

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 6.8 OF
THE ARIZONA RULES OF
CRIMINAL PROCEDURE

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Supreme Court No. R-05-00__

This petition seeks an amendment of Rule 6.8 of the Arizona Rules of Criminal Procedure to ensure that counsel appointed in capital cases comply with the practitioner specific guidelines set forth in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised Edition February 2003) (attached as Exhibit A). The proposed amendment is a logical extension of United States Supreme Court jurisprudence addressing this issue and is consistent with this Court’s prior amendments to Rule 6.8, which required lead trial counsel to be familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See* Rule 6.8(b)(1)(iii), ARIZ. R. CRIM. P.

In assessing the performance of counsel in capital cases, the United States Supreme Court has consistently and increasingly referred to the American Bar Association’s (“ABA”) published standards guiding the performance of defense counsel in such cases. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984);

Williams v. Taylor, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005).¹

In *Strickland* the Court established that the proper standard for attorney performance in criminal cases “is that of reasonably effective assistance.” *Id.* The Court explained that prevailing professional norms define the standard and that the Sixth Amendment requires counsel to comply with those norms. The Court noted in *Strickland*, which was decided in 1984, that one source of those norms were the ABA Standards for Criminal Justice.

In *Williams*, the Court again referred to the ABA Standards for Criminal Justice in assessing counsel’s performance in a capital case. The Court listed a number of shortcomings in counsel’s investigations and noted that “[w]hether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s background. *See* 1 ABA Standards for Criminal Justice 4-4.1, commentary, pp. 4-55 (2d ed. 1980).” 529 U.S. at 396.

¹ *Strickland* cites the *ABA Standards for Criminal Justice*, a predecessor to the capital-case-specific ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. *Williams* cites the same.

Three years later in *Wiggins*, the Court reemphasized its reliance in *Williams*'s on the ABA Standards:

In finding Williams' ineffectiveness claim meritorious, we...concluded that counsel's failure to...present voluminous mitigating evidence...could not be justified as a tactical decision...because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant's background (citing 1 ABA Standards for Criminal Justice commentary). 539 U.S. at 522.

Finally, in *Rompilla*, the Court relied at least as heavily on ABA Standards and Guidelines as it did in *Wiggins*. Demonstrating that the Standards represent the objective reasonable standards that *Strickland* requires counsel to follow, 466 U.S. at 688, the Court stated that it "long [has] referred to [these ABA Standards] as 'guides to determining what is reasonable.'" 125 S. Ct. at 2466 (quoting *Wiggins*, 539 U.S., at 524 (quoting *Strickland*, 466 U.S., at 688)).

Petitioners propose that Rule 6.8 of the Arizona Rules of Criminal Procedure be amended as follows:

Rule 6.8. Standards for appointment and performance of counsel in capital cases.

- a. General.** To be eligible for appointment in a capital case, an attorney
 - (1) Shall have been a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment;

- (2) Shall have practiced in the area of state criminal litigation for three years immediately preceding the appointment; and
- (3) Shall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

b. Trial Counsel.

- (1) *Lead counsel.* To be eligible for appointment as lead counsel, an attorney must meet the qualifications set forth in section (a) of this rule and the following:
 - (i) Shall have practiced in the area of state criminal litigation for five years immediately preceding the appointment;
 - (ii) Shall have been lead counsel in at least nine felony jury trials that were tried to completion and have been lead counsel or co-counsel in at least one capital murder jury trial;
 - (iii) Shall be familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and shall comply with Guidelines 1.1.

10.2, 10.3, 10.4(B-D), 10.5, 10.6, 10.7, 10.8, 10.9.1, 10.9.2, 10.10.1, 10.10.2, 10.11, 10.12, 10.13, and 10.14; and

- (iv) Shall have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational hours of relevant training or educational programs in the area of criminal defense.

- (2) *Co-counsel.* To be eligible for appointment as co-counsel, an attorney must be a member in good standing of the State Bar of Arizona and shall have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense. Section (b)(1)(iii) applies to co-counsel.

- c. **Appellate and Post-conviction Counsel.**
To be eligible for appointment as appellate

or post-conviction counsel, an attorney must meet the qualifications set forth in section (a) of this rule and the following:

- (1) Within three years immediately preceding the appointment have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings;
- (2) Have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense; and
- (3) Shall be familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and

shall comply with Guidelines 1.1,
10.15.1 and 10.15.2.

