COMMENTS OF THE AMERICAN BAR ASSOCIATION
TO OFFICE OF JUSTICE PROGRAMS DOCKET NO. 1464
"CERTIFICATION PROCESS FOR STATE CAPITAL COUNSEL SYSTEMS"

I. STATEMENT OF ORGANIZATIONAL INTEREST

The American Bar Association ("ABA") respectfully submits these comments on the proposed regulations relating to certification of states pursuant to Chapter 154 of Title 28, U.S.C. ("Proposed Final Rule"). *See* Notice of Request for Public Comment, 74 Fed. Reg. 6,131 (Feb. 5, 2009), The ABA is a voluntary, national membership organization of the legal profession. Its more than 413,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, judges, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates in allied fields.

Although the ABA has not taken a position on the constitutionality of the death penalty, the ABA is dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const. art. 1, § 1.2. The ABA has made the right to effective assistance of counsel in capital cases and the preservation of the writ of *habeas corpus* a priority. The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. *See, e.g., ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) ("ABA Guidelines") and the *ABA Standards for Criminal Justice* (2d ed. 1980).

The ABA has adopted policy statements and issued reports urging specific reforms in federal and state post-conviction procedures.[1] The ABA has presented testimony and written materials at congressional hearings with respect to reform of the *habeas corpus* statutes.[2] In 1989, under a grant from the State Justice Institute, an ABA task force conducted a nationwide study of death penalty *habeas corpus* practice and procedures. Based upon the task force's report and recommendations, the ABA in 1990 adopted, by overwhelming vote, a comprehensive policy statement that urged legislative reform of *habeas corpus* procedures, both state and

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[1] *See, e.g., Resolution of the ABA House of Delegates* 112D (1982) (the ABA resolved to "support the prompt availability of competent counsel for both state and federal [post-conviction] proceedings"); *Resolution of the ABA House of Delegates* (Feb. 1988) (resolution calling for the federal government to adopt procedures and standards for the appointment of counsel for death row inmates in federal *habeas corpus* proceedings).

[2] *See, e.g., Fairness and Efficiency in Habeas Corpus Adjudication: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) (statement of John J. Curtin, Jr., President of the ABA, and of James S. Liebman, Professor of Law, Columbia University School of Law, and Member, ABA Task Force on Death Penalty *Habeas Corpus*); *Habeas Corpus: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (statement of L. Stanley Chauvin, Jr., President of the ABA).

federal, to make them more efficient and better able to address the merits of the fundamental claims many post-conviction petitions raise in capital cases. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1 (1990) (task force report).

Simultaneous with this review, the ABA House of Delegates in February 1989 adopted *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*. The Guidelines "amplify previously adopted Association positions on effective assistance of counsel in capital cases" and "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." *Resolution of the ABA House of Delegates* (Feb. 1989). The *ABA Guidelines* were revised and updated in 2003.

The Proposed Final Rule raises important questions concerning the representation of capital defendants, effective assistance of counsel and the relationship between the federal and state courts in *habeas corpus* proceedings – issues that long have been and are today of vital concern to the ABA.

II. OVERVIEW OF COMMENTS

The ABA previously submitted comments regarding the proposed regulations on August 25, 2007. Because the Proposed Final Rule fails to address numerous points raised in the ABA's initial comments, the ABA is submitting these supplemental comments.

The Proposed Final Rule was required by Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005, which amended Chapter 154 of Title 28 of the United States Code and provided that a state would be eligible for expedited handling of *habeas corpus* petitions in capital cases if the Attorney General certified that the state had a mechanism for the appointment and compensation of competent counsel for state post-conviction proceedings in capital cases. While the ABA does not take a position on whether Section 507 is good policy, the approach taken by the Department of Justice in implementing Section 507 fails to effectuate and otherwise ignores key aspects of the compromise inherent in the legislation. That compromise required states to make significant improvements in the administration of their systems of post-conviction representation (including the quality of appointed counsel) in order to be entitled to streamlined review on habeas corpus. At its core, the Proposed Final Rule fails to abide by this compromise and would allow states to obtain streamlined review without ensuring that capital defendants receive competent counsel (or that such counsel is appropriately compensated) in post-conviction proceedings.

The problems with the Proposed Final Rule fall into three general categories.

First, the Proposed Final Rule ignores significant aspects of the implementing legislation, as well as established legal benchmarks for how key terms in the legislation are to be understood and defined. These flaws include (a) the failure to consider whether the state's mechanism would actually lead to the appointment of competent counsel, as opposed to any counsel; (b) the consideration of state mechanisms for the compensation of counsel in all post-conviction cases,

as opposed to capital cases; and (c) the use of illustrative examples that suggest that the Attorney General will certify programs that fall short of established minimum standards regarding the competence, compensation and expense reimbursement of counsel.

Second, the Proposed Final Rule fails to establish either standards regarding the content of state applications or the criteria the Attorney General is to use in evaluating applications. This *ad hoc* approach to the statutory task does nothing to prevent arbitrary and capricious decision making.

Third, while the Proposed Final Rule adopts "notice" and "comment" procedures for review of applications, the process for the Attorney General's review and consideration of applications falls well below the standards for agency rule making action under the Administrative Procedure Act, as well as the Due Process Clause. In particular, the process for the Attorney General's review and consideration of applications (a) fails to ensure that interested parties have adequate notice of the application and a reasonable opportunity to be heard, (b) expressly contemplates *ex parte* communications between the Attorney General and the state applicant, (c) fails to require that any determination be based on reasoned consideration of the evidence, and (d) fails to provide for a procedure by which interested persons can seek review or decertification of a state program after it has been certified, even if the operation of the program falls short of the statutory standard or is not in accord with the state's application.[3]

In publishing the Proposed Final Rule, the Department has taken the position that it is required to abdicate its statutory responsibilities with regard to two critical issues. The statutory language provides no support for the Department's position.

