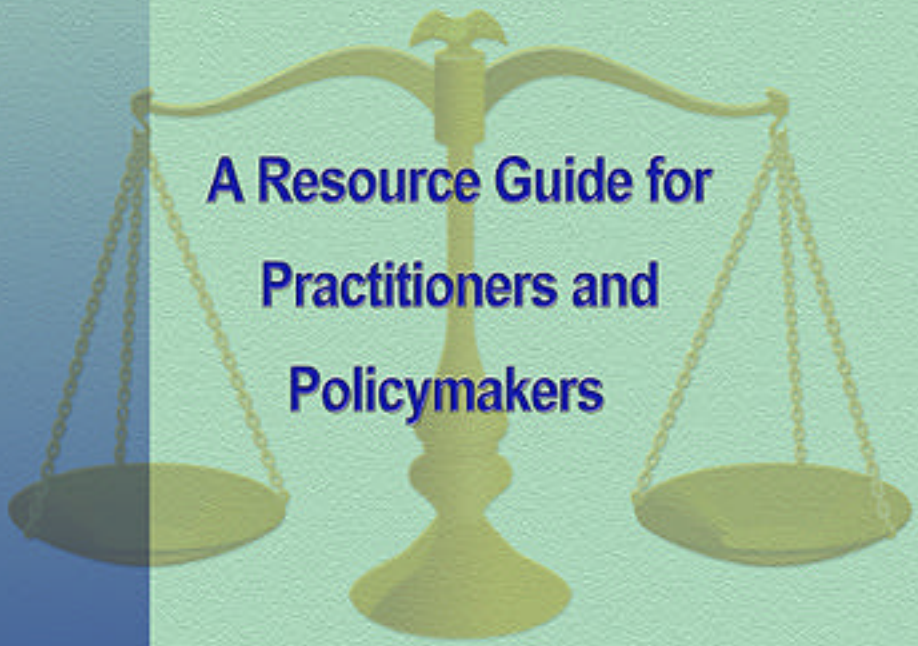
U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

Compendium of Standards for Indigent Defense Systems



A Resource Guide for Practitioners and Policymakers

Volume III

Standards for

Capital Case Representation

December 2000

This document was prepared by the Institute for Law and Justice and supported by a contract with the Bureau of Justice Assistance, United States Department of Justice. The opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice. The permission of copyright holders for the inclusion of copyright materials herein is gratefully acknowledged and such inclusion does not operate to waive in any context the rights of the copyright holders under the Copyright Act.

Foreword

The U.S. Department of Justice (DOJ) is committed to the principle that all Americans should have equal access to quality legal defense. As Attorney General Janet Reno has

Gideon v. Wainwright to provide every criminal defendant charged with a serious crime with competent counsel." Toward that end, Attorney General Reno has encouraged cooperative efforts among justice officials and the private bar "to strive to implement helpful standards for indigent defense standards that cover, among other things, skills, experience, and appropriate workloads for indigent defense offices." Implementation of standards governing all aspects of indigent defense systems can enhance the fairness and credibility of our justice system.

The *Compendium of Standards for Indigent Defense Systems* brings together standards from a wide variety of sources and shows the different ways in which they address practice and procedure: administration of defense systems, attorney performance, capital case representation, appellate services, and juvenile justice defense. Included are standards and rules issued by national organizations; by state agencies and special interest groups, including bar associations, public defender organizations, and state high courts; and by local court systems.

The standards presented here do not necessarily represent the only acceptable models. Rather, they have been collected to give practitioners and policymakers examples of the range of current "best practices" developed at the state and local level, along with the recommendations of several national standards-setting bodies.

The Office of Justice Programs is making the *Compendium* available in hard copy, CD, and electronic formats. It is our hope that this resource will be used by State and local governments and agencies to compare standards from other jurisdictions and develop their own, thereby helping to assure the fulfillment of the Sixth Amendment and of *Gideon v. Wainwright.*

Mary Lou Leary
Acting Assistant Attorney General
Office of Justice Programs

Nancy E. Gist
Director
Bureau of Justice Assistance

Acknowledgments

The *Compendium of Standards for Indigent Defense Systems* was edited by Neal Miller of the Institute for Law and Justice and Peter Ohlhausen of Ohlhausen Research, Inc.

Grateful appreciation goes to former Assistant Attorney General Laurie Robinson for her support of the project and to the following individuals for their contributions to the development and production of the *Compendium*:

Advisory Board Members

Ms. Marea Beeman, Vice President, The Spangenberg Group

Professor Adele Bernhard, Pace University School of Law

Mr. Larry Landis, Director, Indiana Public Defender Council

Mr. Jim Neuhard, State Appellate Defender, State of Michigan

Mr. Paul Petterson, Indigent Defense Counsel, National Association of Criminal Defense Lawyers

Ms. Patti Puritz, Director, Juvenile Justice Center, American Bar Association

Ms. Jo-Ann Wallace, Chief Counsel, National Legal Aid and Defender Association

Mr. Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association

Professor Richard Wilson, Washington College of Law, The American University

Institute for Law and Justice Staff

Edward Connors, President

Joan Peterschmidt, Senior Project Management Associate

Office of Justice Programs Staff

Arnold J. Hopkins, Office of the Assistant Attorney General, Office of Justice Programs

Kristine Orlando, Grants Program Specialist, Bureau of Justice Assistance

Contents

Introduction

List of Standards and Table of Key Elements

A. General
1. Need for Standards
2. Need to Ensure Quality/Effective Legal Services
3. Insufficiency of Minimum Criminal Defense Standards

B. Counsel Appointment
1. Method of Appointment
2. Trial Attorney Qualifications/Experience
3. Appeals Attorney Qualifications/Experience
4. Postconviction Attorney Qualifications/Experience
5. Monitoring of Performance and Removal from Roster
6. Requirement for Training

C. Plan Elements
1. Requirement for a Formal Plan
2. Provision for Support Services
3. Related Standards

D. Financial
1. Client Eligibility
2. Attorney Compensation Rate

E. Workload
1. Requirement That Workload Not Be Excessive
2. Specification of the Number of Attorneys per Case

F. Attorney Performance: Pretrial
1. Requirement for Performance Standards
2. Need to Prepare As If Death Penalty to Be Sought
3. Theory of Case
4. Independent Investigation
5. Close Contact with Client

6. Pretrial Motions
7. Plea Negotiations
8. Need to Inform Client of Plea Options
9. Explanation of Plea Contents and Implications

G. Attorney Performance: Trial

1. Preparing for Voir Dire
2. Preserving Objections to Error
3. Establishing a Plan to Avoid Death Sentence

H. Attorney Performance: Sentencing

1. Preparing for Sentencing
2. Conducting Sentencing Investigation
3. Considering Own Sentencing Report
4. Preparing for Prosecutor Arguments at Sentencing
5. Considering Full Scope of Defense Arguments

I. Attorney Performance: Postjudgment

1. Trial Counsel Duties
2. Appellate Counsel Duties
3. Postconviction Counsel Duties
4. Clemency Counsel Duties
5. Related Standards

Introduction

The *Compendium of Standards for Indigent Defense Systems* presents national, state, and local standards relating to five major aspects of indigent defense:

- Administration of defense systems (Volume I)
- Attorney performance (Volume II)
- Capital case representation (Volume III)
- Appellate representation (Volume IV)
- Juvenile justice defense (Volume V)

These standards are non-case specific statements that help policymakers assess the adequacy or appropriateness of the provision of defense services to indigent defendants. Some standards are aspirational, that is, a goal for the future; other standards are enforced by operating or funding agencies. The standards and rules collected here were issued by national organizations; state agencies; bar associations; pu blic defender agencies; state high courts; and local court or bar associations.

The *Compendium* is intended to be useful for persons preparing to establish, review, or improve a public defense program or system. It should also be useful for persons dealing with funding sources; for agencies or organizations that are developing standards governing either criminal defense systems or individual attorney performance; and for academics and courts that need a reference point.

Sponsorship and Development

The *Compendium* was commissioned by the Bureau of Justice Assistance in the Office of Justice Programs of the United States Department of Justice. It was developed by the staff of the Institute for Law and Justice with guidance from an advisory board of practitioners and academics in the field of criminal defense systems. The assistance of the Spangenberg Group is also gratefully acknowledged, especially in helping identify state and local standards for inclusion in the *Compendium*.

Methodology

Once a standard was identified, ILJ staff sought permission from the sponsoring agency to reprint the standard here. The intent of the *Compendium* was to be as inclusive as possible. No effort was made to include only the "best" standards. If any standards have been left out, we apologize to the standards' sponsors.

Each volume lists specific topics, such as provision of training or the need for adequate facilities, and then presents all the standards relevant to those topics. By and large, the selection of topics followed the topical headings used in the standards the mselves.

The materials included in the *Compendium* go beyond standards themselves. In several instances, we have included court rules and agency operational policies that are the functional equivalent of standards. The inclusion of such materials points to the need to put standards into context. At the state level, standards do not exist by themselves. Their content is often shaped by state legislation and court rules, either of which may have been the force requiring the development of the standards. Thus, to understand state and local standards, some knowledge of the governing state law is required. By necessity, any state law that creates a defense services delivery mechanism also treats the issues of governance, structure, jurisdiction, funding, and many other topics often covered by standards. While this *Compendium of Standards for Indigent Defense Systems* includes a limited review of state laws, an exhaustive review is beyond its reach.

Implicit in the standards are the ethical requirements expected of all attorneys in all types of cases. In a sense, the standards are but commentary to certain overriding ethical principles: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for this representation" (ABA Model Rules of Professional Conduct 1.1, adopted 1983). Further, as the Model Code of Professional Responsibility (Canon 7) directs, "A lawyer should represent a client zealously within the bounds of the law." What the standards do is identify how those principles can be achieved and measured in the indigent defense setting, no matter what type of indigent defense system is used.

These standards may be used either to evaluate an existing system (consisting of public defenders, contract firms, private assigned counsel, or a combination of such systems) or to compare or consider replacing one type of system with another.

The standards allow funders to determine whether providers of defense services are performing effectively and efficiently. For the clients, who can neither choose nor readily change their attorneys, these standards provide some measure of assurance that their lawyers will provide high-quality, zealous representation. Finally, these standards inform both funders and attorneys what services are required and what services need to be funded.

State Legislation, Court Rules, and Standards Relating to Capital Case Representation Experience and Training

E = Experience requirement; T = Training requirement

State	Law	Rule	Standards/ Guidelines	State Capital Defender Agency	No Death Penalty
AL					
AK					Yes
AZ		Yes: E,T			
AR				Public Defender Commission. Yes: E, T	
CA		Yes: E Appeals/ Postconviction		State Public Defender handles appeals; Habeas Corpus Center handles post-conviction. Court rule applies to both.	
CO				Public Defender. Practice is to appoint experienced, competent attorneys for trial and appeal	
CN				Public Defender. Practice is E, T	
DE				Public Defender. Civil service rules require experience; practice is to appoint attorneys experienced in capital cases	
DC					Yes
FL	Yes: E	Yes soon E, T		Post-Conviction Center (3 regional). Uses proposed Supreme Court rule for hires	
GA		Yes: E, T	Yes: E, T	Multicounty Public Defender. Yes: E, T	
HA					Yes
ID		Yes: E, T Trial/Appeal		Appellate Public Defender. Court rule applies to office	
IL				Appellate Defender. Practice is for experience	
IN		Yes: E, T Trial/Appeal	Yes: E	Public Defender. (handles postconviction)	
IA					Yes
KS	Yes: E, T		Yes: E, T Trial/Appeal	Indigent Defense Services. No policy; practice is for experience	
KY				Department of Public Advocacy, special unit. Policy: goal is to meet ABA standard	
LA		Yes: E, T	Yes: E, T Trial/Appeal		

