



**TESTIMONY**

*of*

**EMILY M. OLSON-GAULT**

*on behalf of the*

**AMERICAN BAR ASSOCIATION**

*for the*

**Birmingham, Alabama Hearing**

*before the*

**JUDICIAL CONFERENCE OF THE UNITED STATES**

**COMMITTEE TO REVIEW**

**THE CRIMINAL JUSTICE ACT PROGRAM**

**February 18, 2016**

Chair Cardone, Chair Emeritus Prado, and distinguished members of the Ad-Hoc Committee to Review the Criminal Justice Act:

My name is Emily Olson-Gault. I submit this written testimony on behalf of the American Bar Association, for which I serve as Director of the Death Penalty Representation Project. The American Bar Association is among the world's largest voluntary professional organizations, with a membership of over 400,000 lawyers, including a broad cross-section of prosecuting attorneys and criminal defense counsel, judges, and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law throughout the world. I submit this testimony at the request of ABA President Paulette Brown to present to the Committee the ABA's position on the administration of the Criminal Justice Act as it relates to the provision of counsel in death penalty cases. This position, as with all policies of the ABA, reflects the collaborative efforts of representatives of every aspect of the profession, including prosecutors, defense attorneys, judges, and academics.

The ABA has long been concerned with the quality and availability of defense counsel in death penalty cases. In 1986, the ABA created the Death Penalty Representation Project to address the lack of counsel available to provide representation to indigent death row prisoners in their state and federal habeas corpus cases. In 2001, the ABA created the Death Penalty Due Process Review Project (then known as the Death Penalty Moratorium Implementation Project) to conduct research regarding state capital punishment systems and their ability to ensure fairness and accuracy in all capital cases. While the ABA does not take a position on the death penalty itself, it calls for all jurisdictions that retain the death penalty to ensure due process and fairness at every stage of a capital proceeding. No single factor is more essential to providing due process than access to qualified, adequately resourced defense counsel.

For more than 30 years, the ABA has engaged in a number of activities designed to promote access to qualified, adequately resourced defense counsel in capital cases. We have recruited hundreds of private civil law firms to provide *pro bono* representation to indigent individuals facing a death sentence. These law firms have provided representation at every stage of capital cases, from pretrial through clemency, with the large majority working on habeas corpus proceedings, including those brought under 28 U.S.C. § 2254 and § 2255. The ABA also works with local stakeholders in death penalty jurisdictions to effect important reforms of their death penalty systems and to ensure fairness, due process, and effective legal representation. Finally, the ABA engages in educational efforts, addressing bar associations, community groups, and judicial conferences about the problems with the administration of the death penalty and proven strategies to improve counsel performance, which in turn reduce mistakes and wrongful convictions.

## I. History and Relevance of the ABA Guidelines

In 1989, the ABA adopted the *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (the “ABA Guidelines”).<sup>1</sup> These guidelines reflected long-standing professional norms in the capital defender community and set forth a baseline for effective representation at every stage of a capital case, from pretrial through clemency, and in any connected litigation, including federal habeas corpus proceedings. The ABA Guidelines were revised and updated in 2003 to reflect changes in community norms and the state of the law.<sup>2</sup> Since 1989, the ABA Guidelines have been relied upon by state and federal judges, including the U.S. Supreme Court, in more than 300 reported opinions in nearly every active death penalty jurisdiction in the country. The ABA Guidelines continue to be consistent with the precedent of the U.S. Supreme Court, which has acknowledged the relevance of both the ABA Guidelines specifically and professional association standards generally.<sup>3</sup> The ABA Guidelines have also been recognized by statute, court rule, and state and local bar associations as providing the national standard of care for capital cases. Consistent with this national recognition of the ABA Guidelines, the 2010 update to the “Spencer Report” to the United States Judicial Conference Committee of Defender Services noted that counsel in federal death penalty cases “are expected to comply with Guidelines 1.1 and 10.2 et seq. of the [ABA Guidelines] . . . .”<sup>4</sup>

The ABA brings the unique viewpoint of a national organization that combines voices from virtually every type of actor in the criminal justice system, including prosecutors, defense attorneys, and the judiciary. From this perspective, we are able to see national trends and identify systemic problems in capital counsel systems. The ABA most frequently observes these systemic issues in state courts, where funding and training often lag far behind the federal system. But even in the federal system, we confront these same

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<sup>1</sup> ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS’N 1989, revised 2003).