1. The Department contends that the Attorney General has no authority under Chapter 154 to give any content to key legislative language like "competent counsel," "compensation," or "reasonable legal expenses," because of the statutory language that says that "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter." Section 2265(a)(3). *See generally* 73 Fed. Reg. 75329 ("[T]he Attorney General has no discretion in defining the requirements that states must satisfy to achieve chapter 154 certification."). This reasoning is incorrect for three reasons. First, the statute expressly states that the Attorney General is required "to determine whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners who have

[3] The Department's suggestion in the Proposed Final Rule that the certification process is exempt from the Administrative Procedure Act, 73 Fed. Reg. 75333, has no support in the statutory language. The Department's further suggestion that the certification process is not a rule making under the Administrative Procedure Act because it does not regulate "future conduct of a group of persons or a single person," *id.*, misstates the relevant standard (the Administrative Procedure Act defines "rule" as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy") and misstates the impact of a certification decision – a decision by the Attorney General to certify a particular state will greatly circumscribe the conduct of capital defendants in future *habeas* litigation. This is classic rule making.

been sentenced to death." Section 2265(a)(1). This statutory mandate cannot be carried out without determining what "competent counsel" is, what their "compensation" is, and what "reasonable litigation expenses" are. Accordingly, the requirement that the Attorney General evaluate state mechanisms against these key statutory terms is "expressly stated in [Chapter 154]." More importantly, because Congress has mandated that the Attorney General is to "promulgate regulations to implement the certification procedure. . .," 28 U.S.C. § 2265(b), the Department of Justice may not issue "regulations containing broad language, open-ended phrases, ambiguous standards and the like . . .[in order for substantive] law [to be] made without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

Second, the statutory language does not require the Justice Department to abdicate standard rule-making functions such as fleshing out the interstitial details on how the opt-in procedure is to be implemented. Rather, when Congress does not define key terms (such as "competent counsel," "compensation," and "reasonable litigation expenses"), an agency presumptively has the authority to define such terms through rule-making. *See, e.g., BCTD v. Donovan*, 712 F.2d 611, 618 (D.C. Cir.) (if Congress does not expressly prohibit an agency from interstitial rule making, the agency generally has "the power to find a way to do so in the interstitial areas not specifically provided for in the statute"); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) ("in the absence of compelling evidence that such was Congress' intention" courts should not "prohibit administrative action imperative for the achievement of an agency's ultimate purposes.").

Third, the Department's approach would permit the Attorney General to engage in standardless decision-making that, for reasons described below, would violate the Administrative Procedure Act and the Attorney General's constitutional obligations to comply with the Due Process clause. The failure to provide standards to evaluate state programs leaves the Attorney General free to make impermissible *ad hoc* determinations.

2. The Department has taken the position that it would violate the statutory language for the Department of Justice to assess whether state applications satisfy the standards of competency because the statute purportedly "assign[s] to the states that seek certification . . . the responsibility to set competency standards." 73 Fed. Reg. 75331. There is no such language in the statute. Rather, the statute expressly states that it is the Attorney General who is required "to determine whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death." Section 2265(a)(1). This is the Attorney General's obligation under the statute, and it would violate the statute to assign this to the states, as the Proposed Final Rule does.

The Proposed Final Rule, thus, remains deeply and fundamentally flawed.

III. SUBSTANTIVE COMMENTS TO THE PROPOSED FINAL RULE

A. The Proposed Final Rule Fails To Ensure That States Establish A Mechanism That Will Ensure The Appointment of Competent Counsel to Represent Indigent Capital Defendants in State Post-Conviction Proceedings

Section 507 expressly requires that in order to certify a state, the Attorney General must determine "whether the State has established a mechanism for the appointment of . . . *competent counsel* in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. § 2265(a)(1)(A) (emphasis added). The Proposed Final Rule does not satisfy this statutory mandate for the following reasons:

1. The Proposed Final Rule disregards the statutory language by requiring only that the Attorney General determine whether the state "has established a mechanism for the appointment of counsel," not "competent counsel" as required by the statute. *Compare* Proposed Final Rule § 26.22(a) ("counsel") *with* 28 U.S.C. § 2265(a)(1)(A) ("competent counsel"). In other words, the Proposed Final Rule literally provides that so long as the state has a mechanism for the appointment of a lawyer, any attorney will suffice, regardless of whether that attorney has the requisite training or skills to undertake the representation.

In doing so, the Proposed Final Rule ignores the word "competent" in 28 U.S.C. § 2265(a)(1)(A). "It is a fundamental principle of statutory construction that effect must be given, if possible, to every word, clause and sentence of a statute so that no part will be inoperative or superfluous, void or insignificant." *Nat'l Ass'n of Recycling Indus. v. I.C.C.*, 660 F.2d 795, 799 (D.C. Cir. 1981) (invalidating rule for failure to effect key statutory language). *See also Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986) (a regulation is unreasonable if it relies on "interpreting a statute in such a way as to make part of it meaningless"); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004) (the failure to implement key statutory language is the "failure . . . to implement Congressional will").

While Section 26.22(d) of the Proposed Final Rule does provide that the Attorney General is required to determine whether "the State provides competency standards for the appointment of counsel . . .," this is not the same as meeting the statutory mandate of actually providing indigent capital defendants "competent counsel." There is a difference between having standards and ensuring that appointed counsel actually meet those standards. There is a difference between having *pro forma* standards and meaningful standards (such as those embodied in the *ABA Guidelines*) that will actually result in the appointment of competent counsel. Finally, there is a difference between providing standards and ensuring that those standards are enforced. As numerous courts have noted, "competency standards are meaningless unless they are actually applied in the appointment process." *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000). *See also Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000); *Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996).

The Proposed Final Rule did not address this point in its supporting analysis.

2. The Proposed Final Rule does not provide any substantive criteria by which the Attorney General is to determine that a state's mechanism provides for appointment of *competent* counsel. Notably, the Proposed Final Rule does not refer to the *ABA Guidelines*, which have been widely cited by courts as establishing the appropriate professional standards for the appointment and performance of competent defense counsel.[4] For illustrative purposes, we have attached as Appendix A a set of substantive criteria from the *ABA Guidelines* that could be used by the Attorney General to evaluate applications.

