COMMENTS OF THE AMERICAN BAR ASSOCIATION
TO OFFICE OF JUSTICE PROGRAMS DOCKET NO. 1540
"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 of the U.S. Code ("Proposed Rule"). *See* Notice of Request for Public Comment, 76 Fed. Reg. 11705 (Mar. 3, 2011). The ABA is a voluntary, national membership organization of the legal profession. Its almost 400,000 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 does not take 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, studied state death penalty systems, and issued reports urging specific reforms in federal and state post-conviction procedures.[1] The ABA has presented testimony and submitted materials at congressional hearings that urge the reforms necessary to ensure the fairness and accuracy of *habeas corpus* proceedings.[2] In 1989, under a

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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). The ABA's examination of eight death penalty jurisdictions were performed by state-based assessment teams of experts, composed of judges, legislators, prosecutors, defense attorneys, members of the State bar, and academics who examined their state's death penalty system in light of the ABA policies. Two of the thirteen areas examined in each state were the provision of defense services as well as the state post-conviction process. See http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project/death_penalty_assessments.html.

[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).

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 federal, to make them more efficient and better able to address the constitutionally meritorious claims that many post-conviction petitions raise. *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).

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 expanded and updated in 2003 to reflect changes in the law and practice that had occurred since 1989.

The Proposed Rule raises serious concerns about the quality of representation for capital defendants, the fairness of death penalty proceedings, 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. The ABA urges that the Department revise the Proposed Rule consistent with the ABA Guidelines before certifying any state under chapter 154.

II. OVERVIEW OF COMMENTS

The ABA previously submitted comments regarding prior versions of the proposed regulations on August 25, 2007 and April 6, 2009. Like its predecessors, the Proposed Rule fails to ensure that states which seek certification have mechanisms in place to ensure the appointment of "competent counsel," as 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, as well as case law interpreting chapter 154. Accordingly, the ABA has serious concerns that the Proposed Rule will result in the Attorney General's improperly certifying states that fail to provide competent post-conviction counsel or otherwise fail to meet the statutory requirements of Section 507. These erroneous certifications would have devastating and detrimental consequences affecting the fairness and accuracy of post-conviction proceedings for death-sentenced prisoners.

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 requires states to make significant and meaningful improvements to the counsel systems that provide legal representation to indigent death-sentenced prisoners (including ensuring the quality of appointed counsel) in order to be entitled to the benefits of streamlined review in federal habeas corpus proceedings. At its core, the Proposed Rule fails to abide by this compromise and would allow states to obtain streamlined review without first ensuring that capital defendants receive the critical assistance of competent counsel in post-conviction proceedings.

Most problematically, the Proposed Rule fails to provide substantive, meaningful criteria for evaluating whether a state's mechanism will actually result in the appointment of *competent* counsel. While the "Section-by-Section Analysis" portions refer favorably to the *ABA Guidelines*, the language of the Proposed Rule contains no such reference, and the actual standards of competency articulated are either too circular, vague, or weak to allow a meaningful, objective evaluation of whether a state program is sufficient to result in the appointment of counsel who are actually *competent*. Similarly, the Proposed Rule does not contain any provisions that spell out how the Attorney General will assess "whether the State provides standards of competency for the appointment of counsel." 28 U.S.C. § 2265(a)(1)(C).

The Proposed Rule remains deeply and fundamentally flawed. For these reasons, the Department of Justice should not use it to certify any state to receive the benefits of streamlined federal habeas review pursuant to Section 507.

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 Rule does not satisfy this statutory mandate for at least six reasons detailed below. We have attached as Appendix A a set of substantive criteria from the *ABA Guidelines* that should be used by the Attorney General to evaluate applications from any state that wishes to benefit from certification.

1. The Proposed Rule fails to require appointment of a post-conviction defense team. In particular, the Proposed Rule suggests that appointment of a single attorney as post-conviction counsel may be adequate. *See* Section 26.22(a)(1) (appointment of "one or more attorneys"). This requirement falls short of recommendations made by the ABA for more than two decades, and the standard set forth in the *ABA Guidelines*, which require the appointment of two competent attorneys, an investigator, and a mitigation specialist. *See ABA Guideline* 4.1.

The importance of a defense team is clear when the nature of defense representation is understood. Under prevailing professional norms, post-conviction counsel must undertake a thorough investigation into the facts surrounding all phases of the case, including an independent examination of the available evidence—both that which was introduced into evidence for the jury to consider, and that which was not presented to the jury—to determine whether the decisionmaker at trial made a fully informed resolution of the issues of both guilt and punishment. This means that counsel must obtain and read the entire record of the trial, including all transcripts and motions. Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, and scrutinize them for what is missing as well as what is present.

Post-conviction proceedings may require filing pleadings simultaneously in several courts, particularly after a death warrant has been signed. These time pressures under which this work is conducted, which are already exceedingly demanding, will be accelerated in states that are certified under the Proposed Rule. Representation of a death-sentenced client in post-conviction proceedings can be as, if not more, demanding than other stages of the capital proceeding. In light of these demands, two qualified attorneys must be appointed.