ME					Yes
MD				Public Defender, special unit. Uses list of experienced attorneys	
MA					Yes
MI					Yes
MN					Yes
MS				Public Defender Authorized	
MO		Yes: E, T		Public Defender System. Court rule applies to contract attorneys. Pay classification scheme requires experienced attorneys in special unit	
MT		Yes: E, T Trial/ Postconviction		Appellate Defense Commission. Court rule applies	
NE				Commission has own standards. Yes: E Trial/Appeal	
NV		Yes: E		Public Defender. Court rule applies	
NH				Public Defender. No policies	
NJ				Public Defender. No policies; practice is to require experience	
NM				Public Defender. Yes: Use ABA/NLADA for special unit and contract	
NY		Yes: E, T Trial/Appeal/ Postconviction		Capital Defender's Office. Policy requires training; court rule also applies	
NC		Yes: E		Appellate Defender. No policy. Indigent Defense Services Commission adopted policy for trial/appeal/postconviction experience	
ND					Yes
OH	Yes: E	Yes: E		Public Defender. Court rule applies	
OK-				Indigent Defense System. Special trial unit	
OR			Yes: E, T	Indigent Defense Services Division. Yes: E, T Trial/Appeal/Postconviction Public Defender (Appellate). Has special unit; staff chosen based on length of experience and subjective measures	

PA					
RI					Yes
SC	Postcon-viction:. E, T			Office of Appellate Defense. No policies; special unit	
SD					
TN		Yes: E, T Appeal/ Postconviction		Postconviction Defender. Court rule applies per commission policy to director only.	
TX					
UT		Yes: E, T			
VT					Yes
VA			Yes: E, T Trial/Appeal		
WA			Yes: E		
WV					Yes
WI					Yes
WY				Public Defender. No policies; special trial unit being established	

List of Standards and Table of Key Elements

Standards Included

National

Conference of Chief Justices, *Resolution XVII: Competence of Counsel in Capital Cases,* 1995

American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,* 1989

American Bar Association, *Standards for Criminal Justice: Providing Defense Services,* 1992

Federal Judicial Conference Committee on Defender Services, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, 1999

National Legal Aid and Defender Association, *Defender Training and Development Standards*, 1997

National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, 1988

State and Local

Georgia Indigent Defense Council, *Guidelines for the Operation of Local Indigent Defense Programs*, 1989

Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases*, 1995

Kansas Board of Indigents' Defense Services, *Permanent Administrative Regulations*, 1994

Louisiana Indigent Defender Board, *Standards on Indigent Defense*, 1995

Nebraska Commission on Public Advocacy, *Standards for Indigent Defense Services in Capital and Non-Capital Cases*, 1996

New York Court of Appeals, *Standards for Appellate Counsel in Capital Cases*, 1998

New York City Indigent Defense Organization Oversight Committee, *General Requirements for All Organized Providers of Defense Services to Indigent Defendants*, 1997

Ohio Public Defender, *Standards and Guidelines for Appointed Counsel Reimbursement (2d)*, 1996

Virginia Public Defender Commission, *Standards for the Qualifications of Appointed Counsel in Capital Cases*, 1999

Washington Defender Association, *Standards for Public Defense Services*, 1989

Key Elements

		National Standards				State and Local Standards									
Topic	**Standard**	**Conf. Chief Justices**	**ABA**	**Federal Judicial Confer-ence**	**NLADA Death Penalty Cases**	**GA**	**IN**	**KS**	**LA**	**NE**	**NY Court**	**NY City**	**OH**	**VA**	**WA**
A. General															
	Need for standards	✓			✓										
	Need to ensure quality/ effective legal services		✓		✓				✓	✓					
	Insufficiency of minimum criminal def. standards		✓		✓					✓					
B. Counsel Appointment															
	Method of appointment		✓		✓			✓			✓				
	Trial attorney qualifications/ experience		✓	✓	✓	✓	✓	✓	✓	✓		✓		✓	✓
	Appeals atty. qualifications/ experience		✓	✓	✓		✓	✓	✓	✓	✓			✓	
	Postconviction atty. quals/ experience		✓	✓	✓			✓		✓	✓			✓	
	Monitoring of performance and removal from roster		✓		✓				✓		✓				
	Requirement for training[1]		✓	✓	✓				✓		✓				

[1] See also the NLADA *Defender Training and Development Standards*, Standard 7.1. Death Penalty Defense: Defender organizations should provide employees responsible for the representation of death penalty clients with all training necessary for high quality service to the client at every stage of the process: pretrial, trial, penalty phase, appeal, and postconviction.

		National Standards				State and Local Standards									
Topic	**Standard**	**Conf. Chief Justices**	**ABA**	**Federal Judicial Confer-ence**	**NLADA Death Penalty Cases**	**GA**	**IN**	**KS**	**LA**	**NE**	**NY Court**	**NY City**	**OH**	**VA**	**WA**
C. Plan Elements															
	Requirement for a formal plan		✓		✓										
	Provision for support services		✓	✓	✓				✓						
	Related standards					✓									
D. Financial															
	Client eligibility									✓					
	Attorney compensation rate		✓	✓	✓	✓							✓		
E. Workload															
	Requirement that workload not be excessive		✓						✓	✓					
	Specification of the number of attorneys per case		✓		✓				✓	✓				✓	

		National Standards				State and Local Standards									
Topic	**Standard**	**Conf. Chief Justices**	**ABA**	**Federal Judicial Confer-ence**	**NLADA Death Penalty Cases**	**GA**	**IN**	**KS**	**LA**	**NE**	**NY Court**	**NY City**	**OH**	**VA**	**WA**
F. Attorney Performance: Pretrial															
	Requirement for performance stds		✓		✓										
	Prepare as if death penalty to be sought		✓		✓					✓					
	Formulate theory of case		✓		✓					✓					
	Conduct independent investigation		✓		✓					✓					
	Maintain close contact with client		✓		✓					✓					
	Consider filing pretrial motions		✓		✓					✓					
	Explore plea negotiations		✓		✓					✓					
	Inform client of plea options		✓		✓					✓					
	Fully explain plea contents and implications		✓		✓					✓					
G. Attorney Performance: Trial															
	Prepare for voir dire		✓		✓					✓					
	Preserve objections to error		✓		✓					✓					
	Establish plan for avoiding death sentence		✓		✓										

		National Standards				State and Local Standards									
Topic	**Standard**	**Conf. Chief Justices**	**ABA**	**Federal Judicial Confer-ence**	**NLADA Death Penalty Cases**	**GA**	**IN**	**KS**	**LA**	**NE**	**NY Court**	**NY City**	**OH**	**VA**	**WA**
H. Attorney Performance: Sentencing															
	Prepare for sentencing		✓		✓					✓					
	Conduct sentencing investigation				✓					✓					
	Consider own sentencing report		✓		✓					✓					
	Prepare for prosecutor arguments at sentencing		✓		✓					✓					
	Consider full scope of defense arguments		✓		✓					✓					
I. Attorney Performance: Postjudgment															
	Trial counsel duties in post judgment		✓		✓					✓					
	Appellate counsel duties		✓		✓										
	Post-conviction counsel duties		✓		✓										
	Clemency counsel duties		✓		✓										
	Related standards		✓		✓										

A. General

The following topics are covered in this section:

1. Need for standards
2. Need to ensure quality/effective legal services
3. Insufficiency of minimum criminal defense standards

Also included is the Conference of Chief Justices resolution on competence of counsel in capital cases.

1. Need for Standards

Commentary. The need for standards may seem obvious to some, but it nonetheless needs explanation to many others. The Chief Justices' resolution and the NLADA Death Penalty Case Standards take very different paths to defining the need for standards. See also "Purpose of Standards" in the other volumes of this compendium.

Conference of Chief Justices, Resolution XVII: Competence of Counsel in Capital Cases

Whereas, the Conference of Chief Justices has long supported legislation that would place reasonable limits on federal habeas corpus review of state convictions, including capital cases; and

Whereas, Congress is presently considering changes in the federal habeas corpus procedures which would substantially limit review of state proceedings, including capital cases; and

Whereas, quality representation and competency of counsel has long been a major subject of federal habeas court litigation, particularly in capital cases; and

Whereas, providing quality representation to defendants facing loss of liberty or life is essential to fundamental due process and the speedy and final resolution of judicial proceedings; and

Whereas, the development, promulgation and implementation of standards and procedures for quality representation in state courts is a state responsibility; and

Whereas, it appears that the numbers of defendants facing potential death penalty sanctions are burgeoning and the energies and resources of the volunteer attorneys, public defenders and death penalty resource centers who have provided the bulk of representation for these defendants over the past decade have largely been exhausted;

Now, therefore, be it resolved that the Conference urges the judicial leadership of each state in which the death penalty is authorized by law to:

- Initiate a broad-based, interdisciplinary planning program to establish standards and a process that will assure the timely appointment of competent counsel, with adequate resources, to represent defendants in capital cases at each stage of such proceedings; and
- Cooperate with other states and the National Center for State Courts in developing a national clearinghouse for joint assistance in developing procedures for recruiting and compensating competent counsel in capital cases; and

Be it further resolved that the national Center shall report biannually to the Conference of Chief Justices and the Conference of State Court Administrators concerning activity that has occurred pursuant to this Resolution.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 3.1 Legal Representation Plan

a. The authority to recruit and select competent attorneys to provide representation in capital cases may be centralized in the defender office or assigned counsel program of the jurisdiction. The defender office or assigned counsel program should adopt Standards and procedures for the appointment of counsel in capital cases consistent with these Standards, and perform all duties in connection with the appointment process as set forth in these Standards.

b. In jurisdictions where it is not feasible to centralize the tasks of recruiting and selecting competent counsel for capital cases in a defender office or assigned counsel program, the legal representation plan should provide for a special appointments committee to consist of no fewer than five attorneys who:

   i. are members of the bar admitted to practice in the jurisdiction;

   ii. have practiced law in the field of criminal defense for not less than five years;

   iii. have demonstrated knowledge of the specialized nature of practice involved in capital cases;

   iv. are knowledgeable about criminal defense practitioners in the jurisdiction; and

   v. are dedicated to quality legal representation in capital cases.

The committee should adopt Standards and procedures for the appointment of counsel in capital cases, consistent with these Standards, and perform all duties in connection with the appointment process.

Standard 11.1 Establishment of Performance Standards

a. The appointing authority should establish Standards of performance for counsel appointed in death penalty cases.

b. The Standards of performance should include, but should not be limited to , the specific Standards set out in Standards 11.3 through 11.9.

c. The appointing authority should refer to the Standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Standard 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Standard 7.1).

2. Need to Ensure Quality/Effective Legal Services

Commentary. Another way to define the need for standards is to focus on the purpose of counsel, especially on able counsel. The four sets of standards below discuss both quality legal representation and ensuring the right to counsel through use of standards.

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

Guideline 1.1 Objective

The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 1.1 Objective

The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Purpose and Scope of Standards. The following standards are designed to ensure that the constitutional right to the effective representation by counsel is provided to indigent persons accused of capital crimes. The certification process described herein is designed to provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar and providing for the largest possible pool of certified counsel.

These standards address principles of eligibility and certification of trial and appellate counsel involved in the defense of indigent clients accused of capital crimes, including educational requirements, workload standards, and support.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard I. Policy Statement: Objective of the Nebraska Commission on Public Advocacy

The objective in providing counsel in cases in which the death penalty is sought should be to ensure that quality legal representation is afforded to defendants eligible for the appointment of counsel during all stages of the case.

3. Insufficiency of Minimum Criminal Defense Standards

Commentary. As the Nebraska standards state, "Death is different." This difference requires the establishment of standards specifically drawn with death penalty cases in mind.

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

Guideline 11.2 Minimum Standards Not Sufficient

A. Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for non-capital cases, should not be adopted as sufficient for death penalty cases.

B. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.2 Minimum Standards Not Sufficient

a. Minimum Standards that have been promulgated concerning representati on of defendants in criminal cases generally, and the level of adherence to such Standards required for non-capital cases, should not be adopted as sufficient for death penalty cases.

b. Counsel in death penalty cases should be required to perform at the l evel of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

III. Operating Policies and Procedures

E. Minimum Standards Required

"Death is different," and all rules established for the protection of the capital defendant should be strictly enforced. The defense of death penalty cases is an evolving practice

and counsel should refer to state and federal death penalty training and practice manuals for preparation and trial of death penalty cases. When the courts are not likely to provide the proper enforcement of the rules *sua sponte*, attorneys must seek to enforce the rules, or their clients will die. The minimal level of attorney competence that may be accepted as sufficient in some jurisdictions in non-capital cases can be fatally inadequate in death penalty cases. For example, attorney ignorance or oversight will not constitute cause for failure to meet the exhaustion requirements of federal habeas corpus, unless the attorney's failures have been so egregious as to meet the current standard of constitutionally ineffective assistance of counsel. Under this rule, otherwise reversible error will be ignored by the court; the capital client, rather than serving an improperly imposed but unreviewable prison term because of counsel's error, will die. To ensure that indigent defendants will not die for, and their attorneys will not have to live with, such error, the standards of performance established by the appointing authority under Guideline 11.1 should include requirements that all aspects of representation be intensified in a capital case.

VII. Performance Standards for Counsel in Capital Cases

Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for non-capital cases, are not sufficient for death penalty cases. Counsel in death penalty cases must perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation. See ABA Guideline 11.2.

B. Counsel Appointment

Ensuring qualified counsel is the first purpose of capital case representation standards (see *supra*). This leads then to standards relating to how counsel are appointed, using what qualification standards.

The following topics are included in this section:

1. Method of appointment
2. Trial attorney qualifications/experience
3. Appeals attorney qualifications/experience
4. Postconviction attorney qualifications/experience
5. Monitoring of performance and removal from roster
6. Requirement for training

Compare the standards below to those found in *Compendium* Volume I, "Standards for the Administration of Defense Services," especially the requirement that there be a system or plan. See also "Plan Elements" *infra* in this volume.

1. Method of Appointment

Commentary. How counsel is appointed determines, in part, who is appointed to represent defendants in capital cases. The several standards here include those for screening for qualifications, roster of attorneys, distributing assignments to all members of the roster, and locus of appointment authority (e.g., court).

Although many local jurisdictions have special qualifications for attorneys in capital cases, very few also have special appointment procedures. But see Cobb County (Georgia) Indigent Defense Program Guidelines, Article II, Section 1, "Method of Appointment in Murder Cases," requiring trial judge or chief judge approval of any defense counsel selected by the program administrator.

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

Guideline 4.1 Selection of Counsel

A. The legal representation plan should provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar.

B. The appointing authority should develop procedures to be used in establishing two rosters of attorneys who are competent and available to represent indigent capital defendants. The first roster should contain the names of attorneys eligible for appointment as lead defense counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in Guideline 5.1; the second roster should contain the names of attorneys eligible for appointment as assistant defense counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in the same Guideline.

C. The appointing authority should review applications from attorneys conc erning their placement on the roster of eligible attorneys from which assignments are made, as discussed in subsection (b). The review of an application should include a thorough investigation of the attorney's background, experience, and training, and an assessment of whether the attorney is competent to provide quality legal representation to the client pursuant to the qualification requirements specified in Guideline 5.1 and the performance standards established pursuant to Guidelines 11.1 and 11.2. An attorney's name should be placed on either roster upon a majority vote of the committee.

D. Assignments should then be made in the sequence that the names appear on the roster of eligible attorneys. Departures from the practice of strict rotation of assignments may be made when such departure will protect the best interests of the client. A lawyer should never be assigned for reasons personal to the committee members making assignments.

In jurisdictions where a defender office or other entity by law receives a specific portion of or all assignments, the procedures in (b) through (d) above should be followed for cases which the defender office or other entity cannot accept due to conflicts of interest or other reasons.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 4.1 Selection of Counsel

a. The legal representation plan should provide for a systematic and publicized method for distributing assignments in capital cases as widely as possible among qualified members of the bar.

b. The appointing authority should develop procedures to be used in establishing two rosters of attorneys who are competent and available to represent indigent capital defendants. The first roster should contain the names of attorneys eligible for appointment as lead defense counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in Standard 5.1; the second roster should contain the names of attorneys eligible for appointment as co-counsel for trial, appeal or postconviction pursuant to the qualification requirements specified in the same Standard.

c. The appointing authority should review applications from attorneys concerning their placement on the roster of eligible attorneys from which assignments are made, as discussed in subsection (b). The review of an application should include a thorough investigation of the attorney's background, experience, and training, and an assessment of whether the attorney is competent to provide quality legal representation to the client pursuant to the qualification requirements specified in Standard 5.1 and the performance Standards established pursuant to Standards 11.1 and 11.2. An attorney's name should be placed on either roster upon a majority vote of the committee.

d. Assignments should then be made in the sequence that the names appear on the roster of eligible attorneys. Departures from the practice of strict rotation of assignments may be made when such departure will protect the best interests of the client. A lawyer should never be assigned for reasons personal to the committee members making assignments.

e. In jurisdictions where a defender office or other entity by law receives a specific portion of all assignments, the procedures in (b) through (d) above should be followed for cases which the defender office or other entity cannot accept due to conflict of interest or other reasons.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

105.3.12 Appointments in Capital Cases

(a) In each case in which the death penalty may be imposed and the defendant is unable to afford counsel, the court shall appoint the capital defender to represent the defendant.

(1) Subject to [Kansas law], the court may appoint co-counsel from the capital appointments panel list to represent the defendant in accordance with the system established by these regulations for providing legal defense services for indigent persons charged with capital felonies. The court, however, shall not appoint any attorney as co-counsel without prior notice to the chief capital defender and the board.

(2) The court shall not appoint any attorney to provide representation in a capital felony without prior notice to the chief capital defender.

(3) Eligibility to serve on the capital appointments panel shall be limited to attorneys who have been screened pursuant to [Kansas law].

(b) The court shall appoint counsel for any indigent person accused of homicide from panel lists approved by the board. The court shall not appoint any attorney to provide representation to an indigent person accused of a felony without prior notice to the chief capital defender.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

Standard 3. Creation of Court of Appeals Roster

(a) Delivery to Screening Panel. The Capital Defender Office shall review each application to determine that it is complete. The Capital Defender Office shall deliver all completed applications, within 30 days of receipt, to the appropriate Screening Panel, together with a statement setting forth the status of the attorney's completion of the training required by section 5, below, and its recommendations to the Screening Panel with respect to whether the attorney is qualified for appointment as appellate counsel in a capital case. The appropriate Screening Panel shall be the panel in the judicial department in which the attorney has his or her principal office for the practice of law.

(b) Designation by Screening Panel. Within 30 days of receipt of the application, each Screening Panel shall designate those attorneys deemed qualified for appointment as appellate counsel in a capital case, and shall report those designations to the Court of Appeals.

(c) Waiver or Deferral of Required Submissions. If an attorney cannot provide each of the above items, the Screening Panel, upon demonstration that the attorney is capable of providing effective representation as appellate counsel in a capital case, and after consideration of the recommendation of the Capital Defender Office, may:

(1) defer submission of any item(s) for a reasonable time, and in the interim designate the attorney as a qualified appellate counsel; or

(2) waive such submission.

(d) Establishment of the Roster. The Court of Appeals shall incorporate the names of each attorney found qualified by a Screening Panel into a single roster of attorneys qualified for appointment as appellate counsel in a capital case.

Standard 4. Additions to Court of Appeals Roster

(a) Requests for Reconsideration. Any attorney whose application for designation as qualified appellate counsel is rejected by a Screening Panel may apply to the Court of Appeals for reconsideration of his or her application pursuant to such procedures as may be prescribed by the Court of Appeals.

(b) Determination by the Court of Appeals. The Court of Appeals shall review each such application pursuant to the criteria set forth in these standards, including consideration of the recommendations of the Capital Defender Office and of the Screening Panel, and may add that attorney to the roster of qualified appellate counsel if the Court deems the attorney qualified to serve as a ppellate counsel in a capital case.

2. Trial Attorney Qualifications/Experience

Commentary. Capital cases require experienced counsel. The standards set forth here call for minimal experiential qualifications only. The ABA and NLADA standards for attorney qualification in death penalty cases are virtually identical.

Georgia and Kansas standards explicitly refer to the ABA standards, while the Louisiana, Nebraska, and Washington standards closely emulate them. The New York City standards add a new requirement that an attorney with capital case experience supervise and add higher experience requirements generally. The Vermont standards follow the ABA requirement in form but do not set experience requirements as high as the ABA does.

In addition to the standards displayed here, many local standards also include attorney eligibility criteria. See, for example, Second Judicial Circuit of Florida, *Conflict Attorney Policies* (October 1992) Standard I(B) "Basic Qualifications: Capital Cases"; Alameda County Bar Association, *Court Appointed Attorneys' Program, Rules and Regulations* (1988), Rule F(1) "Experience Requirements for Capital Cases"; Circuit Conflict Committee, Eleventh Judicial Circuit of Florida, *Policies and Procedures* (1992) "Attorney Qualifications: Category IV Cases"; Montgomery County (Alabama), *Capital Murder Appointment Procedures*; Philadelphia General Court, Regulation 89-3, Rule 406, "Standards for Appointment of Counsel," Rule 406-1, ppointment in Homicide Cases"; Gwinnett Judicial Circuit (Georgia) Internal Operating Procedure 98-5, Part X Attorneys Guideline 10.1(A) "Qualification of Panel Attorneys in Felony-Life/Death Cases"; and Cobb County (Georgia) Indigent Defense Program Guidelines, Article 1, Section 4, "Murder," Section 5, "Capital itional state-level standards include these: *Nevada Supreme Court Rules*, Rule 250 "Procedures in Capital Cases," Subsection (IV), "Qualification of Defense Counsel"; North Carolina State Bar, *Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases*, Art. VII §7.3 (1995); *Indiana Rules of Criminal Procedure*, Criminal Rule 24: Capital Cases, §(B) "Appointment of Qualified Trial Counsel"; *Utah Rules of Criminal Procedure*, Rule 8, "Appointment of Counsel," §(b)(c); and Arkansas Public Defender Commission, *Minimum Standards*, "Attorney Qualifications: Certification Criteria, Attorney Eligibility:

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

Guideline 5.1 Attorney Eligibility

1. TRIAL

A. Lead trial counsel assignments sh ould be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense; and

iii. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

iv. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

v. are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

vi. have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

vii. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Trial co-counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. who qualify as lead counsel under paragraph (A) of this Guideline or meet the following requirements:

a. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

d. have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil

litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointment

a. Quality of Counsel. Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding type of litigation. High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management.

b. Qualifications of Counsel. As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial, appeal, or postconviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals, or postconviction review that, in combination with co-counsel, will assure high quality representation.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 5.1(1)

The appointing authority should distribute assignments in capital cases to attorneys who possess the following qualifications:

1. TRIAL

A. Lead trial counsel assignments should be distributed to attorneys who:

(i) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

(ii) are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense; and

(iii) have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

(iv) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

(v) are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

(vi) have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

(vi) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Trial co-counsel assignments should be distributed to attorneys who:

(i) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

(ii) who qualify as lead counsel under paragraph A of this Standard or meet the following requirements:

a. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder or aggravated murder; or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

d. have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

(i) Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

(ii) Specialized postgraduate training in the defense of persons accused of capital crimes;

(iii) The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.4 Panel Attorney Programs

…

(e) Cases in which the death penalty is sought shall be assigned only to attorneys of sufficient experience, skill and competence to render effective assistance of counsel to defendants in such cases. The American Bar Association "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" may be referred to as a suggestion for the determination of the experience, skill and competence of the attorneys.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

Standard E. Appointment of Counsel

The comprehensive plan shall provide for the appointment of trial counsel meeting the following qualifications.

1. *Murder*. To be eligible to serve as appointed counsel in a case where the accused is charged with murder, an attorney shall:

   a. be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience; and

b. have prior experience as lead or co-counsel in no fewer than three (3) felony jury trials that were Class C felonies or higher which were tried to completion.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

Rule 105-3-2 Eligibility to Serve (a)

…

(4) Each attorney assigned or appointed to the defense of any indigent person accused of a capital felony shall be a prequalified death penalty attorney. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person accused of a capital felony, pursuant to these regulations and "Guideline 5.4(1), Attorney Eligibility," as published in the 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." Each attorney who is eligible to serve on the capital appointments panel shall be certified by the board.

