January 30, 2012

Samuel W. Phillips  
Circuit Executive  
1100 East Main Street, Suite 617  
Richmond, Virginia  23219

Re:  Comments of the American Bar Association to Proposed Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases

Dear Mr. Phillips:

Please accept these comments on behalf of the American Bar Association regarding the proposed Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases (hereinafter “Special Death Penalty Compensation Procedures”) issued on January 4, 2012 by the United States Court of Appeals for the Fourth Circuit Judicial Council.

The Association recognizes that the resources of the federal government and judiciary are limited. Federal courts, like state courts, must make difficult choices about the use of limited funding. This year, as ABA President, I have appointed a Task Force on Preservation of the Justice System to address what I believe is one of the most critical issues facing the legal profession today: the severe underfunding of our justice system, depletion of resources, and the courts’ struggle to perform their constitutional function and provide access to justice for countless Americans. The Task Force will work with judges, bar associations and other stakeholders to call attention to this crisis and share strategies for innovation and efficiency. In these times of economic hardship, we understand that our courts must maintain adequate financial support and essential resources to fulfill their constitutional responsibility.

The ABA recognizes that the Special Death Penalty Compensation Procedures are intended to maximize the use of limited funding for the largest number of indigent defendants. The ABA is concerned, however, that a short-term financial savings that may be achieved by implementation of the proposed procedures will be negated by long-term consequences that are inconsistent with the goals of our justice system.

Specifically, we are concerned that the Special Death Penalty Compensation Procedures will worsen an already serious situation for indigent capital defendants by making the
process of obtaining skilled, experienced defense counsel much more difficult and result in an unacceptable quality of legal representation in death penalty cases.

As you may know, the American Bar Association does not take a position on the death penalty itself. The Association’s policies, however, are the result of decades of interest and engagement by its members and staff regarding the fair administration of the death penalty. Our work has included undertaking numerous studies, the filing of amicus briefs at the United States Supreme Court, and efforts to help ensure that every person facing a possible death sentence has the assistance of competent and skilled attorneys at every stage of the proceedings against them. For example, for the past 25 years the ABA Death Penalty Representation Project has worked to improve the quality and availability of counsel in death penalty cases by recruiting volunteer counsel from civil law firms to handle capital cases, training judges and lawyers about the resources and skills necessary for an effective capital defense, and promulgating the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003), which are widely accepted as the national standards for the defense of death penalty cases.

The concerns detailed below are based on our interest, our experience, and our desire to be useful to the Judicial Council as it contemplates making these important changes in procedure. We appreciate having the opportunity to submit these comments.

1. The Special Death Penalty Compensation Procedures are inconsistent with the delivery of high quality legal representation for capital defendants and death-sentenced prisoners in the Fourth Circuit.

The ABA believes that high quality legal representation is demanded for all cases in which the death penalty is a possibility. By “high quality,” we mean that counsel in

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1 See, e.g., ABA House of Delegates Resolution, Feb. 3, 1997 ("RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . ."); Report No. 6 of the Criminal Justice Section, Feb. 1990, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/death_penalty_provisions0290.authcheckdam.pdf (urging implementation of certain measures in the litigation of death penalty cases, including the provision of competent and adequately compensated counsel); Report of the Section of Criminal Justice, Feb. 1985 (Recommending that when attorneys are appointed to represent defendants in the trial of death penalty cases, two attorneys shall be appointed as trial counsel to represent the defendant, and the primary attorney shall have substantial trial experience which includes the trial of serious felony cases).


3 See ABA Guideline 1.1 Objective and Scope of Guidelines ("The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence.").
capital cases should have the requisite skills, experience, time, resources, and devotion to their client’s interests. Our experience has taught us this is critical to ensuring that capital trials are constitutional and that post-conviction proceedings meaningfully examine the constitutionality of trials and appeals. Unfortunately, we have also learned that the quality of legal representation is closely correlated with availability and amount of compensation.

The Special Death Penalty Compensation Procedures establish fee caps (amounts will be “presumptively excessive”) for defense counsel not only in federal capital trials, but for direct appeals for defendants sentenced to death, and post-conviction proceedings for federal death row inmates (18 U.S.C. § 2255) and state death row inmates (§ 2254). Caps on compensation for defense counsel compensation are specifically prohibited by ABA policy.

ABA Guideline 9.1 - Funding and Compensation states:

B. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

As the Commentary to Guideline 9.1 explains:

When assigned counsel is paid a predetermined fee regardless of the number of hours of work actually demanded by the representation, there is an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee. . . . [T]he quality of representation often suffers when adequate compensation for counsel is not available. . . . It is demonstrably the case that, by discouraging more experienced criminal defense attorneys from accepting appointments in capital cases, inadequate compensation has often left capital representation to inexperienced or outright incompetent counsel.

ABA Guidelines 9.1, comment at 987-88.

2. The Special Death Penalty Compensation Procedures will make the recruitment of qualified and experienced capital counsel in the Fourth Circuit more difficult.

Capital cases are the most time consuming and complicated kinds of criminal cases. Various studies and reports conservatively estimate that many hundreds and often
thousands of hours must be spent preparing a capital case for trial or post-conviction proceedings in order to ensure that they are litigated competently.⁴ At the hourly rate currently authorized by the Criminal Justice Act (CJA), under the proposed Special Death Penalty Compensation Procedures appointed capital counsel would be compensated for just 281 hours of time over the life of the case. This is far below the amount of time that all studies indicate must be invested by counsel.

The Association’s 25 years of experience recruiting and training defense counsel for death penalty cases has demonstrated the already very difficult task of recruiting skilled and experienced counsel to accept capital cases at the CJA rate of $178/hour. That is because the authorized rate is usually much less than what counsel can charge other clients in other kinds of cases. Establishing caps on compensation that are required by the Special Death Penalty Compensation Procedures would act as a further deterrent for counsel who already accept less than they could otherwise earn to represent an indigent capital client. Implementation of these procedures will leave capital cases to counsel who may not have necessary skills or experience to perform competently.

Volunteer counsel who provide pro bono services to indigent capital clients have helped fill the need for legal representation and have provided badly needed financial resources to capital cases. But recruitment of mid-sized and large civil law firms has been severely affected for the past several years by the downturn in the economy. The significant investment of time and money in capital cases is an undertaking that fewer and fewer firms now accept. Recruitment of counsel will be significantly more difficult if the opportunity to recover some of their fees in federal court is limited by the Special Death Penalty Compensation Procedures.

3. The Special Death Penalty Compensation Procedures do not help ensure the fair administration of the death penalty in the Fourth Circuit.

Justice demands that proceedings in a death penalty case must be fair and truly adversarial. The results in death penalty cases must be based on the merits and not on factors such as the availability of resources for the defense or arbitrary limits on counsel compensation. The government has no such restrictions on the number of attorney hours or the amount of money it can commit to a capital case. By limiting defense counsel, these important cases will be decided on a dramatically uneven playing field. Additional disparities will be created between capital defendants who are represented by CJA counsel and those who are represented by Federal Defender Offices, who will be able to commit whatever attorney resources they deem appropriate to effective representation. The fairness of death penalty proceedings will be seriously compromised, and justice may be denied as a result.

For these reasons, the American Bar Association urges the Fourth Circuit Judicial Council to withdraw the proposed Special Death Penalty Compensation Procedures. We are available and willing to assist you in any manner you would find helpful in crafting Procedures consistent with the ABA’s standards.

Thank you for the opportunity to submit these comments.

Respectfully submitted,

[Signature]

Wm. (Bill) T. Robinson III
President