Similarly, the standard of practice to provide high quality legal representation requires that the post-conviction team must include an investigator and a mitigation specialist. Post-conviction counsel must be prepared to thoroughly reinvestigate the entire case (including interviews and/or investigation of the critical witnesses for the prosecution) to ensure that the client was neither actually innocent[3] nor convicted or sentenced to death in violation of either state or federal law. Because state post-conviction proceedings are often the first and only opportunity to present new evidence to challenge the legality of the conviction and sentence, it is imperative that counsel conduct a searching inquiry to assess whether any mistake may have been made. The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts in post-conviction proceedings. Likewise, a mitigation specialist possesses clinical and information-gathering skills and training (including the skills to recognize congenital, mental or neurological conditions, an understanding of how these conditions may have affected the defendant's development and behavior, and an ability to find mitigating themes in the client's life history) that most lawyers simply do not have. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row. Because the Constitution forbids the execution of persons with mental retardation, this is a necessary area of inquiry in every case, making the inclusion of mitigation experts absolutely essential in all post-conviction cases. *See, e.g.*, *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005) ("the mitigation specialist is an indispensible member of the defense team throughout all capital proceedings" (internal citations omitted).

2. The Proposed Rule does not meet well-recognized standards for the appointment of *competent* post-conviction counsel. While Section 26.22(b), in contrast to prior versions of the rule, requires the Attorney General to consider whether a state's appointment mechanism "provides for the appointment of competent counsel," the actual standards for competency (as opposed to the commentary in the sectional analysis) do not even refer to the *ABA Guidelines*, which have been widely cited and utilized by courts as the appropriate professional standards for the appointment and performance of competent defense counsel,[4] and do not require counsel to comply with them.[5]

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[3] Since the reinstatement of the death penalty in 1976, 138 people on death row in the United States have been exonerated. DEATH PENALTY INFORMATION CENTER, *Facts About the Death Penalty*, (May 20, 2010) *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

[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.

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The criteria that are currently in the Proposed Rule are simply not sufficient to ensure the appointment of *competent* counsel. For example, certification under the Proposed Rule is appropriate in a state where there are "qualification standards that reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases." § 26.22(b)(1). This "requirement" is both circular and vague and will allow certification of states that utterly fail to ensure the competency of appointed counsel. Similarly, the Proposed Rule is satisfied by states that appoint "counsel [that] meet[] qualification standards established in conformity with 42 U.S.C. 14163(2)(A)." This requirement also fails to ensure competency of counsel because the underlying statutory provision simply requires a state to "establish qualifications for attorneys who may be appointed to represent indigents in capital cases," and does not provide any standards for making such an assessment. While the "sectional analysis" for both of these provisions cites the *ABA Guidelines* with approval,[6] the relevant provisions of the *Guidelines*

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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).

[5] *See* Ariz. R. Crim. P. 6.8; *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*. Order, ADKT No. 411 (NV 2008); Ohio Sup. R. 20.05.

[6] *See, e.g.*, Proposed Rule at 13 (noting that in evaluating whether a state mechanism satisfies the third criteria, the Attorney General will consider relevant the "standards of experience, knowledge, skills, training, education, or combination thereof that a State requires attorneys to meet"); Proposed Rule at 11 (noting that the second criteria definition of "effective system . . . is largely based on elements of the [*ABA Guidelines*]."

have not been embedded in the actual regulation and the regulation does not require compliance with them.

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 "I know it when I see it" determination of particular state programs, which the second and third criteria permit. *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").

The Proposed Rule currently allows for appointment of counsel "who have been admitted to the bar for at least five years and have at least three years of felony litigation experience." § 26.22(b)(1). This will allow the appointment of counsel who do not have the requisite skills and knowledge to competently represent capital defendants in post-conviction proceedings. Both post-conviction litigation and capital representation require expertise in procedural, legal, and technical issues beyond the skill set of many appointed counsel, and the abilities that post-conviction counsel must possess in order to provide competent representation in death penalty cases differ significantly from general felony representation. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 855 n.2 (1994) ("counsel appointed to 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"); *Hodges v. Epps*, No. 1:07CV66-MPM, 2010 WL 3655851, *18 (N.D. Miss. Sept. 13, 2010) (in granting habeas relief based on ineffective assistance of counsel, noting that defense counsel "was not qualified under the [ABA Guidelines] to take on this representation"); *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).

Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to that representation differ in significant ways from those necessary to succeed at trial. In addition, death penalty cases at the post-conviction stage may be subject to rules that provide less time for preparation than is available in noncapital cases, and may require the simultaneous preparation of substantive pleadings. Similarly, homicide cases are typically more complex than other felony cases and often involve evidence of many different types, requiring the ability to understand and present evidence involving a variety of experts -- pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, etc. Because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in noncapital cases. Defense counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns. Counsel must be able to develop and implement advocacy strategies that apply existing rules in the pressure-filled environment of high-stakes, complex litigation, as

well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment. It is for these reasons that the ABA Guidelines conclude that "quantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task." *See* ABA Guideline 5.1 Commentary. Requiring three years of general felony litigation experience simply is not a sufficient nor meaningful method of ensuring that competent counsel are appointed in post-conviction proceedings. Moreover, the vague reference to "litigation" as opposed to "defense" means that a former prosecutor with no defense experience or skills whatsoever would be qualified for appointment under the Proposed Rule.