(5) Each attorney assigned or appointed to represent an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment shall be prequalified by the board. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment, pursuant to these regulations and "Guideline 5.1(1), Attorney Eligibility," as published in the 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." Each attorney who is eligible to serve on the capital appointments appellate panel shall be certified by the board.

(6) Each attorney assigned or appointed to represent an indigent person who has been convicted of capital murder and who is under a sentence of death in postconviction proceedings shall be prequalified by the board. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment, pursuant to these regulations and "Guideline 5.1(III), Attorney Eligibility," as published in the 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." Each attorney who is eligible to serve on the capital appointments postconviction panel shall be certified by the board.

(7) To ensure compliance with these regulations in capital felony or homicide cases, each attorney assigned or appointed to the defense of any indigent person accused of a capital felony or a homicide shall be appointed from panel lists screened pursuant to these regulations and approved by the board.

…

(b) Except for appointment of an attorney to provide representation for an indigent person accused of a capital felony or a homicide, an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment or an indigent person who has been convicted of capital murder and who is under a sentence of death in postconviction proceedings, the judge may waive any of the above conditions if the attorney selected by the judge has sufficient training, resources, and experience to undertake the case in question.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part I. General Principles of Certification Eligibility. The following standards shall be applied to attorney certification under any part of this chapter:

Standard 7-1.1. Eligibility. The attorney shall be familiar with the practice and procedure of the criminal courts of Louisiana and shall be a member in good standing of the Louisiana Bar or admitted to practice *pro hac vice*.

Standard 7-1.2. Evidentiary Matters. The attorney shall be familiar with the use of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence.

Standard 7-1.3. Initial Training. Within one year of an initial application for certification under the standards of this Chapter, the attorney shall complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Standard 7-1.4. Continuing Training. To maintain certification, counsel shall, every two years from the date of certification, successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Part II. Trial Lead Counsel. To be certified to serve as trial lead counsel, an attorney shall also satisfy the following minimum standards.

Standard 7-2.1. Eligibility Criteria. Trial lead counsel shall:

(A) Be an experienced and active trial practitioner with at least five years of litigation experience;

(B) Have prior experience as lead counsel in no fewer than nine jury trials tried to completion; of these nine jury trials, at least five must have involved felonies or two must have involved the charge of murder; and

(C) Have prior experience as lead counsel or associate counsel in at least one case in which the death penalty was sought and was tried through the penalty phase or have prior experience as lead counsel or associate counsel in at least two cases in which the death penalty was sought and where, although resolved prior to trial or at the guilt phase, a thorough investigation was performed for a potential penalty phase.

Part III. Trial Associate Counsel. To be certified to serve as trial associate counsel in a capital case, an attorney shall also satisfy the following minimum standards.

Standard 7-3.1. Eligibility Criteria. Trial associate counsel shall:

(A) Be an experienced and active trial or appellate practitioner with at least three years of litigation experience; and

(B) Have prior experience as lead counsel in no fewer than three felony jury trials which were tried to completion, including service as lead or associate counsel in at least one homicide trial.

…

Standard 7-6.2. Alternative Requirements; Trial Lead Counsel. An attorney seeking certification as trial lead counsel under Part VI of this Chapter, shall:

(A) Satisfy Standards 7-1.1, 7-1.2, and 7-2.1(A) of this Chapter ;

(B) Substantially satisfy Standard 7-2.1(B) or 7-2.1(C); and

(C) In the case of certification by the Louisiana Indigent Defender Board, the applicant, prior to the start of trial in a capital case he or she has been appointed to handle, must successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Standard 7-6.3. Alternative Requirements; Trial Associate Counsel. An attorney seeking certification as trial associate counsel under Part VI of this Chapter, shall:

(A) Satisfy Standards 7-1.1, 7-1.2, and 7-3.1(A) of this Chapter;

(B) Substantially satisfy Standard 7-3.1(B) of this Chapter; and

(C) In the case of certification by the Louisiana Indigent Defender Board, the applicant, prior to the start of trial in a capital case he or she has been appointed to handle, must successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard III. Operating Policies and Procedures

…

C. Counsel Eligibility Standards

The following classes of attorneys are created to set the minimum standards for counsel in capital and non-capital cases at trial, appellate, and postconviction stages.

Class A: Counsel qualified as lead counsel in capital cases.

Class B: Counsel qualified as co-counsel in capital cases.

…

1. Qualifications for A

1.1 Member of the Nebraska bar or admitted *pro hac vice*.

1.2 Experienced and active in criminal defense with not less than five years experience in criminal litigation.

1.3 Prior experience as lead counsel in at least ten jury trials of serious or complex cases tried to completion, including:

(1) two murder cases as co-counsel and five felony jury trials of a Class III or higher felony, or

(2) one murder trial in which the death sentence was sought, and five felony jury trials of Class III or higher felony.

1.4 Experience in trial practice which includes the use of and challenge of psychiatric and other forensic experts, including, but not limited to ballistic, fingerprint, handwriting, DNA, pathologists, psychologists, and addictionologists.

1.5. Demonstrates proficiency and commitment which exemplify the quality of representation appropriate to capital cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

2. Qualifications for B

2.1 Member of the Nebraska bar or admitted *pro hac vice*.

2.2 Experienced and active in criminal defense with not less than three years experience in litigation of criminal defense.

2.3 Prior experience as lead or co-counsel in:

a. At least five jury trials of serious or complex cases tried to completion, including (1) one murder case or (2) two jury trials of Class III or higher felony.

2.4 Demonstrates proficiency and commitment which exemplify quality of representation appropriate to capital cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

…

4. Alternative Qualification

The Chief Counsel may determine an attorney is qualified even though the attorney may not meet all qualifications above. The Chief Counsel may, in his/her discretion permit any counsel to participate in a given case. The Chief Counsel will look to the following factors in deciding whether to consider such a special request:

4.1 Extensive criminal and/or civil trial experience ;

4.2 Clearly demonstrated ability to provide competent representation ;

4.3 Experience in death penalty trial not meeting standards above, such as work as counsel other than lead or co-counsel ;

4.4 Specialized postgraduate training in defense of persons accused in capital crimes, such as experience in a death penalty resource center or law school postconviction project;

4.5 Availability of ongoing consultation support from experienced death penalty counsel.

New York City Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants

Standard II. Qualification of Lawyers

…

B. Evaluation Criteria

1. Qualifications for Counsel

…

(b) Specific Criteria for Assignment of Trial Counsel to Particular Categories of Cases

…

(iii) Homicide Cases

(1) If the defense organization is assigned homicide cases, in addition to requiring that lawyers meet all the requirements for handling felony cases, does it require additional experience, including prior experience examining expert witnesses, before certifying lawyers as qualified to handle homicide cases?

(2) Does the defense organization require that lawyers conducting their first homicide trial be supervised by a lawyer who has previously tried homicide cases as lead or sole counsel?

Specific Guideline:

Each staff lawyer assigned by the defense organization to handle homicide cases without supervision must have had actual court experience in at least sixty criminal cases during the previous five years, involving at least:

(i) thirty negotiated pleas, dismissals, or other non-trial dispositions, at least ten of which occurred postindictment;

(ii) fifteen hearings in which oral testimony was taken and a decision was rendered;

Virginia Public Defender Commission, Standards for the Qualifications of Appointed Counsel in Capital Cases

A. TRIAL COUNSEL

1. Court-appointed "lead counsel" must:
    a. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*.
    b. Have at least five years of criminal litigation practice with demonstrated competence.
    c. Have had, within the past two years, some specialized training in capital litigation.
    d. Have at least one of the following qualifications:
        i. Experience as "lead counsel" in the defense of at least one capital case ;
        ii. Experience as "co-counsel" in the defense of at least two capital cases;
        iii. Experience as "lead counsel" (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum sentence of at least five years imprisonment.
    e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default.
    f. Have demonstrated proficiency and commitment to quality representation.
2. Court-appointed "co-counsel" must:
    a. Meet all of the requirements of "lead counsel" except 1(b) and 1(d).

Washington Defender Association, Standards for Public Defense Services

Standard Fourteen. Qualification of Attorneys

1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services should meet the following minimum professional qualifications:
    a. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and
    b. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.

2. Trial attorneys' qualifications according to severity or type of case:

    a. Death Penalty Representation. Each attorney acting as lead counsel in a death penalty case shall meet the following requirements:

        1. The minimum requirements set forth in Section 1; and

        2. at least five years criminal trial experience; and

        3. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and

        4. have served as lead or co-counsel in at least one jury trial in which the death penalty was sought; and

        5. have completed at least one death penalty defense seminar within the previous two years.

3. Appeals Attorney Qualifications/Experience

Commentary. All of the several standards for trial attorney qualifications also set standards for appeals attorneys, except for the Georgia guidelines. Again, the ABA and NLADA standards are virtually identical and serve as the model for the states' standards.

See also, Utah Rules of Criminal Procedure, Rule 8, "Appointment of Counsel," §(d); Arizona Supreme Court Rules of Criminal Procedure, Rule 6.8, "Standards for Appointment of Counsel in Capital Cases," §(c), "Appellate and Postconviction Counsel" (1996); Indiana Rules of Criminal Procedure Criminal Rule 24, "Capital Cases," §(J), "Appointment of Appellate Counsel"; Philadelphia General Court Regulation 89-3, Rule 406, "Standards for Appointment of Counsel," Rule 406-2, "Appeals in Death Penalty Cases" (1996); and Second Judicial Circuit of Florida, *Conflict Attorney Policies*, Policy I, "Basic Qualification," §(E) "Capital Appellate Division" (1997). The Montgomery (Alabama) Capital Murder Appointment Procedures, Section 12, call for trial attorneys to continue to represent their clients in capital cases through the direct appeal process.

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

Guideline 5.1 Attorney Eligibility

II. APPEAL

A. Lead appellate counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. are experienced and active trial or appellate practitioners with at least three years experience in the field of criminal defense; and

iii. have prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of murder or aggravated murder conviction; or alternatively, have prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and

iv. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel . At a minimum, however, appellate co-counsel candidates must demonstrate to the satisfaction of the appointing authority that they:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and

iii. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

iv. have attended and successfully completed within two years of their appointment a training or educational program on criminal appellate advocacy.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointments

…

c. Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing appellate counsel, courts should, among other relevant factors, consider:

i. the attorney's experience in federal criminal appeals and capital appeals;

ii. the general qualifications identified in paragraph 1(a), above; and

iii. the attorney's willingness, unless relieved, to serve as counsel in any postconviction proceedings that may follow the appeal.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 5.1

II. APPEAL

A. Lead appellate counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. are experienced and active trial or appellate practitioners with at least three years experience in the field of criminal defense; and

iii. have prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of murder or aggravated murder conviction; or alternatively, have prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and

iv. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel . At a minimum, however, assistant appellate attorney candidates must demonstrate to the satisfaction of the appointing authority that they:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and

iii. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

iv. have attended and successfully completed within two years of their appointment a training or educational program on criminal appellate advocacy.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation.

Indiana Public Defender Commission, Standards for Indigent Defense Services in Non-Capital Cases

Standard F. Appointment of Appellate Counsel

The comprehensive plan shall provide for the appointment of lead appellate counsel meeting the following qualifications.

1. *Murder and Class A or B felony*. To be eligible to serve as appointed counsel in a case where the accused is charged with murder or a Class A or B felony, an attorney shall be an experienced and active trial or appellate practitioner with at least three (3) years experience in criminal litigation and have completed prior to appointment at least six (6) hours of training in appellate practice in a course approved by the Indiana Public Defender commission.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

Rule 105-3-2 Eligibility to Serve (a)

…

(5) Each attorney assigned or appointed to represent an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment shall be prequalified by the board. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment, pursuant to those regulations and "Guideline 5.1(11), Attorney Eligibility," as published in the 1989 version of the American Bar Association elines for the Appointment and Performance of Counsel in Death Penalty Cases." Each attorney who is eligible to serve on the capital appointments appellate panel shall be certified by the board.