- d. Exceptional Circumstances.** In exceptional circumstances and with the consent of the Supreme Court, an attorney may be appointed who does not meet the qualifications set forth in sections (a)(1) and (2), (b) and (c) of this rule, providing that the attorney's experience, stature and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in this rule and that the attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule. Section (b)(1)(iii) and (c)(3) shall apply to attorneys appointed under this section.

RESPECTFULLY SUBMITTED this 7th day of December, 2005.

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American Bar Association

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

Black Letter Only

**Revised Edition
February 2003**

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The following black-letter text of the guidelines has been formally approved by the American Bar Association House of Delegates as official policy.

Introduction

This revised edition of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* is the product of a two-year long drafting effort. In April 2001, the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation jointly sponsored the ABA Death Penalty Guidelines Revision Project to update the Guidelines, which were originally adopted by the ABA House of Delegates in 1989. An Advisory Committee of experts was recruited to review and identify necessary revisions, including representatives from the following ABA and outside entities: ABA Criminal Justice Section; ABA Section of Litigation; ABA Section on Individual Rights and Responsibilities; ABA Standing Committee on Legal Aid and Indigent Defendants; ABA Special Committee on Death Penalty Representation; National Association of Criminal Defense Lawyers; National Legal Aid and Defender Association; Federal Death Penalty Resource Counsel; Habeas Assistance and Training Counsel; and State Capital Defenders Association.

Expert capital litigators were retained as consultants to the ABA Death Penalty Guidelines Revision Project to incorporate the decisions of the Advisory Committee into preliminary drafts of revisions. Drafts were considered by Advisory Committee members during several day-long meetings in Washington, D.C. as well as follow-up discussions. The final working draft of the revisions was approved by the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation. The ABA House of Delegates approved the revised edition of the Guidelines on February 10, 2003.

Acknowledgements

The American Bar Association gratefully acknowledges the assistance of the members of the Advisory Committee and others who contributed valuable insight and expertise to this endeavor: Barry Alberts, private practitioner, Schiff Hardin & Waite, Chicago, Illinois (Representative from ABA Section of Litigation); Sylvia Bacon, Judge (Retired), Superior Court of the District of Columbia, Washington, D.C. (Representative from ABA Criminal Justice Section); Stephen B. Bright, Director, Southern Center for Human Rights, Atlanta, Georgia (Representative from National Association of Criminal Defense Lawyers); David I. Bruck, private practitioner, Columbia, South Carolina (Representative from Federal Death Penalty Resource Counsel); Mardi Crawford, Staff Attorney, New York State Defenders Association, Albany, New York; Lawrence J. Fox, private practitioner, Drinker Biddle & Reath LLP, Philadelphia, Pennsylvania (Chair, ABA Special Committee on Death Penalty Representation); Stephen K. Harper, Co-coordinator, Capital Litigation Unit, Miami-Dade County Public Defender's Office, Miami, Florida (Representative from National Legal Aid and Defender Association); Randy Hertz, Professor of Law, New York University School of Law, New York, New York; Henderson Hill, private practitioner, Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., Charlotte, North Carolina (Representative from ABA Special Committee on Death Penalty Representation); Denise LeBoeuf, Director, Capital Post-conviction Project of Louisiana, New Orleans, Louisiana; Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis, Indiana; Margaret Love, of counsel, Asbill Moffitt & Boss, Chartered, Washington, D.C.; Jill Miller, Forensic Social Worker, Madison, Wisconsin; L. Jonathan Ross, private practitioner, Wiggin & Nourie, P.A., Manchester, New Hampshire (Chair, ABA Standing Committee on Legal Aid and Indigent Defendants); Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York; Randolph Stone, Professor of Law, University of Chicago School of Law, Chicago, Illinois (Representative from ABA Standing Committee on Legal Aid and Indigent Defendants); Ronald J. Tabak, private practitioner, Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York (Representative from ABA Section of Individual Rights and Responsibilities); Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association, Washington, D.C.; and Denise Young, private practitioner, Tucson, Arizona (Representative from Habeas Assistance and Training Project).

The following ABA staff and ABA entities participated in this project: Terry Brooks; Rebecca Coffee; Shubhangi Deoras; Judith Gallant; Robin Maher; Melanie Mays; Elisabeth Semel; the Association of the Bar of the City of New York; Criminal Justice Section; the Special Committee on Death Penalty Representation; the Section of Individual Rights and Responsibilities; the Standing Committee on Legal Aid and Indigent Defendants; the Section of Litigation; and the Senior Lawyers Division.

Finally, the ABA thanks Raoul Schonemann, Chris Spaulding, and Janice Bergmann, who served as consultants to this project, and expresses its special appreciation to the Reporter, Eric M. Freedman, Professor of Law, Hofstra University School of Law, Hempstead, New York.