<sup>2</sup> ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003) [hereinafter “ABA Guideline(s)"], in 31 HOFSTRA L. REV. 913 (2003), available at <http://ambar.org/2003Guidelines>.

<sup>3</sup> “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ We long have recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable.’” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Bobby v. Van Hook*, 558 U.S. 4 (2009) (*per curiam*); *Florida v. Nixon*, 543 U.S. 175, 191 and n. 6 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000)); see also *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (noting “We have long referred to these ABA Standards as guides to determining what is reasonable”) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) and *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

<sup>4</sup> JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (Sept. 2010), available at <http://www.uscourts.gov/file/2945/download>.

challenges on a regular basis. There are several broad categories of issues that the ABA has encountered in the federal death penalty system, including funding, counsel appointment, and counsel performance. For each of these issues, ABA Guidelines and other ABA standards<sup>5</sup> provide guidance to help courts and defender programs ensure high-quality defense representation.

## **II. Capital Defense Funding**

Adequate funding is essential to the provision of high-quality representation in capital cases. When counsel fails to provide effective representation, it is often due to limitations such as fee caps and the failure to fully fund expert and investigative members of the defense team. For example, the ABA has been contacted regularly by appointed counsel in federal cases who must make the impossible choice of providing effective representation or paying the overhead for their law practice. As discussed in the ABA Guidelines, failure to provide adequate funding results in the inability to attract qualified counsel to take on capital cases<sup>6</sup> and, where adequate counsel might be found, the inability of that counsel to conduct the necessary and thorough investigation of both guilt and penalty phase issues required at every stage of a capital case.<sup>7</sup>

The ABA Guidelines instruct that a legal representation plan must ensure “funding for the full cost of high quality legal representation . . . .”<sup>8</sup> To achieve this goal, the ABA Guidelines give specific suggestions, including elimination of flat fees and fee caps, compensation for actual attorney time spent working on the case, and full compensation for non-attorney members of the defense team at a rate that is commensurate with rates in the private sector.<sup>9</sup> The ABA is aware that federal districts differ on the imposition of funding limitations and urges federal courts that continue to impose compensation caps to amend this practice, which is antithetical to the provision of high-quality representation.

Importantly, sufficient funding must be available for every stage of a capital case, from pre-trial through clemency.<sup>10</sup> The ABA’s Capital Clemency Resource Initiative (CCRI)

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<sup>5</sup> Other useful standards include the *ABA Ten Principles of a Public Defense Delivery System* (“ABA Ten Principles”) and the *ABA Standards for Criminal Justice: Providing Defense Services*. These standards address broader issues such as independence, parity of resources, adequate training, and the role of the private bar which are applicable to capital and non-capital cases alike.

<sup>6</sup> “It is [the] inmates—and the justice system—rather than lawyers (who can always move to more lucrative fields) that are victimized when jurisdictions fail to fulfill their financial responsibilities. What is ‘most important [is that] the quality of representation often suffers when adequate compensation for counsel is not available.’” ABA Guideline 9.1, commentary, citing ABA Standards for Criminal Justice, Standard 5-2.4.

<sup>7</sup> See ABA Guidelines 9.1 (“Funding and Compensation”) and 10.7 (“Investigation”).

<sup>8</sup> ABA Guideline 9.1(A).

<sup>9</sup> ABA Guideline 9.1(B) and (C).

<sup>10</sup> See ABA Guidelines 1.1 (“Objective and Scope of Guidelines”) and 10.2 (“Applicability of Performance Standards”).

was created with the goal of providing training and resources to defenders representing clients in their capital clemency proceedings. The CCRI's research has uncovered that many federal district courts are placing caps on the funds they are allocating for capital clemency representation. Such caps are likely to significantly impair the ability of certain defenders to vigorously represent their clients.