Rule 105-3-12 Appointments in Capital Cases

…

(c) Appeals. The court shall appoint the state appellate defender to represent an indigent defendant in each appeal of a capital felony conviction in accordance with K.A.R. 105-10-2.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part IV. Appellate Lead Counsel. To be certified to serve as lead counsel in the appeal of a capital case, an attorney shall also satisfy the following minimum standards.

Standard 7-4.1. Eligibility Criteria. Unless certified in accordance with Part VI of this Chapter, appellate lead counsel shall:

(A) Be familiar with the practice and procedure of the Louisiana Supreme Court in the appeal of capital cases;

(B) Be an experienced and active trial or appellate practitioner with at least three years experience in the field of criminal defense;

(C) Have prior experience within the last three years as lead co unsel in the appeal of no fewer than three felony convictions in federal or state court; and

(D) Have prior experience within the last three years as lead counsel or associate counsel in the appeal or postconviction application, in federal or state court, of at least one case where a sentence of death was imposed.

Part V. Appellate Associate Counsel. To be certified to serve as associate counsel in the appeal of a capital case, an attorney shall also satisfy the following minimum standards.

Standard 7-5.1. Eligibility Criteria. Unless certified in accordance with Part IV of this Chapter, appellate associate counsel:

(A) Shall be familiar with the practice and procedure of the Louisiana Supreme Court in the appeal of capital cases; and

(B) May have less experience than an attorney qualified to serve as lead appellate counsel, although such attorney shall have demonstrated adequate proficiency in appellate advocacy in the field of felony defense.

Part VI. Alternative Certification Procedure. Notwithstanding Parts II through IV of this Chapter, a district court judge may move the Board to certify as trial lead counsel, trial associate counsel, or appellate lead counsel, an attorney who does not strictly satisfy the specific standards above.

Standard 7-6.4. Alternative Requirements; Appellate Lead Counsel. An attorney seeking certification as appellate lead counsel under Part VI of this Chapter shall:

(A) Satisfy Standards 7-1.1, 7-1.2, 7-4.1(A) and 7-4.1(B) of this Chapter;

(B) Substantially satisfy Standard 7-4.1(C) or 7-4.1(D); and

(C) In the case of certification by the Louisiana Indigent Defender Board, the applicant, prior to filing a brief in the appeal of a capital case he or she has been appointed to handle, must successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard III. Operating Policies and Procedures

C. Counsel Eligibility Standards

…

5. APPEAL

5.1 Lead appellate counsel assignments should be distributed to attorneys who:

a. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

b. are experienced and active trial or appellate practitioners with at least five years experience in the field of criminal defense; and

c. have five years experience in criminal litigation and criminal appeals as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience as lead counsel in the appeal

of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of a murder or aggravated murder conviction; or alternatively, have prior experience as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder conviction; and

d. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

e. demonstrate proficiency and commitment exemplifying quality appropriate to serious criminal cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

5.2 Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel. At a minimum, however, appellate co-counsel candidates must demonstrate the following:

a. member of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

b. at least three years experience in the practice of law as an appellate lawyer. The appellate experience may include advising clients on questions or interpretations of law and/or administrative policies concerning criminal law, or serving as an attorney for state or federal appellate courts, or a combination of the above. The appellate attorney shall have knowledge of state and/or federal statutory and case law and constitutional provisions, the principles and practices of criminal law, judicial procedures and rules of evidence, the principles and practices of legal research, the procedures of trial, and the techniques of preparing and drafting legal documents and forms; and

c. familiarity with the practice and procedure of the appellate courts of the jurisdiction; and

d. demonstrates proficiency and commitment exemplifying quality appropriate to serious criminal cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

5.3 Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

a. experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs 1 or 2 above;

b. specialized postgraduate training in the defense of persons accused of capital crimes;

c. the availability of ongoing consultation support from experienced death penalty counsel.

The Chief Counsel is to ensure that any lawyer representing an appointed indigent client will provide competent representation.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

Standards for Appellate Counsel in Capital Cases

1. Appellate Qualifications and Experience

(a) Sole Appellate Counsel. To be eligible to be appointed as sole appellate counsel on direct appeal in a capital case, an attorney must demonstrate that he or she:

(1) has at least five years of criminal trial or criminal appellate or postconviction experience, or has at least three years of concentrated criminal litigation experience;

(2) is familiar with the practice and procedure of the trial and appellate courts of New York, including the New York Court of Appeals; and

(3) also has had primary responsibility for the appeal of at least five felony convictions in any state or federal court, at least three of which were on behalf of the defendant, and at least three of which were orally argued by the attorney.

(b) Two Appellate Counsel. To be eligible to be appointed as **one of two appellate counsel** on direct appeal in a capital case:

(1) one attorney must demonstrate that he or she has the qualifications set forth in (a) above.

(2) the second attorney must demonstrate that he or she:

(i) has at least three years of criminal litigation or postconviction experience;

(ii) is familiar with the practice and procedure of the trial and appellate courts of New York, including the New York Court of Appeals; and

(iii) has had primary responsibility for the appeal, in any state or federal court, of at least three felony convictions, at least one of which was on behalf of the defendant.

(c) Trial Counsel. If otherwise qualified under these standards, and with the consent of the client, a defendant's capital trial counsel may seek to be appointed capital appellate counsel on the same defendant's appeal.

(d) Waiver. If an attorney cannot meet one or more of the requirements set forth above, the Screening Panel, after consideration of the recommendation of the Capital Defender Office, may waive such requirement by demonstration by the attorney that he or she, by reason of extensive civil litigation and/or appellate experience or other exceptional qualifications, is capable of providing effective representation as appellate counsel in a capital case.

2. Applications to the Capital Defender Office

…

(b) Required Submissions. In support of an application, an attorney shall submit to the Capital Defender Office:

(1) at least two briefs, written exclusively or primarily by the applicant, the opposing briefs, and the decisions;

(2) descriptions of any capital or other criminal appellate advocacy or other criminal practice program attended;

(3) the names, addresses and phone numbers of two prosecutors and two defense attorneys, current or former, including at least one appellate adversary, familiar with the applicant's work as an effective advocate;

(4) the applicant may submit the name, address and phone number of one appellate judge, if the judge is familiar with the applicant's work as an effective advocate; and

(5) any other material that may be relevant to fully evaluate the applicant's appellate qualifications and experience.

Virginia Public Defender Commission, Standards for the Qualifications of Appointed Counsel in Capital Cases

B. APPELLATE COUNSEL—Attorneys qualifying as court appointed "lead counsel" under Section A(1) automatically qualify as "lead" appellate counsel. Other appointed appellate counsel must meet the following requirements:

1. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*.
2. Have briefed and argued the merits in:
   a. At least three criminal cases in appellate court; or
   b. The appeal of a case in which the death penalty was imposed.
3. Have had, within the past two years, some specialized training in capital case litigation and be familiar with the rules and procedures of appellate practice.

4. Postconviction Attorney Qualifications/Experience

Commentary. As with the trial and appeal attorney standards, the ABA and NLADA standards serve as the model for state standards. Note that of the nine state standards for trial attorney qualifications, two (Georgia and Indiana) have no standard for postconviction counsel. The sole set of state or local standards that include capital case representation is the Philadelphia *General Court Regulation* 89-3, Rule 406, "Standards for Appointment of Counsel," and Rule 406-4, "Postconviction Petitions by Prisoners Under Sentence of Death" (1996). The Arizona Supreme Court *Rules of Criminal Procedure*, Rule 6.8, "Standards for Appointment of Counsel in Capital Cases," sets identical requirements for appellate and postconviction counsel.

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

Guideline 5.1 Attorney Eligibility

III. POSTCONVICTION

A. Assignments to represent indigents in postconviction proceedings in capital cases should be distributed to attorneys who:

   i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

   ii. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

   iii. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases which were tried to completion, as well as prior experience as postconviction counsel in at least three cases in state or federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

   iv. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and

   v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the postconviction phase of a criminal case, or alternatively, a program which focused on the trial of cases in which the death penalty is sought; and

   vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition to the experience level detailed above, it is desirable that at least one of the two postconviction counsel also possesses appellate experience at the level described in II.B. above (relating to appellate co-counsel).

B. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or postconviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

   i. Experience in trial, appeal and/or postconviction representation in death penalty cases which does not meet the levels detailed in paragraph A above;

   ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

   iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointments

…

d. Special Considerations in the Appointment of Counsel in Postconviction Proceedings. In appointing postconviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal postconviction proceedings and in capital postconviction proceedings, as well as the general qualifications set forth in paragraph 1(a).

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 5.1 Attorney Eligibility

III. POSTCONVICTION

A. Assignments to represent indigents in postconviction proceedings in capital cases should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

ii. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and

iii. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases which were tried to completion, as well as prior experience as postconviction counsel in at least three cases in state or federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

iv. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the postconviction phase of a criminal case, or alternatively, a program which focused on the trial of cases in which the death penalty is sought; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition to the experience level detailed above, it is desirable that at least one of the two postconviction counsel also possesses appellate experience at the level described in II.B. above (relating to appellate co-counsel).

B. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or postconviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in trial, appeal and/or postconviction representation in death penalty cases which does not meet the levels detailed in paragraph A above;

ii. Specialized postgraduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation.

Kansas Board of Indigents' Defense Services, Permanent Administrative Regulations

Rule 105-3-2 Eligibility to Serve (a)

…

(6) Each Attorney assigned or appointed to represent an indigent p erson who has been convicted of capital murder and who is under a sentence of death in postconviction proceedings shall be prequalified by the board. Each attorney shall be screened by the board to determine the attorney's qualifications to serve as defense counsel to an indigent person who has been convicted of capital murder and who is under a sentence of death in the direct review of the judgment, pursuant to these regulations and "Guideline 5.1(III), Attorney Eligibility," as published in the 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Each attorney who is eligible to serve on the capital appointments postconviction panel shall be certified by the board.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard III. Operating Policies and Procedures

…

C. Counsel Eligibility Standards

6. POSTCONVICTION

6.1 Assignments to represent indigents in postconviction proceedings in capital cases for lead and co-counsel assignments should be distributed to a ttorneys who:

a. are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and

b. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defense, and five years experience in appellate advocacy; and

c. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex criminal cases of violence which were tried to completion, as well as prior experience as appellate counsel in at least five cases before the Nebraska Supreme Court where the conviction involved a period of incarceration in excess of one year for a serious violent felony and the conviction resulted from a jury trial, and have been counsel in at least two habeas corpus proceedings in federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel or co-counsel in at least two cases in which the charge was first degree murder; or alternatively,

of the five trials, at least one was first degree murder and the additional four were serious violent felonies; and

d. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and

e. demonstrate proficiency and commitment exemplifying quality appropriate to serious criminal cases. This will be judged by a history of participation in criminal continuing legal education programs, membership and activity in professional associations supporting criminal defense practitioners, and reputation among criminal law practitioners.

In addition to the experience level detailed above, it is desirable that at least one of the two postconviction counsel also possesses appellate experience at the level described in the standards above relating to appellate co-counsel.

6.2 Alternate Procedures: Assignments to represent indigents in postconviction proceedings in capital cases for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or postconviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

a. five years prior experience in trial, appeal and/or postconviction representation in death penalty cases which does not meet the levels detailed in paragraph 1 above;

b. five years experience and specialized training in the defense of persons accused of capital crimes;

c. the availability of ongoing consultation support from experienced death penalty counsel for at least five years.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

Standards for State Postconviction Counsel in Capital Cases

1. State Postconviction Qualifications and Experience

(a) State Postconviction Counsel. To be eligible to be appointed as lead counsel on an initial motion pursuant to section 440.10 or 440.20 of the Criminal Procedure Law and any appeal therefrom in a capital case, an attorney must demonstrate that he or she:

(1) has at least six years criminal trial, criminal appellate or state or federal postconviction experience, or has at least four years of concentrated criminal or civil litigation experience;

(2) is familiar with:

(i) the practice and procedure of the trial and appellate courts of New York, including the New York Court of Appeals; and

(ii) the practice and procedure of the federal courts with regard to federal habeas corpus petitions;

(3) has conducted twelve trials before judges, arbitration panels or juries to verdict, decision, or hung jury, in serious and complex civil or criminal cases;

(4) has had primary responsibility for the appeal of at least five felony convictions in any state or federal court, at least three of which were on behalf of the defendant, and at least three of which were orally argued by the attorney;

(5) has substantial familiarity with, and extensive experience in the use of, expert witnesses and scientific and medical evidence including, but not limited to, mental health and pathology evidence; and

(6) meets two of the following criteria:

(i) has tried five homicides to verdict or hung jury with at least three as defense counsel;

(ii) has, at the trial level, represented to disposition defendants in eight homicide cases;

(iii) has represented capital defendants in three state or federal postconviction proceedings;

(iv) has brought five motions, pursuant to section 440.10 or 440.20 of the Criminal Procedure Law, where hearings were held and witnesses examined.