[4] *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); *Haliym v. Mitchell*, 2007 FED App. 0262P (6th Cir. Jul.13, 2007); *Diaz v. Quarterman*, No. 05-70057, 2007 U.S. App. LEXIS 15855 (5th Cir. Jul. 3, 2007); *State v. Garza*, No. CR-04-0343-AP, 2007 Ariz. LEXIS 68 (Ariz. Jun. 29, 2007); *Morris v. Beard*, Civil Action No. 01-3070 (E.D. Pa. Jun. 20, 2007)*; Dickerson v. Bagley*, 453 F.3d 690 (6th Cir. 2006)*; Hedrick v. True*, 443 F.3d 342 (4th Cir. 2006); *Lundgren v. Mitchell*, 440 F. 3d 754 (6th Cir. 2006); *Martinez v. Dretke*, No. Civ.A. G-02-718, 2006 WL 305666 (S.D. Tex. Feb. 7, 2006), *rev'd*, *Martinez v. Quarterman*, 481 F.3d 249 (5th Cir. 2007); *Summerlin v. Schriro*, 427 F. 3d 623 (9th Cir. 2005)*; Clark v. Mitchell*, 425 F.3d 270 (6th Cir. 2005)*; Moore v. Parker*, 425 F.3d 250 (6th Cir. 2005)*; United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005)*; Harries v. Bell*, 417 F. 3d 631 (6th Cir. 2005)*; Earp v. Ornoski*, 431 F. 3d 1158 (9th Cir. 2005)*; Smith v. Dretke*, 422 F. 3d 269 (5th Cir. 2005)*; Mason v. Mitchell*, 396 F.Supp.2d 837 (N.D. Ohio Oct. 31, 2005)*; Crowe v. Terry*, 426 F.Supp.2d 1310 (N.D. Ga. 2005)*; Mitts v. Bagley*, No. 1:03CV1131, 2005 WL 2416929 (N.D. Ohio Sept.29, 2005)*; Thomas v. Beard*, 388 F.Supp.2d 489 (E.D. Pa. 2005)*; United States v. Karake*, 370 F.Supp.2d 275 (D.D.C. 2005)*; Stitt v. United States*, 369 F.Supp.2d 679 (E.D. Va. 2005), *rev'd on other grounds*, 475 F.Supp.2d. 571 (2007)*; Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2005)*; Allen v. Woodford*, 395 F.3d 979 (9th Cir. 2005), *amending Allen v. Woodford*, 366 F.3d 823 (9th Cir. 2004)*; Kandies v. Polk*, 385 F.3d 457 (4th Cir. 2004)*; Hartman v. Bagley*, 333 F. Supp. 2d 632 (N.D. Ohio 2004)*; Lovitt v. True*, 330 F.Supp.2d 603 (E.D. Va. 2004)*; Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004); *Davis v. Woodford*, 384 F.3d 628 (9th Cir. 2004) (dissent)*; Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004) (concurring opinion), *rev'd*, *Bell v. Cone*, 543 U.S. 447 (2005)*; Rompilla v. Horn*, 355 F.3d 233 (3rd Cir. 2004) (dissent)*; Rompilla v. Horn*, 359 F.3d 310 (3rd Cir. 2004); *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003)*; Longworth v. Ozmint*, 302 F. Supp. 2d 535 (D.S.C. 2003); *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003) (concurring in part and dissenting in part)*; United States v. Suarez*, 233 F.Supp.2d 269 (D.P.R. 2002)*; United States v. Miranda*, 148 F.Supp.2d 292 (S.D.N.Y. 2001)*; United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998)*; Crandell v. Bunnell*, 144 F.3d 1213 (9th Cir. 1998), *overruled by Schell v. Witek*, 218 F. 3d 1017 (2000)*; Brecheen v. Reynolds*, 41 F.3d 1343 (10th Cir. 1994)*; State v. Morris*, 160 P.3d 203 (2007);No. CR-05-0267-AP, 2007 Ariz. LEXIS 65, (Ariz. Jun. 18, 2007)*; Commonwealth v. Spotz*, 896 A.2d 1191 (Pa. 2006); *Kilgore v. State*, 933 So. 2d. 1192 (Fla. Dist. Ct. App. 2006)*; Henry v. State*, 937 So. 2d. 563 (Fla. 2006)*; Davis v. State*, No. CC-93-534, 2006 WL 510508 (Ala.Crim.App. Mar. 3, 2006), *abrogated by Ex parte Clemons*, No. 1041915, 2007 WL 1300722 (Ala. May 04, 2007); *Torres v. State*, 120 P. 3d 1184 (Okla. Crim. App. 2005); *Commonwealth v. Hall*, 872 A.2d 1177 (Pa. 2005)*; Commonwealth v. Brown*, 872 A.2d 1139 (Pa. 2005)*; Presley v. State*, 2005 Ala. Crim. App. LEXIS 52 (Feb. 25, 2005)*; Commonwealth v. Williams*, 863 A. 2d 505 (Pa. 2004)*; Harris v. State*, 947 So. 2d. 1079 (Ala. Crim. App. 2004), *rev'd on other grounds*, *Ex Parte Jenkins*, 2005 Ala. LEXIS 49 (Ala. Apr. 8, 2005)*; In re Larry Douglas Lucas*, 94 P.3d 477 (Cal. 2004)*; Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (Ga. 2004)*; Peterka v. State*, 890 So.2d 219 (Fla. 2004)*; Armstrong v. State*, 862 So.2d 705 (Fla. 2003)*; Zebroski v. State*, 822 A.2d 1038 (Del. 2003).

This failure to adopt substantive criteria by which the Attorney General can evaluate whether proposed mechanisms will lead to the appointment of competent counsel expressly violates 28 U.S.C. § 2265(b), which requires the Attorney General to "promulgate regulations to implement the certification procedure. . . ." Because Congress has required the Department of Justice to engage in a rule-making process to implement the standards for evaluating applications, the Administrative Procedure Act does not permit the Attorney General to engage in standardless or *ad hoc* determinations of particular applications, which the Proposed Final Rule not only permits but seems to contemplate. *See generally Checosky v. Securities and Exchange Commission*, 139 F.3d 221, 225 (D.C. Cir. 1998) ("When an agency utterly fails to provide a standard for its decision, it runs afoul of more than one provision of the Administrative Procedure Act. . . .An agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring that we can declare with confidence that the agency action was arbitrary and capricious."); *Airmark Corp. v. FAA*, 758 F.2d 685, 695 (D.C. Cir. 1985) (concluding it is arbitrary and capricious to fail "to provide a consistent approach that would allow even a guess as to what the decisional criteria would be").