3. The Proposed Rule does not require a state that seeks certification to adopt meaningful performance standards. *See ABA Guidelines* 10.1. Nor does the Proposed Rule reflect how the Attorney General is to assess, consistent with the statutory mandate, "whether the State provides standards of competency for the appointment of counsel." 28 U.S.C. § 2265(a)(1)(C). To the extent the Proposed Rule contemplates that a program can be certified without robust performance standards or an examination whether the state enforces those standards, such an approval would be contrary to the statutory language. *See, e.g.*, *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) ("competency standards are meaningless unless they are actually applied in the appointment process"). Moreover, the failure of the Proposed Rule to require the Attorney General to evaluate a state's performance standards is in contrast to prior versions of the Proposed Rule, which required the Attorney General to determine whether the "State provides competency standards for the appointment of counsel." *See* 74 Fed. Reg. 6, 131 (Feb. 5, 2009) § 26.22(d).

In articulating the criteria by which a state's performance standards will be assessed, the Attorney General should expressly reference and require states to comply with the relevant *ABA Guidelines*. The *ABA Guidelines* contain specific standards that should be included in any set of performance criteria for post-conviction counsel in death penalty cases. *See ABA Guidelines* 10.2–10.15.1. A state that fails to implement and enforce these criteria should not be certified.

4. The Proposed Rule does not require a state that seeks certification to provide funds for the training, professional development, and continuing education of post-conviction counsel. *See ABA Guideline 8.1*. Given the extraordinary complexity and demands of capital cases, as well as the rapid change in legal and technological issues, the *ABA Guidelines* require that post-conviction counsel participate in continuing legal education specific to death penalty cases at least once every two years.

5. The Proposed Rule does not require that a state seeking certification consider the defense team's existing workload before making appointment. *See ABA Guideline* 6.1. Because the pace of post-conviction litigation in many jurisdictions is already expedited, special care must be made to ensure that the appointment is consistent with the defense team's overall workload. In failing to require consideration of this factor, the Proposed Rule is inconsistent with case law and the *ABA Guidelines* which reflect the understanding that the competence of counsel may be severely affected (or even frustrated) by existing workload. *See, e.g., Williams v. Birkett*, 697 F.Supp.2d 716, 731-32 (E.D. Mich. 2010) ("Counsel's workload should never be so large as to interfere with the rendering of quality representation . . . . The workload demands of capital cases are unique: the duty to investigate, prepare and try both the guilt/innocence and

mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by a guilty plea."); *Lockett v. Anderson*, 230 F.3d 695, 711-12 (5th Cir. 2000) (counsel's workload at time of appointment rendered assistance of counsel ineffective); *U.S. v. Gray*, 32 M.J. 730, 735 (A.C.M.R. 1991) ("We expect the Chief, Defense Appellate Division, to manage his personnel so that counsel working on capital cases are not overburdened by other cases. *See* ABA Guidelines at §§ 6.1, 7.1. The quality of representation provided the appellant in this death penalty case is far more important than statistical measures of efficiency in handling other cases."). Because the Proposed Rule permits the Attorney General to certify a state that appoints counsel without regard to existing workloads, the Proposed Rule again fails to satisfy the statutory requirement that the state have a mechanism for the appointment of "competent counsel."

6. The Proposed Rule does not require a state that seeks certification to provide for the *timely* appointment of counsel. 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 timing of the appointment is such that it provides counsel with sufficient time before a filing or other court-imposed deadline to engage in meaningful representation of the client. In failing to so require, the Proposed Rule is inconsistent with case law and 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"); *Ashmus v. Calderon*, 31 F.Supp.2d 1175, 1186-87 ("[e]ffective and competent habeas representation is compromised by long delays in the appointment of counsel. All the familiar problems associated with delay arise (memory fades, the record grows cold, and witnesses become unavailable."). *See generally Chambers v. Maroney*, 399 U.S. 42, 54 (1970) ("courts should make every effort to effect early appointments of counsel").

IV. CONCLUSION

The Proposed Rule fails to ensure that genuinely competent counsel, with the necessary skills and knowledge that the term "competence" reflects, are provided to death-sentenced prisoners in post-conviction proceedings. The ABA urges the Department to revise the Proposed Rule to, among other things, require compliance with the *ABA Guidelines* (either by name or in substance) before any state is certified.[7] The Department should use this important opportunity to make a meaningful contribution to improving the quality of legal representation for indigent death-sentenced prisoners in post-conviction proceedings. We offer our continuing assistance toward meeting this important goal.

[7] 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.