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Definitional Notes

Throughout these Guidelines:

1. As in the first edition, “should” is used as a mandatory term.
2. By “jurisdiction” is meant the government under whose legal authority the death sentence is to be imposed. Most commonly, this will be a state (as opposed to, *e.g.*, a county) or the federal government as a whole. The term also includes the military and any other relevant unit of government (*e.g.*, Commonwealth, Territory). Where a federal judicial district or circuit is meant, the Commentary will so state.
3. The terms “counsel,” “attorney,” and “lawyer” apply to all attorneys, whether appointed, retained, acting *pro bono*, or employed by any defender organization (*e.g.*, federal or state public defenders offices, resource centers), who act on behalf of the defendant in a capital case. When modified by “private,” these terms apply to both *pro bono* and retained attorneys.
4. The term “custody” is used in the inclusive sense of *Hensley v. Municipal Court*, 411 U.S. 345, 350-51 (1973).
5. The term “post-conviction” is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to 28 U.S.C. § 255, but including all applications of similar purport, *e.g.*, for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, *e.g.*, applications for original writs of habeas corpus, applications for certificates of probable cause), all applications

for interlocutory relief (*e.g.*, stay of execution, appointment of counsel) in connection with any of the foregoing. If a particular subcategory of post-conviction proceeding is meant, the language of the relevant Guideline or Commentary will so state.
6. The terms “defendant,” “petitioner,” “inmate,” “accused” and “client” are used interchangeably.
7. The terms “capital case” and “death penalty case” are used interchangeably.
8. The terms “defender organization,” “Independent Authority,” and “Responsible Agency” are defined in Guideline 3.1 and accompanying Commentary
9. The term “Legal Representation Plan” is defined in Guideline 2.1.

GUIDELINE 1.1 – OBJECTIVE AND SCOPE OF GUIDELINES

- A. 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 by any jurisdiction.**
- B. These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation.**

GUIDELINE 2.1 – ADOPTION AND IMPLEMENTATION OF A PLAN TO PROVIDE HIGH QUALITY LEGAL REPRESENTATION IN DEATH PENALTY CASES

- A. Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines (the “Legal Representation Plan”).**
- B. The Legal Representation Plan should set forth how the jurisdiction will conform to each of these Guidelines.**
- C. All elements of the Legal Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.**

GUIDELINE 3.1 – DESIGNATION OF A RESPONSIBLE AGENCY

- A. The Legal Representation Plan should designate one or more agencies to be responsible, in accordance with the standards provided in these Guidelines (the “Responsible Agency”) for:
1. ensuring that each capital defendant in the jurisdiction receives high quality legal representation, and
 2. performing all the duties listed in Subsection E.
- B. The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.
- C. The Responsible Agency for each stage of the proceeding in a particular case should be one of the following:

Defender Organization

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.
- 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 should be performed by the Independent Authority. The jurisdiction should 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 should, in accordance with the provisions of these Guidelines, 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;**
 4. **assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;**
 5. **monitor the performance of all attorneys providing representation in capital proceedings;**
 6. **periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;**
 7. **conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and**
 8. **investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.**

GUIDELINE 4.1 – THE DEFENSE TEAM AND SUPPORTING SERVICES

- A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.**
 - 1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, 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 should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality 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.**
 - 1. Counsel should have the right to have such services provided by persons independent of the government.**
 - 2. Counsel should have 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.**

GUIDELINE 5.1 – QUALIFICATIONS OF DEFENSE COUNSEL

- A. The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.**
- B. In formulating qualification standards, the Responsible Agency should insure:**
 - 1. That every attorney representing a capital defendant has:**
 - a. obtained a license or permission to practice in the jurisdiction;**
 - b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and**
 - c. satisfied the training requirements set forth in Guideline 8.1.**
 - 2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure 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.**

GUIDELINE 6.1 – WORKLOAD

The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.

GUIDELINE 7.1 – MONITORING; REMOVAL

- A. The Responsible Agency should monitor the performance of all defense counsel to ensure that the client is receiving high quality legal representation. Where there is evidence that an attorney is not providing high quality legal representation, the Responsible Agency should take appropriate action to protect the interests of the attorney's current and potential clients.
- B. The Responsible Agency should 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 high quality legal representation.
- C. The Responsible Agency should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality 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 high quality 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 Guideline should be restored to the roster only in exceptional circumstances.
- F. The Responsible Agency should ensure that this Guideline is implemented consistently with Guideline 2.1(C), so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Guideline.