(b) Waiver. If an attorney cannot meet one or more of the requirements set forth above, the Screening Panel, after consideration of the recommendation of the Capital Defender Office, may waive such requirement upon demonstration by the attorney that he or she, by reason of extensive criminal or civil litigation, 440 motion practice, appellate and/or postconviction experience or other exceptional qualifications, is capable of providing effective representation as postconviction counsel in a capital case.

2. Applications to Capital Defender Office

(a) Applications. In support of an application, an attorney shall submit to the Capital Defender Office a form prescribed by the Capital Defender Office and approved by the Administrative Board of the Courts. It shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall also identify any requirement that he or she requests be waived, and shall set forth in detail his or her criminal or civil litigation, 440 motion practice, appellate and/or postconviction experience or other exceptional qualifications that justify waiver.

(b) Required Submissions. In support of an application, an attorney shall submit to Capital Defender Office:

(1) a description of a trial or postconviction strategy in a case handled by the attorney and reflective of the attorney's thorough advocacy. This strategy may have, for instance, aimed to achieve a favorable pre-trial disposition or to alter the range of sentencing options;

(2) at least two memoranda of law prepared by the attorney in connection with separate cases;

(3) at least two appellate briefs written exclusively or primarily by the applicant, the opposing briefs, and the decisions;

(4) the names, addresses, and phone numbers of two prosecutors and two defense attorneys, current or former, including at least one adversary, familiar with the applicant's work as an effective advocate;

(5) the applicant may submit the name, address and phone number of one judge, if the judge is familiar with the applicant's work as an effective a dvocate;

(6) a description of specialized trial, appellate or postconviction capital defense training programs regularly attended; and

(7) any other material that may be relevant to fully evaluate the applicant's qualifications and experience.

Virginia Public Defender Commission, Standards for the Qualifications of Appointed Counsel in Virginia Cases

Standard C. Habeas Corpus Counsel

1. Habeas Corpus "Lead Counsel" must satisfy <u>one</u> of the following requirements:

   a. Be qualified as "lead counsel" pursuant to Section A(1) and possess familiarity with Virginia as well as federal habeas corpus practice.

   b. Possess experience as counsel of record in Virginia or federal postconviction proceedings involving attacks on the validity of one or more felony convictions as well as a working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences.

2. Habeas Corpus "Co-Counsel" must satisfy <u>one</u> of the following requirements:

   a. Service as lead or co-counsel in at least one capital habeas corpus proceeding in Virginia and/or federal courts during the last three (3) years;

   b. Have at least (7) years of civil trial and appellate litigation experience in the Courts of Record of the Commonwealth and/or federal courts.

5. Monitoring of Performance and Removal from Roster

Commentary. Both the ABA and NLADA standards call for monitoring attorney performance for purposes of future appointments and removal. The NLADA standards add some additional material to emphasize that monitoring is not to interfere with the existing case appointment and implies that case removal be sought only where the client has no objections. Of the eight states that follow the ABA and NLADA standards in some form for attorney qualifications, only Louisiana provides for attorney monitoring. The New York Court of Appeals Standards simply provide for the exercise of the removal power as a function of the court. See also, Arkansas Public Defender Commission Minimum Standards, Attorney Qualifications Certification Criteria, "Removal from Certification Lists for Cause" (1997); Second Judicial Circuit of Florida, Conflict Attorney Policies, Policy (IV), "Terms of Appointment, (B) Performance Review Committee and (C) Periodic Evaluation, (i) Evaluation Forms and (v) Removal from Conflict List"; and Eleventh Judicial Circuit of Florida, Circuit Conflict Committee, Policies and Procedures, "Policy:Decertification and Other Sanctions" (1982) (not limited to capital cases).

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

Guideline 7.1 Monitoring; Removal

A. The appointing authority should monitor the performance of assigned counsel to ensure that the client is receiving quality representation. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case, the attorney should not receive additional appointments. Where there is compelling evidence that an unalterable systemic defect in a defender office has caused a default in the basic responsibilities of an effective lawyer, resulting in prejudice to a client's case, the office should not receive additional appointments. The appointing authority shall establish a procedure which gives written notice to counsel or a defender office whose removal is being sought, and an opportunity for counsel or the defender office to respond in writing.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 7.1 Monitoring; Removal

(a) The appointing authority should monitor the performance of assigned counsel to ensure that the client is receiving quality representation. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case, the attorney should not receive additional appointments. Where there is compelling evidence that an

unalterable systemic defect in a defender office has caused a default in the basic responsibilities of an effective lawyer, resulting in prejudice to a client's case, the office should not receive additional appointments. The appointing authority shall establish a procedure which gives written notice to counsel or a defender office whose removal is being sought, and an opportunity for counsel or the defender office to respond in writing.

(b) In fulfilling its monitoring function, however, the appointing authority should not attempt to interfere with the conduct of particular cases. Representation of an accused establishes an inviolable attorney-client relationship. In the context of a particular case, removal of counsel from representation should not occur over the objection of the client.

(c) No attorney or defender office should be readmitted to the appointment roster after removal under (a) above unless such removal is shown to have been erroneous or it is established by clear and convincing evidence that the cause of the failure to meet basic responsibilities has been identified and corrected.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part VII. Monitoring; Removal. Attorneys certified within the guidelines of this Chapter shall be monitored to ensure eligibility.

Standard 7-7.1. Status and Training Criteria. An attorney who fails to maintain his or her status and educational requirements as defined in Part I of this Chapter shall not be considered certified for purposes of appointment in capital cases. An attorney may seek recertification once the criteria of Part I are satisfied.

Standard 7-7.2. Ineffectiveness. Where there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to an indigent client's case, the attorney shall not be considered certified for purposes of appointment in capital cases. In this instance, an attorney shall be given an opportunity to respond in writing to specific charges of ineffectiveness.

Standard 7-7.3. Review of Active Representation. Representation of an accused establishes an inviolable attorney-client relationship. Thus, an attorney's eligibility to represent an indigent client may not be reviewed, except by a court of proper jurisdiction, on the basis of conduct involving a case in which the attorney is presently actively representing the indigent client.

Standard 7-7.4. Recertification. An attorney decertified under Standard 7-7.2 shall not be recertified unless the decertification is shown to have been erroneous or it is established by clear and convincing evidence that the cause of the failure to meet basic responsibilities has been identified and corrected.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

6. Retention and Eligibility

…

(b) Removal from the Court of Appeals Roster. The Court of Appeals may remove from its roster of attorneys any attorney who, in the Court's judgment, has not provided competent, thorough representation.

6. Requirement for Training

Commentary. The ABA and NLADA standards for attorney qualifications include a training requirement. The NLADA version is represented here, as is the ABA's additional standard on training.

The Louisiana standards for training are also reprinted here from the trial attorney qualifications along with a standard for maintaining training. Also included here are the federal and New York Court of Appeals standards.

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

Guideline 9.1 Training

Attorneys seeking eligibility to receive appointments pursuant to these Guidelines should have completed the training requirements specified in Guideline 5.1. Attorneys seeking to remain on the roster of attorneys from which assignments are made should continue, on a periodic basis, to attend and successfully complete training or educational programs which focus on advocacy in death penalty cases. The legal representation plan for each jurisdiction should include sufficient funding to enable adequate and frequent training programs to be conducted for counsel in capital cases and counsel who wish to be placed on the roster.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

8. Training

Federal Death Penalty Training Programs. The Administrative Office should continue to offer and expand training programs designed specifically for defense counsel in federal death penalty cases.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 5.1 Attorney Eligibility

The appointing authority should distribute assignments in capital cases to attorneys who possess the following qualifications:

I. TRIAL

A. Lead trial counsel assignments should be distributed to attorneys who:

…

(vi) have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought;

B. Trial co-counsel assignments should be distributed to attorneys who:

…

d. have completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought…

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

…

ii. Specialized postgraduate training in the defense of persons accused of capital crimes…

Attorneys appointed under this paragraph should be prescreened by a panel of experienced death penalty attorneys (see Standard 3.1) to ensure that they will provide competent representation.

Standard 9.1 Training

Attorneys seeking eligibility to receive appointments pursuant to these Standards should have completed the training requirements specified in Standard 5.1. Attorneys seeking to remain on the roster of attorneys from which assignments are made should continue, on a periodic basis to attend and successfully complete training or educational programs which focus on advocacy in death penalty cases. The legal representation plan for each jurisdiction should include sufficient funding to enable adequate and frequent training programs to be conducted for counsel in capital cases and counsel who wish to be placed on the roster.

NLADA Defender Training and Development Standards

Standard 7.1 Death Penalty Defense

Defender organizations should provide employees responsible for the representation of death penalty clients with all training necessary for high quality service to the client at every stage of the process: pretrial, trial, penalty phase, appeal and postconviction.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part I. General Principles of Certification Eligibility. The following standards shall be applied to attorney certification under any part of this chapter:

…

Standard 7-1.3. Initial Training. Within one year of an initial application for certification under the standards of this Chapter, the attorney shall complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

Standard 7-1.4. Continuing Training. To maintain certification, counsel shall, every two years from the date of certification, successfully complete a minimum of 12 hours of Board-approved training primarily involving advocacy in the field of capital defense.

…

Standard 7-7.1. Status and Training Criteria. An attorney who fails to maintain his or her status and educational requirements as defined in Part I of this Chapter shall not be considered certified for purposes of appointment in capital cases. An attorney may seek recertification once the criteria of Part I are satisfied.

New York Court of Appeals, Standards for Appellate Counsel in Capital Cases

5. Training

(a) Certification. An Attorney shall not be eligible to be appointed as postconviction counsel in a capital case unless the Capital Defender Office shall certify that the attorney satisfactorily has completed a capital postconviction course prescribed by the Capital Defender Office and approved by the Administrative Board of the Courts.

(b) Interim Certification. The Screening Panel, or the Court of Appeals, in its discretion, may permit an attorney to be eligible for such appointment if the attorney meets all of the other requirements for qualification and experience, and the Capital Defender Office confirms that such attorney is in active pursuit of such training and certification.

6. Retention and Eligibility

(a) On-Going Training. To remain eligible for appointment as counsel, an attorney must attend and successfully complete capital training sessions as prescribed by the Capital Defender Office.

C. Plan Elements

The following groups of standards are included in this section:

1. Requirement for a formal plan
2. Provision for support services
3. Related standards

Compare the standards below to those found in *Compendium* Volume I, "Standards for the Administration of Defense Services," especially American Bar Association Defense Services Standard 5-1.2(d).

1. Requirement for a Formal Plan

Commentary. The formal plan requirements as set forth by the ABA guidelines and the NLADA standards are identical, with only a few language differences. Both are included for the sake of completeness.

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

Guideline 3.1 The Legal Representation Plan

The legal representation plan for each jurisdiction should include measures to formalize the process by which attorneys are assigned to represent capital defendants. To accomplish this goal, the plan should designate a body (appointing authority) within the jurisdiction which will be responsible for performing all duties in connection with the appointment of counsel as set forth by these Guidelines. This Guideline envisions two equally acceptable approaches for formalizing the process of appointment:

a. The authority to recruit and select competent attorneys to provide representation in capital cases may be centralized in the defender office or assigned counsel program of the jurisdiction. The defender office or assigned counsel program should adopt standards and procedures for the appointment of counsel in capital cases consistent with these Guidelines, and perform all duties in connection with the appointment process as set forth in these Guidelines.

b. In jurisdictions where it is not feasible to centralize the tasks of recruiting and selecting competent counsel for capital cases in a defender office or assigned counsel program, the legal representation plan should provide for a special appointments committee to consist of no fewer than five attorneys who:

    i. are members of the bar admitted to practice in the jurisdiction;

    ii. have practiced law in the field of criminal defense for not less than five years;

    iii. have demonstrated knowledge of the specialized nature of practice involved in capital cases;

    iv. are knowledgeable about criminal defense practitioners in the jurisdiction; and

    v. are dedicated to quality legal representation in capital cases.