3. The illustrative examples given in the Proposed Final Rule, when combined with the Rule's failure to flesh out the standards for appointment mechanisms, suggest that the Attorney General is prepared to certify mechanisms that are inconsistent with and contrary to established legal standards for the appointment of "competent" counsel. In particular, the Proposed Final Rule indicates that the Attorney General would certify mechanisms such as those set forth in § 26.22(a) Examples 1 and 2, which are appointment mechanisms based solely on an attorney's qualification for some pre-defined status (such as employment by a public defender office or from a "list of attorneys available to represent defendants") without consideration of the qualifications, training or experience of those attorneys to conduct post-conviction litigation or represent capital defendants, without consideration of the proposed staffing and workload of such attorneys, without consideration of the timing of the appointment, and without consideration of potential conflict of interest issues. As discussed below, numerous courts have held that a mechanism for appointment of counsel that permits such appointments will not result in the appointment of competent counsel.

Both post-conviction litigation and capital representation require expertise in procedural, legal, and technical issues beyond the skill set of many appointed counsel. Because Examples 1 and 2 suggest that it is sufficient to appoint counsel without regard to his or her qualifications, training or experience, the Proposed Final Rule is inconsistent with case law defining "competence" in the context of post-conviction and capital representations, as well as the *ABA Guidelines*.[5] *See, e.g., McFarland v. Scott*, 512 U.S. 849, 855 n.2 (1994) ("counsel appointed to

[5] Although the Proposed Final Rule asserts that Congress intended to "overcome" the court cases defining "competent counsel" in enacting this legislation, 73 Fed. Reg. 75332, there is no language in the statute that indicates that those decisions were being abrogated, nor is this interpretation of the statute -- which relies on excerpts of floor statements from two members of Congress -- consistent with basic principles of statutory construction. *See, e.g., Barnhardt v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute"). Rather than abrogating the case law, when Congress fails to define key terms in its statutes, it is presumed that Congress adopted the definition of those terms as established in case law. *See Granholm v. Heald*, 544 U.S. 460, 499

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represent capital defendants in post-conviction proceedings must meet more stringent experience criteria than attorneys appointed to represent non-capital defendants under the Criminal Justice Act of 1964"); *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000); *Colvin-El v. Nuth*, 1998 WL 386403 at *8 (D. Md. 1998) (because of the complex body of law and procedure unique to post-conviction review, an attorney must have some experience in that area); *Austin v. Bell*, 927 F. Supp. 1058, 1062 (D. Tenn. 1996). Because the Proposed Final Rule suggests that the Attorney General can certify a state that appoints counsel lacking adequate qualifications, training or experience, the Proposed Final Rule fails to satisfy the statutory requirement that the state must have a mechanism for the appointment of "competent counsel."

Moreover, because the pace of post-conviction litigation in many jurisdictions is already expedited, special care must be made to ensure that staffing for the representation is appropriate and consistent with the defense team's overall workload. Because Examples 1 and 2 suggest that it is sufficient to appoint counsel without regard to staffing or workload considerations, the Proposed Final Rule is inconsistent with case law defining "competence" in the context of post-conviction and capital representations, as well as the *ABA Guidelines*. *See, e.g.*, *Lockett v. Anderson*, 230 F.3d 695, 711-12 (5th Cir. 2000) (counsel's workload at time of appointment rendered assistance of counsel ineffective); *Cleaver v. Bordenkircher*, 624 F.2d 1010, 1012 (6th Cir. 1980) (appointed counsel ineffective because of workload at time of appointment). Because the Proposed Final Rule suggests that the Attorney General can certify a state that appoints counsel without regard to staffing or workload, the Proposed Final Rule fails to satisfy the statutory requirement that the state must have a mechanism for the appointment of "competent counsel."

Similarly, because almost all states impose strict deadlines on capital defendants seeking post-conviction review (including the requirement in some jurisdictions that such review be pursued simultaneously with direct appeal), it is important that the state's mechanism for appointment of counsel provide for timely appointment of counsel. Because Examples 1 and 2 suggest that the Attorney General may certify a state that has a mechanism that leads to the untimely appointment of counsel, the Proposed Final Rule is inconsistent with case law defining "competence" in the relevant context, as well as the ABA Guidelines. *See, e.g.*, *Spears v. Stewart*, 283 F.3d 992, 1019 (9th Cir. 2002) ("timeliness [in appointment of post-conviction counsel] is a requirement at the heart of the post-conviction procedure"). *See generally Chambers v. Maroney*, 399 U.S. 42, 54 (1970) ("courts should make every effort to effect early appointments of counsel").

Example 1 is also inconsistent with the statutory prohibition in Section 2261(d), which is designed to ensure that appointed counsel do not have a conflict of interest based on their prior representation of the defendant at trial and accordingly, would have no conflict with their client

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(2005) (applying presumption that statute incorporates settled judicial construction) (citing *Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993)); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language.").

in asserting a claim of ineffective assistance of counsel in a post-conviction proceeding. Example 1 suggests that the Attorney General could approve a mechanism that would allow the appointment of one lawyer from a public defender office (or law firm), where that same public defender office or law firm represented the client at trial. This is inconsistent with the ABA Guidelines, as well as the ABA's Model Rules of Professional Conduct Rule 1.10, which provide that any conflict of interest an individual lawyer has in representing a particular client is imputed to his or her firm.

The Proposed Final Rule did not address these points in its supporting analysis.

B. The Proposed Final Rule Fails To Ensure That States Have Established Mechanisms for the Compensation and Payment of Reasonable Litigation Expenses of Counsel Appointed to Represent Indigent Capital Defendants in State Post-Conviction Proceedings

Section 507 expressly requires that for a state to be certified, the Attorney General must determine "whether the State has established a mechanism for the . . . compensation and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. § 2265(a)(1)(A). A state mechanism that does not provide for adequate compensation will likely have the effect of leaving capital defense representation to inexperienced and possibly incompetent counsel. To ensure that counsel is "competent," therefore, compensation must be sufficient to encourage experienced and capable lawyers who would otherwise command higher fees to accept appointments in capital cases. Thus, for example, because the representation of post-conviction capital prisoners can take hundreds of hours, capped or predetermined fees do not constitute compensation that will ensure counsel are competent. At the same time, however, states must retain the ability to monitor litigation expenses to ensure that they are reasonable, in order to protect public funds. The Proposed Final Rule is insufficient to meet this statutory mandate for the following reasons:

1. The Proposed Final Rule disregards the plain statutory language by providing that the Attorney General is to base his determinations about the adequacy of a state's mechanisms for the compensation of appointed counsel and reimbursement of reasonable litigation expenses based on all post-conviction proceedings, not "post-conviction proceedings brought by indigent prisoners who have been sentenced to death." *See* 28 U.S.C. § 2265(a)(1)(A) (specifying that the determination with regard to compensation and expense reimbursement must be made with regard to indigent capital defendants). The Proposed Final Rule improperly defines "State post-conviction proceeding" as any and all "collateral proceeding following direct State review or expiration of time for seeking direct State review," *see* Proposed Final Rule §§ 26.21 (Definition of "State post-conviction proceeding"), without regard to whether the collateral proceeding involves a capital defendant. This definition is incorporated into the Proposed Final Rule's description of the determinations the Attorney General is required to make with regard to the mechanisms for compensation of counsel, as well as the examples of mechanisms for payment of reasonable litigation expenses. *See* Proposed Final Rule §§ 26.22(b)&(c). Accordingly, the

plain language of the Proposed Final Rule requires these determinations to be made with regard to all post-conviction litigation, rather than the subset of capital post-conviction litigation. [6]

This point was raised in our August 25, 2007 comments, but the Proposed Final Rule fails to address or fix it.

2. The Proposed Final Rule does not provide any substantive criteria by which the Attorney General is to determine that a state's mechanism provides for the compensation and payment of reasonable litigation expenses of competent counsel. Notably, the Proposed Final Rule does not refer to the *ABA Guidelines*, which have been widely cited by courts as establishing the appropriate professional standards for compensation and reimbursement of competent defense counsel.[7] As discussed above with respect to competency of counsel, this failure to adopt substantive criteria by which the Attorney General can evaluate whether proposed mechanisms will lead to the compensation and reasonable expense reimbursement of competent counsel violates 28 U.S.C. § 2265(b), which requires the Attorney General to "promulgate regulations to implement the certification procedure. . . ."

The Proposed Final Rule did not address this point in its supporting analysis.

3. The illustrative examples of compensation and expense reimbursement mechanisms given in the Proposed Final Rule suggest that the Attorney General is prepared to certify mechanisms that are inconsistent with and contrary to established legal standards for the compensation and expense reimbursement of competent counsel. In particular, the Proposed Final Rule indicates that the Attorney General would certify mechanisms such as those set forth in § 26.22(b) Example 1 and § 26.22(c) Example 2, which are mechanisms that provide for presumptive caps on compensation and expenses. Such caps are inconsistent with prevailing legal standards regarding the compensation and expense reimbursement of competent counsel, and with the *ABA Guidelines*. *See, e.g.*, *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) ("a compensation system that results in substantial losses to the appointed attorney or his firm cannot be deemed adequate"); 18 U.S.C. § 3599 (providing hourly compensation for attorneys in federal capital cases, including post-conviction proceedings, with no flat fees or caps on compensation); 42 U.S.C. § 14163(e) (providing defense attorneys in capital cases should be "compensated for actual time and service, computed on an hourly basis"). *See also Guidelines* § 9.1(B) & (C). The examples are also inconsistent with the standards adopted by numerous states regarding the adequate level of compensation. *See, e.g.*, Conn. Gen. Stat. Ann. § 51-293 (requiring that public defenders receive salaries comparable to those paid to the state prosecutor); Tenn. Code Ann. § 16-2-518 (1994) (requiring that for every $1 increase in funding provided to

[6] The expenses incurred by, and compensation required by, counsel litigating a post-conviction capital matter are likely to be considerably greater than those of counsel litigating a non-capital matter, if for no other reason, because a post-conviction capital proceeding will likely involve review of both the merits and sentencing trials, while a non-capital proceeding will likely focus only on a merits trial. The statute requires that the Attorney General's determinations be made with regard to the application of a state's mechanisms to the (likely more expensive) subset of capital cases, not the generally applicable mechanisms for post-conviction cases.

[7] *See* cases discussed in note 4.

the district attorney's office, there will be a concomitant increase of $0.75 in funding for the public defender's office); Minn. Stat. Ann. § 611.27 (ordering the state commissioner of finance to pay for necessary expenses in indigent defendants' appellate and post-conviction cases when the state public defender's office does not have sufficient funds); Nev. Rev. Stat. Ann. § 34.750 (requiring allocation of funds from the "statutory contingency account" to the state public defender's office if the funds appropriated to the public defender for the "necessary [defense] costs and expenses" of indigent defendants have been exhausted).

The Proposed Final Rule did not address this point in its supporting analysis.

D. The Proposed Certification Process Does Not Provide All Interested Parties Adequate Notice or a Meaningful Opportunity to Be Heard on An Application

The Attorney General's certification decisions can affect the rights of hundreds of capital defendants. For this reason, the Proposed Final Rule appropriately recognizes that interested persons must have an opportunity to comment on the application. § 26.23(c). The proposed procedure for reviewing certification applications, however, falls well short of providing the procedural protections required by the Administrative Procedure Act for rule making processes, as outlined in 5 U.S.C. § 553.

Although the Proposed Final Rule concedes that the certification process is an "adjudication" for purposes of the Administrative Procedure Act, 73 Fed. Reg. 75333, the conclusion that interested parties are not required to be given notice or a meaningful opportunity to be heard does not follow for two reasons. First, the nature of the proceeding is much closer to a rule making than an adjudication. Second, the rights described below -- the right to notice and the right to be heard -- are required by the Administrative Procedure Act regardless of whether the proceeding is classified as a rule making or an adjudication.