As discussed in ABA Guideline 9.1, the imposition of a flat fee limits the availability of qualified counsel, hinders defenders' ability to secure expert assistance, and fails to take into account the enormous amount of time that clemency representation may entail. In order to ensure that clemency remains a viable "fail-safe" within our death penalty system,<sup>11</sup> and to avoid creating a potential conflict of interest for attorneys who undertake this representation, the ABA urges courts to follow the guidance of Guideline 9.1 and fully compensate attorney and non-attorney members of the defense team at every stage of a capital case, including clemency.

### **III. Counsel Appointment Standards**

#### *a. Qualifications for counsel appointment*

The Judicial Conference of the United States' *Guidelines for Administering the Criminal Justice Act and Related Statutes* ("CJA Guidelines") instruct, among other things, to consider bar association qualification standards and the recommendations of federal and community defender organizations when evaluating the qualifications of an attorney for appointment to a federal death penalty case.<sup>12</sup> For the appointment of counsel in post-conviction proceedings, the CJA Guidelines require counsel to have been admitted in the court where the case will be prosecuted for at least five years and to have at least three years of felony experience. The 1989 version of the ABA Guidelines provided similar recommendations, requiring, among other things, at least five years of experience in the field of criminal defense. In the 2003 revision, however, the focus of the qualification standards explicitly shifted from quantitative to qualitative measures. This was in recognition of the fact that quantitative measures, such as years of experience, are insufficient to determine an attorney's qualifications for the task of representing a capital defendant or prisoner.<sup>13</sup>

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<sup>11</sup> See *Harbison v. Bell*, 556 U.S. 180, 194 (2009) (holding that 18 U.S.C. § 3599 permits federally funded habeas counsel in death penalty cases to continue their representation through state clemency proceedings and that Congress intended to ensure that death sentenced individuals would not be without an attorney to navigate the "sometimes labyrinthine clemency process" of many states).

<sup>12</sup> GUIDELINES FOR ADMINISTERING THE CRIMINAL JUSTICE ACT AND RELATED STATUTES [hereinafter "CJA Guidelines"] (JUDICIAL CONFERENCE OF THE UNITED STATES, vol. 7), available at <http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines>.

<sup>13</sup> ABA Guideline 5.1, History of Guideline and commentary.

The ABA frequently encounters cases where defenders with many years of experience are routinely providing ineffective representation to their capital clients; conversely, we have found in our 30 years of experience working with *pro bono* law firms that these civil litigators who lack specific felony experience nonetheless provide superior post-conviction representation.<sup>14</sup> Therefore, in addition to requiring that each appointed attorney is licensed to practice in the jurisdiction and has demonstrated a commitment to providing high quality representation, the ABA Guidelines recommend consideration of the following factors:

- 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.<sup>15</sup>

These considerations are designed to assist the appointing authority in making a nuanced determination of counsel's qualifications for the unique task of defending a death penalty case. The ABA also encourages reliance on the knowledge and expertise of federal and community defender offices when assessing counsel's qualifications for appointment in habeas corpus and other proceedings. It is the experience of the ABA that the individuals in these offices, in addition to being some of the most skilled and talented capital defenders in the country, are extremely knowledgeable about members of the legal community in their jurisdictions and are able to provide valuable insight and guidance regarding appointment issues.

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<sup>14</sup> See ABA Guideline 5.1, commentary, n. 111.

<sup>15</sup> ABA Guideline 5.1.

*b. Continuity of counsel between state and federal post-conviction proceedings*

The CJA Guidelines instruct judges to maintain continuity of counsel between state habeas and federal § 2254 proceedings.<sup>16</sup> While continuity of counsel may, in fact, be in the best interests of the client and of providing effective representation in a given case, this should not be the presumption. This is particularly true given the U.S. Supreme Court’s decision in *Martinez v. Ryan*.<sup>17</sup> Before a court grants equitable relief under *Martinez*, federal counsel must first demonstrate that state counsel was ineffective. It is both a practical and an ethical problem for a lawyer to raise a claim of ineffectiveness against him- or herself. ABA Guideline 2.1 calls for the representation plan to “provide a mechanism to ensure conflict-free representation.”<sup>18</sup> Consistent with this Guideline, the ABA encourages adoption of a plan that provides for review of potential *Martinez* issues by conflict-free counsel who can advise the client about the benefits and drawbacks of continuing appointment of the same attorney in state and federal habeas proceedings.