The committee should adopt standards and procedures for the appointment of counsel in capital cases, consistent with these Guidelines, and perform all duties in connection with the appointment process.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 3.1 The Legal Representation Plan

The legal representation plan for each jurisdiction should include measures to formalize the process by which attorneys are assigned to represent capital defendants. To accomplish this goal, the plan should designate a body (appointing authority) within the jurisdiction which will be responsible for performing all duties in connection with the appointment of counsel as set forth by these Standards. This Standard envisions two equally acceptable approaches for formalizing the process of appoin tment:

(a) The authority to recruit and select competent attorneys to provide representation in capital cases may be centralized in the defender office or assigned counsel program of the jurisdiction. The defender office or assigned counsel program should adopt Standards and procedures for the appointment of counsel in capital cases consistent with these Standards, and perform all duties in connection with the appointment process as set forth in these Standards.

(b) In jurisdictions where it is not feasible to cen tralize the tasks of recruiting and selecting competent counsel for capital cases in a defender office or assigned counsel program, the legal representation plan should provide for a special appointments committee to consist of no fewer than five attorneys who:

   i. are members of the bar admitted to practice in the jurisdiction;

   ii. have practiced law in the field of criminal defense for not less than five years;

   iii. have demonstrated knowledge of the specialized nature of practice involved in capital cases;

   iv. are knowledgeable about criminal defense practitioners in the jurisdiction; and

   v. are dedicated to quality legal representation in capital cases.

The committee should adopt Standards and procedures for the appointment of counsel in capital cases, consistent with these Standards, and perform all duties in connection with the appointment process.

2. Provision for Support Services

Commentary. The ABA and NLADA standards for support services are virtually identical. See their corresponding standards in *Compendium* Volume I, "Standards for the Administration of Defense Services." The Louisiana standards follow the spirit, if not the letter, of these two national standards. The federal standards will be relevant to states with a state public defender system. See also, Indiana Rules of Criminal Procedure, Criminal Rule 24: Capital Cases, Section (c)(2) and (c)(3) "Incidental Expenses."

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

Guideline 8.1 Supporting Services

The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Guidelines with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

7. Experts

a. Salaried Positions for Penalty Phase Investigators. The federal defender program should consider establishing salaried positions within FDOs for persons trained to gather and analyze information relevant to the penalty phase of a capital case. FDOs should explore the possibility that, in addition to providing services in death penalty cases to which their FDO is appointed, it might be feasible for these investigators to render assistance to panel attorneys and to other FDOs.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 8.1 Supporting Services

The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Standards with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for

effective defense representation at every stage of the proceedings, including the sentencing phase.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part X. Support Services.

Standard 7-10.1. Securing Support Services. Counsel appointed to represent a capital defendant should secure all proper and necessary support services, including, but not limited to, investigative, expert, mitigation, and any other support services necessary to prepare and present an adequate defense. An attorney should use all available support services and facilities needed for an effective performance at every stage of the proceedings, including pretrial, trial and sentencing. Counsel should seek financial and technical assistance from all possible sources, including the district indigent defender board and the Capital Program, Expert Witness/Testing Fund, and District Assistance Fund of the Louisiana Indigent Defender Board.

3. Related Standards

Commentary. In Georgia, the contract attorney program may not handle death penalty cases as part of the contract. Compare ABA Defense Services Standards S 5.3.3(vi) providing that contracts for defense services should "include special provisions for complex matters such as capital cases."

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

Guideline 2.7 Contract Attorney Program

The inclusion of capital felonies where the death penalty is sought as a portion of the contract is prohibited.

D. Financial

The standards in this section address the following topics:

1. Client eligibility
2. Attorney compensation rate

Compare the standards below to those found in *Compendium* Volume I, "Standards for the Administration of Defense Services."

1. Client Eligibility

Commentary. In addition to the Nebraska standards herein, see also those standards found under in *Compendium* Volume I, "Standards for the Administration of Defense

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard II. Definitions

…

D. INDIGENT

An indigent party is defined as:

(a) A party who is:

(i) Receiving an annual gross income of 125% or less of the current federally established poverty level; or

(ii) Residing in a public mental health facility or is the subject of a proceeding in which admission or commitment to such a facility is sought, provided that where the County Board of Mental Health or the judge has reason to believe the party is not indigent, a determination of indigency shall be made in accordance with these rules; or

(iii) Serving a sentence in a correctional institution and has no available funds; or

(iv) Held in custody in jail and has no available funds; or

(b) A party who is unable to retain legal counsel without prejudicing the party's ability to provide economic necessities for the party or the party's family.

E. INCOME

Income shall mean salary, wages, interest, dividends, rental income, and other earnings and cash payments such as amounts received from pensions, annuities, social security, and public assistance programs.

Standard VIII. Nebraska Commission on Public Advocacy Standards to Determine Indigency

These rules shall apply to any party who has a right to be represented by an attorney of the Commission on Public Advocacy. The eligibility for appointment of an attorney at public expense shall be determined in conformance with these rules.

A. DEFINITION OF TERMS

The following definitions shall apply to these rules:

1. **Income** shall mean salary, wages, interest, dividends, rental income, and other earnings and cash payments such as amounts received from pensions, annuities, social security, and public assistance programs.

2. **Indigent** for purposes of this rule shall mean:

   (a) A party who is:

      (i) Receiving an annual gross income of 125% or less of the current federally established poverty level; or

      (ii) Residing in a public mental health facility or is the subject of a proceeding in which admission or commitment to such a facility is sought, provided that where the County Board of Mental Health or the judge has reason to believe the party is not indigent, a determination of indigency shall be made in accordance with these rules; or

      (iii) Serving a sentence in a correctional institution and has no available funds; or

      (iv) Held in custody in jail and has no available funds; or

   (b) A party who is unable to retain legal counsel without prejudicing the party's ability to provide economic necessities for the party or the party's family.

B. AFFIDAVIT OF INDIGENCY

A party who desires to proceed as an indigent represented by an attorney appointed by the court shall complete an affidavit under oath concerning his or her financial resources (FORM 1). The party shall be advised of the penalties for perjury. The defendant has an ongoing duty to update the affidavit as his or her financial status changes.

C. DETERMINATION OF INDIGENCY

If the court finds that the party has not effectively waived his or her right to counsel, and the party has not arranged to obtain counsel, the court shall receive the affidavit of indigency and may question the party under oath. After reviewing the information contained in the affidavit and, if applicable, the party's testimony, the court shall determine whether the party is indigent under these rules. The court shall record its finding on the affidavit of indigency (FORM 1) and file it with the papers in the case. The county or prosecuting attorney shall have no standing in the determination of indigency or the appointment of counsel.

D. ASSIGNMENT OF COUNSEL/NOTICE OF ASSIGNMENT

If the court finds that a party is indigent, the court shall appoint an attorney or the Commission on Public Advocacy to provide representation for the party. The Clerk of the Court shall promptly complete and transmit a notice of assignment of counsel (FORM 2) and shall file a copy in the case file.

E. REVIEW OF INDIGENCY DETERMINATION

1. A party's indigency status may be reviewed in a formal hearing at any stage of a court proceeding if additional information regarding financial circumstances becomes available to the court.

2. A party has a right to reconsideration in a formal hearing of the findings and conclusions regarding the party's indigency.

2. Attorney Compensation Rate

Commentary. The ABA and NLADA standards implicitly recognize the need to compensate attorneys in capital cases at rates higher than those paid other assigned counsel. As the federal recommendations point out, this is necessary to attract the experienced attorneys required in such cases. The two state fee schedules do not, however, necessarily follow the national recommendations. See also, Indiana Rules of Criminal Procedure, Rule 24: Capital Cases, Sections (c)(1) and (k)(1), "Hours and Contrast the Gwinnett Judicial Circuit, Internal Operating Procedure 98-5, "Fee Schedule," Guideline 11.2, which provides for a $100 compensation rate for lead counsel and $75 for second chair counsel, with Cobb County Indigent Defense Program Guidelines, Article V, Section 2(a), Rate of Payment in Death Penalty Cases, setting the reimbursement rate as $50/$40 for counsel with no maximum.

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

Guideline 10.1 Compensation

A. Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

B. Capital counsel should also be fully reimbursed for reasonable incidental expenses.

C. Periodic billing and payment during the course of counsel's representation shoul d be provided for in the representation plan.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointment

…

e. Hourly Rate of Compensation for Counsel. The rate of compensation for counsel in a capital case should be maintained at a level sufficient to assure the appointment of attorneys who are appropriately qualified to undertake such representation.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 10.1 Compensation

a. Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

b. Capital counsel should also be fully reimbursed for reasonable incidental e xpenses.

c. Periodic billing and payment during the course of counsel's representation should be provided for in the representation plan.

Georgia Indigent Defense Council, Guidelines for the Operation of Local Indigent Defense Programs

2.6 Fees Paid to Lawyers Under a Panel Program

Capital felonies in which the death penalty is sought should be compensated based on hourly rates and the time spent as documented in records submitted by the attorneys.

Compensation for a capital felony case in which the death penalty is sought shall be at least at the same hourly rate as other cases, but each case should be examined by the court and the fee total should be based on a complete examination of the individual case. Special attention shall be given to continuing counsel obligations in death penalty cases when conviction and imposition of the death penalty occur.

Ohio Public Defender, Standards and Guidelines for Appointed Counsel Reimbursement

Section II. State Maximum Fee Schedule for Appointed Counsel Reimbursement

…

B. Trial Level Proceedings

1. Reimbursement for representation in trial level cases will be made based on the maximum rate of $40.00 per hour for out-of-court services and $50.000 per hour for in-court services.

2. The prescribed maximum fees permitted in trial level proceedings are:

Offense Proceeding	Fee Maximum
Aggravated Murder (w/specs) as per O.R.C. 2929.04(A) and 2941.14(B)	$40,000 (Ohio Supreme Court Rule 65 of the Rules of Superintendence of the Common Pleas Courts requires the appointment of two (2) attorneys in capital offense cases. This fee is the maximum that will be paid on the combined bills of both attorneys appointed to the case.)
Aggravated Murder (w/o specs)	$6,000/1 attorney
	$8,000/2 attorneys
Murder	$3,000

…

D. Appellate Level Proceedings

…

2. Reimbursement for representation of appellate level proceedings involving a death sentence will be made based on the maximum rate of $45.00 per hour for both out-of-court and in-court services.

3. The prescribed maximum fees permitted in appellate level proceedings are listed below. The rates apply to each level of appeal.

Offense/Proceeding	Fee Maximum
Aggravated Murder (death sentence imposed)	$10,000
Aggravated Murder (sentence other than death)	4,000
Murder	1,500

E. Postconviction and Habeas Corpus Proceedings

…

3. Reimbursement for postconviction and state habeas corpus proceedings involving a death sentence shall be made based on the maximum rate of $45.00 per hour for both out-of-court and in-court services to a maximum of $10,000 for each stage of the postconviction or habeas corpus proceedings.

E. Workload

Limitations on the number of cases an attorney should accept are a common standard for trial attorneys. (See *Compendium* Volume I, "Standards for the Administration of Defense Services.") However, special problems relating to workload limitations and distribution exist in capital cases.

The standards in this section address the following topics:

1. Requirement that workload not be excessive
2. Specification of the number of attorneys per case

1. Requirement That Workload Not Be Excessive

Commentary. The ABA and Louisiana standards set forth general principles that speak to how excessive caseloads can interfere with proper representation in capital cases. In contrast, the Nebraska standards set forth statistical expectations for the number of death penalty cases an attorney can be expected to handle. See also, Indiana Rules of Criminal Procedure, Rule 24: Capital Cases, Section (B)(3), (J)(2). Compare ABA Defense Services Standard 5-53(a) providing that "special consideration should be given to the workload created by representation in capital cases."