With regard to the suggestion that the Proposed Final Rule is exempt from the rule making provisions of the Administrative Procedure Act, the language of the regulation indicates that the certification process constitutes rule making under the Administrative Procedure Act, because it refers both to "notice" and "comment" procedures. More importantly, because the practical impact of a certification decision will circumscribe the rights of capital defendants in *habeas* litigation, it "[a]ffects the rights of broad classes of unspecified individuals. . . is prospective, and has a definitive effect on individuals only after [the certification decision] subsequently is applied," and is therefore rule making. *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448-49 (9th Cir. 1994). This conclusion is consistent with the limited authorities cited in the Proposed Final Rule – most notably the Attorney General's Manual on the Administrative Procedure Act – the certification decisions will impact and regulate the future conduct of habeas litigation for significant classes of individuals, and the decision whether to certify a state is made on policy considerations.[8]

[8] Citing the preclearance provisions of the Voting Rights Act as the exclusive example, the Proposed Final Rule notes that other determinations by the Attorney General whether state laws satisfy federal statutory standards do not constitute rule making. The inquiry and impact of a preclearance decision, however, are far different than the impact of a certification decision. If a

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These are hallmarks of a rule making process, and for this reason, the process must be governed by the Administrative Procedure Act. Because the certification decision has a substantial impact upon private parties, "the Administrative Procedure Act's general rule making section, 5 U.S.C. § 553, sets down certain procedural requirements with which agencies must comply. . . ." *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749 (D.C. Cir. 2001). Under these circumstances, the Administrative Procedure Act sets forth "an outline of minimum essential rights and procedures" and represent "the minimum requirements of public rule making procedure short of statutory hearing." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 545-46 (1978) (quoting legislative history). Although Congress certainly has the power to authorize more streamlined procedures for agency action than what is in the Administrative Procedure Act, there is nothing in Section 507 that suggests Congress intended to do so here. In the absence of express statutory language to the contrary, the Department of Justice must adopt regulations that comply with the Administrative Procedure Act and the Due Process Clause in making certification decisions.

1. The Proposed Final Rule Fails to Provide Adequate Notice to Interested Parties

a. The Proposed Final Rule Fails To Provide for Adequate Initial Notification

To ensure that a state's plan is adequate, all interested parties should be notified and given the opportunity to be heard regarding a state's application. The identity of interested parties may be different in each state, but will include at minimum all public defender's offices, any non-governmental state defender organizations, the state bar association, and capital defendants.

The Proposed Final Rule fails to provide for adequate notice to interested parties. In particular, the Proposed Final Rule only requires that (a) the state provide notice of its request for certification to the chief justice of the state's highest court, § 26.23(b)(2), and (b) the Attorney General publish a notice that the state has applied for certification in the Federal Register, § 26.23(c). This falls short of the Attorney General's obligations under the Due Process Clause to provide notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Washington Toxics Coalition v. E.P.A.*, 2005 WL 2656597, *2 (W.D. Wash. Oct 17, 2005) ("publication in the Federal Register does not serve as notice to persons who are legally entitled to personal notice") (citing *Camp v. United States Bureau of Land Mgmt.*, 183 F.3d 1141, 1145 (9th Cir.1999)); *United Church Bd. for World Ministries v. S.E.C.*, 617 F.Supp. 837, 839 (1985) ("Whether notice is adequate depends on the particular circumstances of each case. '[T]he

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voting statute is blocked, the prior statute remains in place and no rights are affected, while if a statute is cleared, it is because the statute does not have the purpose and will not have the effect of discriminating based on race, meaning that a determination is made that the rights of a broad class of people are not affected.

answer . . . must turn on how well the notice that the agency gave serves the policies underlying the notice requirement.'") (quoting *Small Refiner Lead Phase-Down Task Force v. E.P.A.*, 705 F.2d 506, 547 (D.C. Cir.1983)). The Administrative Procedure Act similarly requires that the published notice "give interested persons, through written submissions and oral presentations, an opportunity to participate in the rulemaking process." *Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004).

Limiting the proposed notification to the manner set forth in the Proposed Final Rule falls well short of these standards. Many of the interested parties to certification decisions (such as capital defendants and their counsel, local public defender offices, the state bar association, and non-governmental state defender organizations) are unlikely to have access to the Federal Register or the means or resources to monitor the Federal Register for a notice of application. Such publication, accordingly, is not "reasonably calculated, under all of the circumstances" to apprise interested parties of the possibility of agency action.

The Proposed Final Rule did not address this point in its supporting analysis.

b. The Proposed Final Rule Fails To Provide Sufficient Information Regarding a State's Application To the Interested Parties

To ensure that all interested parties have a meaningful opportunity to comment on a state's application, that application must be made available to the public. Although the Proposed Final Rule provides the public some opportunity to comment on an application, § 26.23(c)(3), it fails to require that the contents of a state's application be made public. Rather, the Proposed Final Rule suggests that it is sufficient for the Attorney General to issue a short form "notice," consisting solely of a list of "any statutes, regulations, rules, policies, and other authorities" cited by the state "in support of its request." § 26.33(c)(2).

Withholding the contents of the application denies the public a meaningful opportunity to comment on the application, without any good reason for the limitation. Interested persons must be able to participate in the review process in a meaningful and informed manner. Moreover, this provision is contrary to the Administrative Procedure Act, as well as the Attorney General's obligations under the Due Process Clause. The Administrative Procedure Act requires, for a notice and comment rule making, that the notice provide "either the terms or substance of the Proposed Final Rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). As numerous courts have held, "the test for sufficiency of the notice is whether the notice fairly apprise[s] interested persons of the subjects and issues before the Agency [such that] an interested member of the public should be able to read the published notice of an application and understand the essential attributes of that application." *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 975 (9th Cir. 2005) (internal punctuation omitted). *See also Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988) (in order to be adequate, notice "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully"); *Am. Med. Ass'n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989) (in order to be adequate, notice must apprise "interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner"). The proposed notice set forth in the

Proposed Final Rule falls well short of these standards; indeed, it requires no explanation at all of how the state believes it will satisfy the requirements of Section 507.

The Proposed Final Rule did not address this point in its supporting analysis.

c. The Proposed Final Rule Fails To Prescribe Minimum Adequate Time for Interested Parties to Comment on the State's Application

To ensure that all interested parties have a meaningful opportunity to comment on an application, the public must have sufficient time to comment. Given the likely complexity of issues necessary to be evaluated in conjunction with an application, including the need to assess state assertions about its program and the actual operation of such program, we believe that the comment period should extend for a minimum of 90 days from the date of the notice of a certification application to affected persons.

However, the Proposed Final Rule provides no minimum time for interested parties to comment on an application. This is inconsistent with the obligation of the Attorney General under the Due Process Clause to "afford a reasonable time for those interested to . . . present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See also United States v. Puig*, 419 F.3d 700, 707 (8th Cir. 2005) (notice must "afford a reasonable time for those interested to make an appearance"); *Idaho ex. Rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248, 1261 (D. Idaho 2001) (a curtailed comment period "deprive[s] the public of any meaningful dialogue or input into the process").