GUIDELINE 8.1 – TRAINING

- A. The Legal Representation Plan should 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 should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of 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 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 insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.**

GUIDELINE 9.1 – FUNDING AND COMPENSATION

- A. The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.**
- 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.**
 - 2. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**
 - 3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**
- C. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**
 - 1. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**
 - 2. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**
 - 3. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for**

services performed in or out of court. Periodic billing and payment should be available.

- D. Additional compensation should be provided in unusually protracted or extraordinary cases.**
- E. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.**

GUIDELINE 10.1 – ESTABLISHMENT OF PERFORMANCE STANDARDS

- A. The Responsible Agency should establish standards of performance for all counsel in death penalty cases.**
- B. The standards of performance should be formulated so as to insure that all counsel provide high quality legal representation in capital cases in accordance with these Guidelines. The Responsible Agency should refer to the standards when assessing the qualifications or performance of counsel.**
- C. The standards of performance should include, but not be limited to, the specific standards set out in these Guidelines.**

GUIDELINE 10.2 – APPLICABILITY OF PERFORMANCE STANDARDS

Counsel should provide high quality legal representation in accordance with these Guidelines for so long as the jurisdiction is legally entitled to seek the death penalty.

GUIDELINE 10.3 – OBLIGATIONS OF COUNSEL RESPECTING WORKLOAD

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines.

GUIDELINE 10.4 – THE DEFENSE TEAM

- A. When it is responsible for designating counsel to defend a capital case, the Responsible Agency should designate a lead counsel and one or more associate counsel. The Responsible Agency should ordinarily solicit the views of lead counsel before designating associate counsel.**
- B. Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.**
 - 1. Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Guidelines, unless:**
 - a. The Guideline specifically imposes the duty on “lead counsel,” or**
 - b. The Guideline specifically imposes the duty on “all counsel” or “all members of the defense team.”**
- C. As soon as possible after designation, lead counsel should assemble a defense team by:**
 - 1. Consulting with the Responsible Agency regarding the number and identity of the associate counsel;**
 - 2. Subject to standards of the Responsible Agency that are in accord with these Guidelines and in consultation with associate counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:**
 - a. at least one mitigation specialist and one fact investigator;**
 - b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;**
 - c. any other members needed to provide high quality legal representation.**
- D. Counsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.**

GUIDELINE 10.5 – RELATIONSHIP WITH THE CLIENT

- A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.**
- B.**
 - 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel’s entry into the case.**
 - 2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client’s rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.**
 - 3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.**
- C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:**
 - 1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;**
 - 2. current or potential legal issues;**
 - 3. the development of a defense theory;**
 - 4. presentation of the defense case;**
 - 5. potential agreed-upon dispositions of the case;**
 - 6. litigation deadlines and the projected schedule of case-related events; and**
 - 7. relevant aspects of the client’s relationship with correctional, parole, or other governmental agents (*e.g.*, prison medical providers or state psychiatrists).**

**GUIDELINE 10.6 – ADDITIONAL OBLIGATIONS OF COUNSEL
REPRESENTING A FOREIGN NATIONAL**

- A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.**
- B. Unless predecessor counsel has already done so, counsel representing a foreign national should:**
 - 1. immediately advise the client of his or her right to communicate with the relevant consular office; and**
 - 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.**
 - a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.**

GUIDELINE 10.7 – INVESTIGATION

- A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.**
 - 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.**
 - 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.**
- B.**
 - 1. All post-conviction counsel have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.**
 - 2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.**

GUIDELINE 10.8 – THE DUTY TO ASSERT LEGAL CLAIMS

- A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:**
- 1. consider all legal claims potentially available; and**
 - 2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and**
 - 3. evaluate each potential claim in light of:**
 - a. the unique characteristics of death penalty law and practice; and**
 - b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and**
 - c. the importance of protecting the client’s rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and**
 - d. any other professionally appropriate costs and benefits to the assertion of the claim.**
- B. Counsel who decide to assert a particular legal claim should:**
- 1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client’s case and the applicable law in the particular jurisdiction; and**
 - 2. ensure that a full record is made of all legal proceedings in connection with the claim.**
- C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:**
- 1. asserting legal claims whose basis has only recently become known or available to counsel; and**
 - 2. supplementing claims previously made with additional factual or legal information.**

GUIDELINE 10.9.1 – THE DUTY TO SEEK AN AGREED-UPON DISPOSITION

- A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.**
- B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:**
 - 1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;**
 - 2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;**
 - 3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing Guidelines or mandatory sentencing requirements;**
 - 4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;**
 - 5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;**
 - 6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;**
 - 7. the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;**

