area.

Accepted the invitation of the International Academy of Trial Lawyers to name a

representative, CJS Chairperson-Elect Paul B. Johnson of Tampa, Florida, to a newly established Ad Hoc Committee of Various Trial Lawyer Associations.

Initiated, through a subcommittee of its Defense Services Committee, a review of guidelines prepared by the National Legal Aid and Defender Association governing the negotiation and award of governmental contracts for criminal defense services.

Approved in August a policy recommendation from its Defense Services committee voicing opposition to the practice of awarding governmental contracts for criminal defense services on the basis of cost alone, and a policy recommendation from its Defense Function Committee outlining certain minimum qualifications for private defense lawyers appointed to represent persons in death penalty cases. Both proposed ABA policy positions will come before the House of Delegates in February.

Initiated through its Prosecution Function Committee development of a series of proposed policy statements, court rules and legislative measures to address the special needs of child abuse victims at the local and national level.

Continued to work closely with the Bar Information Program (on the crisis in indigent criminal defense funding) of the ABA's Standing Committee on Legal aid and Indigent Defendants, including work towards tying a network of indigent defense administrators into the Section.

Received a \$49,792 grant from the National Institute of Justice to its Victim Witness Project for six-month study comparing sentences for sex offenses against children with sentences for sex offenses against adults. The two-pronged project will look at the sentencing statutes of the fifty states and at actual sentencing practices in three jurisdictions.

Provided technical assistance to the Department of Justice in the development of six model statutes as part of the federal government's efforts to implement the legislative recommendations of President Reagan's Task Force on Victims of Crime. The subjects of the statutes are employer access to sex offense criminal history records, counselor confidentiality, restitution, victim impact statements, open parole hearings, and "Son of Sam" escrow accounts for victim suits against offenders who would otherwise profit from publicity about their crime.

Made progress, through its Victim Witness Project, in developing a set of case continuance guidelines to reduce the number of

case continuances and to make those which are necessary less burdensome from the victim's point of view.

Cosponsored with the ABA Professional Education Division an ABAS National Institute on Juvenile Delinquency Trial Techniques on September 15-16, 1984, in New York City. The Section's Juvenile Justice Committee will cosponsor a second such program in 1985 on the West Coast.

Made preparations, through its Juvenile Justice and Amicus Curiae Committees, to be ready to draft a proposed ABA amicus curiae brief based on existing Section-sponsored ABA policy in opposition to capital punishment for juveniles, in the event that the U.S. Supreme Court considers a case in this term in which the application of the death penalty to juveniles is at issue.

Worked toward completion, through its Juvenile Justice Standards Implementation Project and Juvenile Justice Committee, of a manual for practitioners exploring the problems of detention after *Schall v. Martin*, and a publication providing checklists and pleadings for the practitioner in the juvenile field.

Continued to distribute copies of its popular *Report on Computer Crime*, the result of a national survey of business, law enforcement and others about the extent of the computer crime problem. The report, now in its third printing, is available from the Section's staff offices in Washington, D.C.

PAUL T. SMITH

Chairperson