The Proposed Final Rule did not address this point in its supporting analysis.

d. The Proposed Final Rule Fails To Provide Any Notice To Interested Parties Regarding Further Communications Between the Attorney General and the State Applicant

The Proposed Final Rule provides that the Attorney General "may, at any time, request supplementary information from the State or advise the State of any deficiencies that would need to be remedied in order to obtain certification." Proposed Final Rule § 26.33(d). The regulations apparently permit these communications to be made on a private, *ex parte* basis, without any notice to the public or interested parties either of the Attorney General's questions or of the state's responses. The only public notification after the initial notice of an application is that "the certification will be published in the Federal Register, if certification is granted." *Id*.

Such *ex parte* communications between the Attorney General and the state applicant regarding the status of the application are inappropriate in a rule making context and deprive the public of a meaningful right to comment on proposed applications. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56-57 (D.C. Cir. 1977) (such contacts violate the Due Process Clause); *State of North Carolina v. E.PA.*, 881 F.2d 1250, 1258 (4th Cir. 1989) (disclosure of *ex parte* communications is necessary to "protect the public's right to participate meaningfully in the decision making process and the critical role of adversarial comment in ensuring proper functioning of agency decision making and effective judicial review") (internal punctuation and

citations omitted). Interested parties cannot possibly rebut assertions made by the state when they do not know what those assertions are.

The Proposed Final Rule did not address this point in its supporting analysis.

2. The Proposed Final Rule Fails to Require the State Applicant to Make an Application That Will Provide a Meaningful Opportunity To Be Heard or Will Result in Reasoned Decision Making

The Proposed Final Rule prescribes no content for a State's application other than an "attestation" that the applicant is an "appropriate state official" and an "affirmation" that the state has provided notice of the request to the chief justice of the state's highest court. Proposed Final Rule ¶ 26.23(b). By failing to specify what the application must contain, the Justice Department has proposed an unworkable mechanism that will result in arbitrary and capricious agency action. At a minimum, the Proposed Final Rule should require the state's application to include (a) some evidence that the state's mechanism actually results, or will result, in the appointment of competent post-conviction counsel to indigent capital defendants (such as a list of the proposed names of qualified attorneys who are eligible to be appointed), (b) the standards of competency for counsel (so that the standards for selection of eligible counsel are clear), and (c) the standards for compensation and expense reimbursement for counsel.

There are several problems with the content-free application process:

a. Without uniform standards for applications, any determinations that the Attorney General makes pursuant to Section 2265(a)(1) will be *ad hoc* decisions. This is inconsistent with the Administrative Procedure Act and due process. *See, e.g., West Virginia Public Services Com'n v. U.S. Dep. of Energy*, 681 F.2d 847 n.75 ("[T]he exercise of unfettered flexibility too often results in ad hoc judgments and arbitrary decisions, both of which are counterproductive to the greater regulatory goals of consistency in decisions and reasoned guidance upon which affected parties may rely"). *See generally Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (an agency's "power to make rules that affect substantial individual rights and obligations carries with it the responsibility . . . to remain consistent. . . .").

b. Without requiring the minimum content for applications described above, it will be difficult for the public to evaluate and comment on applications. This is inconsistent with the requirement that interested parties be provided with a meaningful opportunity to be heard. *See, e.g, Air Transp. Ass'n of Am. V. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) ("the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation"); *Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor*, 2007 WL 2089740 (D.C. Cir. July 24, 2007) ("The Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations").

The Proposed Final Rule did not address either of these points in its supporting analysis.

3. The Proposed Final Rule Fails To Require That the Attorney General Support Approval or Denial of an Application with Reasoned Decision Making

The Proposed Final Rule provides that the only publication regarding a certification decision is that "the certification will be published in the Federal Register, if certification is granted." Proposed Final Rule § 26.33(d). In other words, the Proposed Final Rule does not require or contemplate that a certification decision will be supported by reasoned decision making. This contravenes a bedrock requirement of administrative law. *See, e.g, Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (the Commission must "provide a reasoned explanation for its action"); *Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (2d Cir. 1993) (a reviewing court must be able to understand the basis of agency's action so that it may judge the consistency of that action with the agency's mandate).

The Proposed Final Rule did not address this point in its supporting analysis.

D. The Proposed Final Rule Fails To Provide an Appropriate Amendment or Decertification Procedure

For a state to have a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in post-conviction proceedings, the state must actually apply the procedures that the Attorney General has certified in each and every case. Congress surely cannot have intended that a state may apply for certification stating that it would follow certain procedures and then in practice not follow those proposed procedures. Congress similarly could not have intended that a state obtain certification upon the assumption that its procedures will result in the appointment of competent counsel, if experience shows that incompetent counsel are routinely appointed. To ensure that states actually follow their proposed procedures and that those procedures in their operation actually meet the statutory standard, and to carry out the statutory purpose of limiting litigation in federal *habeas corpus* proceedings, interested parties should have the ability to petition for a certification to be amended or rescinded, and the Attorney General must have the ability to decertify a state that no longer meets the criteria of 28 U.S.C. § 2265(a)(1).

The Proposed Final Rule fails to allow interested parties to petition for a state to be decertified or to permit the Attorney General to decertify a state, even if the state materially changes the provisions of its program or fails to operate its program in accordance with the terms of application, or if in practice the program fails to provide competent counsel. *See* Proposed Final Rule § 26.33(e) ("[S]uch certification is final and will not be reopened. Subsequent changes in a State's mechanism for providing legal representation to indigent prisoners in State post-conviction proceedings in capital cases do not affect the validity of a prior certification. . . ."). These restrictions are arbitrary, and they are inconsistent with the statutory language of Section 507, which makes clear that the certification decision is based on the mechanisms and standards of competency the state proposes to use, rather than what the state had in the past. In other words, the Attorney General must be able to evaluate the operation of a state program on an ongoing basis, just as the obligations of a state that seeks to retain the significant benefits of certification are ongoing. Moreover, restricting the circumstances under which a certification decision may be rescinded violates the Administrative Procedure Act. *See* 5 U.S.C. § 553(e)

("Each agency shall give an interested person the right to petition for the . . . amendment, or repeal of a rule.").