#### **IV. Performance and Monitoring of Capital Counsel**

ABA Guidelines 10.1 through 10.15.2 detail performance standards for counsel in capital cases. In order to provide effective representation, this set of Guidelines collectively requires, among other things, that counsel limit caseloads, retain the assistance of experts and investigators, develop a relationship of trust with the client, conduct an investigation of both guilt and penalty issues, thoroughly investigate all potential claims before deciding whether to assert them, cooperate with successor counsel, and seek the necessary funding to meet these requirements.

The ABA regularly receives requests for *pro bono* assistance from death row prisoners who already have appointed counsel. We hear greatly troubling stories of prisoners who have gone many months, and sometimes years, without any communication from their attorneys. These same attorneys often fail to conduct a searching investigation of guilt and innocence issues and consequently file briefs with little or no new evidence that could support a claim for habeas relief. The ABA applauds the large majority of federal defense counsel, including CJA Panel Attorneys, who are dedicated, talented, and committed to zealous advocacy on behalf of their clients. But we are also troubled by how often we see the same attorneys named in these desperate pleas for help from death row prisoners.

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<sup>16</sup> See CJA Guideline 620.70(a).

<sup>17</sup> 132 S.Ct. 1309 (2012) (recognizing that failures of post-conviction counsel to effectively raise certain claims in state habeas corpus proceedings may serve as cause to overcome the procedural bars that prevent review of claims by federal courts in § 2254 proceedings).

<sup>18</sup> See ABA Guideline 2.1 (“Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases”) and Commentary.

It is also discouraging when we see these repeated failures of counsel coming from jurisdictions that have adopted in substantive part the ABA Guidelines' performance standards. This tells us that performance standards alone are simply not enough. The counsel appointment system must also include a well-defined mechanism for regularly monitoring and enforcing these standards. The CJA Standards do not include any recommendations for such a mechanism. Instead, each federal jurisdiction currently employs its own procedures for monitoring and removal, leading to inconsistent outcomes.

ABA Guideline 7.1(B) recommends that the responsible agency “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 representation.” The performance standards in Guidelines 10.1 through 10.5.1 are designed to be used by monitoring authorities to help with the evaluation of defense counsel as part of this publicized procedure.<sup>19</sup> Notably, the ABA Guidelines call for the responsible agency to be independent of the judiciary, either in the form of a defender organization or independent authority run by defense attorneys.<sup>20</sup> This responsible agency is also tasked by ABA Guideline 3.1 with responsibility for recruiting, appointing, and training defense attorneys for all stages of a capital case.

The ABA Guidelines are designed to provide a roadmap for courts to assist with ensuring high-quality representation. However, no plan will truly improve the quality of counsel if the criteria are not uniformly applied and if unqualified or poorly performing attorneys remain eligible for appointment. Similarly, the responsible agency must be serious about investigating complaints regarding the performance of counsel and removing those attorneys who do not meet qualification and performance standards. We encourage this Committee to use the tools in the ABA Guidelines as they were intended, to help ensure high-quality defense in capital cases.

In closing, we appreciate the Committee's consideration of the ABA's perspective on these important issues and are happy to provide any additional information that the Committee might find helpful. Thank you for the opportunity to provide these remarks.

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<sup>19</sup> The ABA also recognizes other valuable assets that already exist within the federal defender system that would help with such monitoring. As with the assessment of qualification standards, it has been the experience of the ABA that lawyers in federal and community defender offices are particularly knowledgeable about counsel issues occurring within their jurisdictions and would be a valuable source of information for the monitoring authority.

<sup>20</sup> ABA Guideline 3.1 (“Designation of a Responsible Agency”). *See also* ABA Ten Principles (“The public defense function, including the selection, funding, and payment of defense counsel, is independent.”)