- 8. concessions that the client might offer, such as:**
 - a. an agreement to proceed waive trial and to plead guilty to particular charges;**
 - b. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;**
 - c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;**
 - d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;**
 - e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;**
 - f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;**
 - g. an agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;**
 - h. agreements such as those described in Subsections 8 (a)-(h) respecting actual or potential charges in another jurisdiction;**
- 9. benefits the client might obtain from a negotiated settlement, including:**
 - a. a guarantee that the death penalty will not be imposed;**
 - b. an agreement that the defendant will receive a specified sentence;**
 - c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;**

- d. an agreement that one or more of multiple charges will be reduced or dismissed;
 - e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
 - f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
 - g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement;
 - h. agreements such as those described in Subsections 9(a)-(h) respecting actual or potential charges in another jurisdiction.
- C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.
- D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.
- E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.
- F. Counsel should not accept any agreed-upon disposition without the client's express authorization.
- G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

GUIDELINE 10.9.2 – ENTRY OF A PLEA OF GUILTY

- A. The informed decision whether to enter a plea of guilty lies with the client.**
- B. In the event the client determines to enter a plea of guilty:**
 - 1. Prior to the entry of the plea, counsel should:**
 - a. make certain that the client understands the rights to be waived by entering the plea and that the client’s decision to waive those rights is knowing, voluntary and intelligent;**
 - b. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea;**
 - c. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court and providing a statement concerning the offense.**
 - 2. During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.**

GUIDELINE 10.10.1 – TRIAL PREPARATION OVERALL

As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

GUIDELINE 10.10.2 – VOIR DIRE AND JURY SELECTION

- A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.**
- B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding “death qualification” concerning any potential juror’s beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.**
- C. Counsel should consider seeking expert assistance in the jury selection process.**

GUIDELINE 10.11 – THE DEFENSE CASE CONCERNING PENALTY

- A. As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution’s case in aggravation.**
- B. Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.**
- C. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.**
- D. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution’s case in aggravation.**
- E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.**
- F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:**
 - 1. Witnesses familiar with and evidence relating to the client’s life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client’s life, or would otherwise support a sentence less than death;**
 - 2. Expert and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability for the underlying offense(s); to give a favorable opinion as to the client’s capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;**

3. **Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;**
 4. **Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.**
 5. **Demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.**
- G. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.**
- H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.**
- I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.**
- J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:**
1. **carefully consider**
 - a. **what legal challenges may appropriately be made to the interview or the conditions surrounding it, and**
 - b. **the legal and strategic issues implicated by the client's co-operation or non-cooperation;**

2. insure that the client understands the significance of any statements made during such an interview ; and
 3. attend the interview.
- K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.
- L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

GUIDELINE 10.12 – THE OFFICIAL PRESENTENCE REPORT

- A. If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:**
- 1. where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;**
 - 2. provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it.**
 - 3. review the completed report;**
 - 4. take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report;**
 - 5. take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate or misleading.**

GUIDELINE 10.13 – THE DUTY TO FACILITATE THE WORK OF SUCCESSOR COUNSEL

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

- A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
- B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
- C. sharing potential further areas of legal and factual research with successor counsel; and
- D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

GUIDELINE 10.14 – DUTIES OF TRIAL COUNSEL AFTER CONVICTION

- A. Trial counsel should be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence.
- B. Trial counsel should take whatever action(s), such as filing a notice of appeal, and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief.
- C. Trial counsel should not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Guideline 10.15 applies in its entirety.
- D. Trial counsel should take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

GUIDELINE 10.15.1 – DUTIES OF POST-CONVICTION COUNSEL

- A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction’s procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.**
- B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.**
- C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.**
- D. The duties of the counsel representing the client on direct appeal should include filing a petition for *certiorari* in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.**
- E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:**
 - 1. maintain close contact with the client regarding litigation developments; and**
 - 2. continually monitor the client’s mental, physical and emotional condition for effects on the client’s legal position;**
 - 3. keep under continuing review the desirability of modifying prior counsel’s theory of the case in light of subsequent developments; and**
 - 4. continue an aggressive investigation of all aspects of the case.**

GUIDELINE 10.15.2 – DUTIES OF CLEMENCY COUNSEL

- A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.**
- B. Clemency counsel should conduct an investigation in accordance with Guideline 10.7.**
- C. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.**
- D. Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if not should seek appropriate redress.**