The Proposed Final Rule's omission of any provision for decertification stands in glaring contrast to its provision allowing a state to request reevaluation of a certification decision. This one-way ratchet is inconsistent with the Administrative Procedure Act.

IV. CONCLUSION

In sum, the Proposed Final Rule fails to ensure that genuinely competent counsel are provided to capital defendants in post-conviction proceedings. The ABA urges the Department to consider redrafting the regulations, and embracing the *ABA Guidelines*, which have been broadly accepted as the standard of care for the defense of death penalty cases.[9] We urge the Department to use this opportunity to improve the quality of representation in post-conviction proceedings and offer our continuing assistance toward meeting this goal.

[9] Dozens of state and federal death penalty cases considering the performance of defense counsel in death penalty cases cite the *ABA Guidelines* as authority. *See* cases discussed in note 4 and *see* ABA, *Cases that Cite to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, *available at* http://www.abanet.org/deathpenalty/resources/docs/2003List.pdf (last visited April 6, 2009).

APPENDIX A: CRITERIA FOR EVALUATION OF STATE APPLICATIONS FOR CERTIFICATION

I. Representation in Post-Conviction Proceedings of Death Penalty Cases

A. A State shall adopt and implement a plan formalizing the means by which competent legal representation in post-conviction death penalty proceedings is to be provided in accordance with these Regulations (the "Legal Representation Plan").

B. The Legal Representation Plan shall set forth how the State will conform to these Regulations.

C. All elements of the Legal Representation Plan should be structured to ensure that counsel defending post-conviction death penalty proceedings are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.

II. Designation of a Responsible Agency

A. The Legal Representation Plan shall designate one or more agencies to be responsible, in accordance with the standards provided in these Regulations for:

1. ensuring that each capital defendant in the jurisdiction receives competent counsel in post-conviction capital proceedings, and

2. performing all the duties listed in Subsection E (the "Responsible Agency").

B. The Responsible Agency shall be independent of the judiciary, and neither the judiciary nor elected officials should select lawyers for specific cases.

C. The Responsible Agency for each stage of the proceeding in a particular case must be one of the following:

<u>Defender Organization</u>

1. A "defender organization," that is, either:

a. a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

b. a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

Independent Authority

2. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation in post-conviction proceedings.

D. Conflict of Interest:

1. In any circumstance in which the performance by a defender organization of a duty listed in Subsection E would result in a conflict of interest, the relevant duty shall be performed by the Independent Authority. The State shall implement an effectual system to identify and resolve such conflicts.

2. When the Independent Authority is the Responsible Agency, attorneys who hold formal roles in the Independent Authority should be ineligible to represent defendants in capital cases within the jurisdiction during their term of service.

E. The Responsible Agency, in accordance with the provisions of these Regulations, shall perform the following duties:

1. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

2. draft and periodically publish rosters of certified attorneys;

3. draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases, which standards must meet the guidelines set forth in Section IV below;

4. assign the attorneys who will represent the defendant in the post-conviction proceedings, except to the extent that the defendant has private attorneys;

5. monitor the performance of all attorneys providing representation in post-conviction capital proceedings;

6. periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide competent legal representation consistent with these Regulations;

7. conduct, sponsor, or approve specialized training programs for attorneys representing defendants in post-conviction death penalty proceedings; and

8. investigate and maintain records concerning complaints about the performance of attorneys providing representation in post-conviction death penalty proceedings and take appropriate corrective action.

III. The Defense Team and Supporting Services

A. The Legal Representation Plan shall provide for assembly of a post-conviction defense team that will provide competent legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with Section IV of the Regulations, an investigator, and a mitigation specialist.

2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

B. The Legal Representation Plan shall provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide competent legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them. The Plan shall ensure that:

1. Counsel has the right to have such services provided by persons independent of the government.

2. Counsel has the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

IV. Qualifications of Defense Counsel

A. The Responsible Agency shall develop and publish qualification standards for defense counsel in post-conviction capital proceedings.

B. In formulating qualification standards, the Responsible Agency will ensure:

1. That every attorney representing a capital defendant in post-conviction proceedings has:

a. obtained a license or permission to practice in the jurisdiction;

b. demonstrated a commitment to providing zealous advocacy and competent legal representation in the defense of capital cases; and

c. satisfied any training requirements set forth in the Legal Representation Plan.

2. That the pool of defense attorneys as a whole is such that each capital defendant within the State receives competent legal representation at post-conviction proceedings. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:

a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

b. skill in the management and conduct of complex negotiations and litigation;

c. skill in legal research, analysis, and the drafting of litigation documents;

d. skill in oral advocacy;

e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

V. Workload

The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in post-conviction death penalty proceedings is maintained at a level that enables counsel to provide each client with competent legal representation in accordance with these Regulations.

VI. Monitoring; Removal

A. The Responsible Agency will monitor the performance of all defense counsel to ensure that the client is receiving competent legal representation. Where there is evidence that an attorney is not providing competent legal representation, the Responsible Agency shall take appropriate action to protect the interests of the attorney's current and potential clients.

B. The Responsible Agency shall establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide competent legal representation.

C. The Responsible Agency shall periodically review the rosters of attorneys who have been certified to accept appointments in post-conviction capital proceedings to ensure that those attorneys remain capable of providing competent legal representation. Where there is evidence that an attorney has failed to provide competent legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide competent legal representation, the office should not receive additional appointments.

D. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the Responsible Agency should provide written notice that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.

E. An attorney or defender office sanctioned pursuant to this regulation should be restored to the roster only in exceptional circumstances.

F. The Responsible Agency should ensure that this provision is implemented consistently with Section II of these Regulations, so that an attorney's

zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this provision.

VII. Training

A. The Legal Representation Plan shall provide funds for the effective training, professional development, and continuing education of all members of the defense team.

B. Attorneys seeking to qualify to receive appointments to represent defendants sentenced to death in post-conviction proceedings should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the handling of post-conviction proceedings in capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law;

2. pleading and motion practice;

3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;

4. jury selection;

5. trial preparation and presentation, including the use of experts;

6. ethical considerations particular to capital defense representation;

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 and biological science;

11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.

D. The Legal Representation Plan should ensure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.