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

Guideline 6.1 Workload

Attorneys accepting appointments pursuant to these Guidelines should provide each client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part IX. Workload. The following standards shall serve as guides to attorneys eligible for appointment in capital cases.

Standard 7-9.1. Professional Obligation. Attorneys accepting appointments pursuant to these standards should provide each indigent client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

Standard 7-9.2. Determination of Workload. To determine maximum workload, an attorney should consider, among other factors, quality of representation, speed of turnover of cases, percentage of cases tried, extent of support services available, court procedures, and involvement in complex litigation.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard III. Operating Policies and Procedures

A. Caseload Standards for the Commission

…

2. Recommended Caseload Standards

The Commission recognizes that the cases it will accept will not likely fall into the general caseload statistical categories which compare the percentage of cases in which a plea is entered to the percentage of cases which go to trial. …[T]he cases themselves will be more complex since the Commission will be handling serious felony, with sizeable records; this too will reduce the normal caseload. These assumptions also hold true for the appellate attorneys. The more complex the cases and the larger the record, fewer appeals can be handled by the appellate attorneys. Therefore, the following yearly caseload standards, per attorney, are recommended, with the understanding that the Commission will be monitoring these standards very carefully over the next year, since there is no history to rely upon, making them subject to change:

…

b. Litigation capital attorney—2 to 3 first degree murder death penalty cases, and an additional 2 to 3 first degree murder, non-death penalty cases (4 first degree non-death penalty cases equal 1 first degree death penalty case). Under no circumstance more than 3 death penalty cases and 1 non-death penalty case at any given time.

…

d. Appellate capital attorney—a combination of 2 to 3 first degree murder death penalty appeals, and 2 to 3 first degree non-death penalty appeals (4 first degree non-death penalty appeals equal 1 first degree death penalty appeal). Under no circumstance more than 3 death penalty appeals and 1 non-death penalty appeal at any given time.

…

D. Workload

Attorneys accepting appointments pursuant to these Guidelines should provide each client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

2. Specification of the Number of Attorneys per Case

Commentary. There is relatively strong agreement among those groups adopting death penalty standards that two attorneys should be appointed in these cases. See also, Kansas Regulation 105-3-12 (*supra*) authorizing appointment of co-counsel. The Georgia guidelines do not speak directly to the point but generally refer to the ABA standards for direction (Georgia Guideline 2.4,*supra*). The Washington state standards refer to "lead counsel," implying two counsel to represent defendant, Standard 14, *supra*. The Indiana standards, the New York Court of Appeals standards, and the New York City requirements do not refer to the number of counsel to be appointed. See also, Utah Rules of Criminal Procedure, Rule 8(b); Arkansas Public Defender Commission, Minimum Standards, Attorney Qualification Certification Criteria, "Number of Attorneys per Case"; Indiana Rules of Criminal Procedures, Rule 24(B); and North Carolina General Statutes §7A-450(b)(1) for an endorsement of the two-attorney standard.

In addition, the Alameda County Bar Association Rules and Regulations of the Court Appointed Attorneys' Program and the Eleventh Judicial Circuit of Florida Circuit Conflict Committee Policies and Procedures seem to implicitly accept a two-attorney appointment by providing separate eligibility criteria for lead and assistant counsel. The Philadelphia General Court Regulation 89-3 authorizes lead counsel to seek appointment of a second attorney from the court when the death penalty issought, but does not require such appointment.

ABA Standards for Criminal Justice: Providing Defense Services

Standard 5-6.1 Initial Provision of Counsel

…In capital cases, two qualified trial attorneys should be assigned to represent the defendant. The authorities should promptly notify the defender, the contractor for services, or the official responsible for assigning counsel whenever the person in custody requests counsel or is without counsel.

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

Guideline 2.1 Number of Attorneys Per Case

In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified postconviction attorneys should be assigned to represent the defendant.

Federal Judicial Conference Committee on Defender Services, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation

1. Qualifications for Appointment

…

b. Qualifications of Counsel. As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial, appeal, or postconviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals, or postconviction review that, in combination with co-counsel, will assure high quality representation.

…

3. Appointment of More Than Two Lawyers

Number of Counsel. Courts should not appoint more than two lawyers to provide representation to a defendant in a federal death penalty case unless exceptional circumstances and good cause are shown. Appointed counsel may, however, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 2.1 Number of Attorneys Per Case

In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified postconviction attorneys should be assigned to represent the defendant.

Louisiana Indigent Defender Board, Standards on Indigent Defense

Part VIII. Number of Attorneys for Capital Defense. The following number of attorneys should be appointed in cases involving an indigent defendant charged with a capital crime or where an appeal has been lodged in a case where the death penalty has been imposed.

Standard 7-8.1. Trial Counsel. In cases where a defendant is charged with a crime for which the death penalty may be imposed, not less than two certified trial

attorneys, one of which must be certified trial lead counsel in accordance with this Chapter, shall be assigned to represent the defendant.

Standard 7-8.2. Appellate Counsel. In cases where the death penalty has been imposed on an indigent defendant and an appeal has been taken, an attorney, certified as appellate lead counsel in accordance with this Chapter, shall be assigned to represent the defendant. It is recommended, but not mandated, that a certified appellate associate counsel be assigned to assist in the appeal, although the degree of participation of the associate counsel may be less than lead counsel.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard III. Operations Policies and Procedures

…

B. Number of Attorneys per Case

In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified postconviction attorneys should be assigned to represent the defendant.

Virginia Public Defender Commission, Standards for the Qualifications of Appointed Counsel in Capital Cases

Preface

While…Virginia Code…does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate and habeas proceedings.

F. Attorney Performance: Pretrial

The three sets of standards reproduced in this section—the ABA guidelines, the NLADA standards, and the Nebraska standards—are all virtually identical in language and content.

This section contains standards on the following topics:

1. Requirement for performance standards
2. Need to prepare as if death penalty to be sought
3. Theory of case
4. Independent investigation
5. Close contact with client
6. Pretrial motions
7. Plea negotiations
8. Need to inform client of plea options
9. Explanation of plea contents and implications

Compare the standards below (except for "Need to Prepare As If Death Penalty to Be
Compendium Volume II, "Standards for Attorney Performance."

1. Requirement for Performance Standards

Commentary. Both the ABA and NLADA standards set forth a requirement for establishing performance standards. Presumably, these standards are to be used in conjunction with the Monitoring and Removal Standards *supra*. See also relevant standards in *Compendium* Volume II, "Standards for Attorney Performance."

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

Guideline 11.1 Establishment of Performance Standards

A. The appointing authority should establish standards of performance for counsel appointed in death penalty cases.

B. The standards of performance should include, but should not be limited to, the specific standards set out in Guidelines 11.3 through 11.9.

C. The appointing authority should refer to the standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Guideline 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Guideline 7.1).

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.1 Establishment of Performance Standards

a. The appointing authority should establish Standards of performance for counsel appointed in death penalty cases.

b. The Standards of performance should include, but should not be limited to the specific Standards set out in Standards 11.3 through 11.9.

c. The appointing authority should refer to the Standards of performance when assessing the qualification of attorneys seeking to be placed on the roster from which appointments in death penalty cases are to be made (Standard 4.1) and in monitoring the performance of attorneys to determine their continuing eligibility to remain on the roster (Standard 7.1).

2. Need to Prepare As If Death Penalty to Be Sought

Commentary. A prosecutor's decision to proceed in seeking the death penalty may be delayed to garner information about the appropriateness of the death penalty. Vigorous counsel can at this point affect the prosecutor's decision by presenting mitigating evidence to show the inappropriateness of the death penalty. Even when this is not possible, acting on the assumption that the death penalty will be pursued is necessary to have sufficient time to gather all relevant evidence. The three standards here agree that prompt action is needed in potential capital cases.

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

Guideline 11.3 Determining That Death Penalty Is Being Sought

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.3. Determining That the Death Penalty Is Being Sought

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

A. Capital Standard No. 1: Determining Whether Case Is Death Case

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one. Even if the case has not been filed as capital murder, if there exists any chance that the case could be amended to charge capital murder, counsel should utilize capital defense

techniques and standards listed below. There can be no substitute for early attention to investigation and preservation of evidence.

3. Theory of Case

Commentary. Trials are often a contest between two versions of what happened, that offered by the prosecution and that offered by the defense. A theory of the case is needed to ensure that the defense version is coherent and believable and that it ties together the various "facts" of the case. It also provides a basis for the defense investigation to seek out witnesses and other evidence.

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

Guideline 11.7.1 General Trial Preparation

A. As the investigations mandated by Guideline 11.4.1 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases.

B. If inconsistencies between guilt/innocence and penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.7.1 General Trial Preparation

(a) As the investigations mandated by Standard 11.4.1 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

I. Capital Standard No. 9: General Trial Preparation

1. As the investigations mandated by Capital Standard No. 2 produce information, counsel should formulate a defense theory. In doing so, counsel should consider both the guilt/innocence phase and the penalty phase, and seek a theory that will be effective through both phases.

4. Independent Investigation

Commentary. The ABA and NLADA standards for investigating duties of defense counsel are virtually identical in their specifications. The Nebraska standards closely follow these two national standards. See also the standards relating to investigation in *Compendium* Volume II, "Standards for Attorney Performance."

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

Guideline 11.4.1 Investigation

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. Charging Documents:

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable statues and precedents, to identify (*inter alia*):

   A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

   C. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

2. The Accused:

   An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

A. Seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights.

B. Explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors.

C. Collect information relevant to the sentencing phase of trial including, but not limited to, medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior); special educational needs including cognitive limitations and learning disabilities; military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and religious and cultural influences.

D. Seek necessary releases for securing confidential records relating to any of the relevant histories.

E. Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in C above.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

4. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

5. Physical Evidence:

   Where appropriate, counsel should make a prompt r equest to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

6. The Scene:

   Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

7. Expert Assistance:

   Counsel should secure the assistance of experts where it is necessary or appropriate for:

   A. preparation of the defense;

   B. adequate understanding of the prosecution's case;

   C. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;

   D. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.4.1 Investigation

a. Counsel should conduct independent investigations relating to the guilt/i nnocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

b. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

c. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

d. Sources of investigative information may include the following:

   (1) Charging documents:

Copies of all charging documents in the case should be obtained and examined in the context of the applicable statues and precedents, to identify (*inter alia*):

A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

C. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

(2) An in-depth interview of the client should be conducted within 24 hours of counsel's entry into the case unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

A. Seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights.

B. Explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors.

C. Collect information relevant to the sentencing phase of trial including, but not limited to, medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior); special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and religious and cultural influences.

D. Seek necessary releases for securing confidential records relating to any of the relevant histories.

E. Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (C) above.

(3) Potential witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect

the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed.

Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

(4) The police and prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

(5) Physical evidence:

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

(6) The scene:

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

(7) Expert assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;

D. Presentation of mitigation.

Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VIII. Performance Standards for Counsel in Capital Cases

B. Capital Standard No. 2: Investigation

Counsel should conduct independent investigations relating to the guilt/innocence and the penalty phases of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

The investigation for the sentencing phase must be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

Sources of investigative information may include the following:

1. Charging Documents

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable statutes and precedents, to identify (*inter alia*):

   1.1 The elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   1.2 The defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

   1.3 Any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

2. The Accused

   An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In the event there is a good reason to postpone this interview, it should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover [the steps] below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

   2.1 Seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights.

   2.2 Explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any

aggravating factors under the applicable death penalty statute and any mitigating factors.

2.3 Collect information relevant to the sentencing phase of trial including, but not limited to, medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior, and special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and religious and cultural influences.

2.4 Seek necessary releases for securing confidential records relating to any of the relevant histories.

2.5 Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in 2.3 above.

3. Potential Witnesses

Counsel generally should interview potential witnesses, including:

3.1 Eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

3.2 Witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), possible mitigating evidence to show why the client should not be sentenced to death;

3.3 Members of the victim's family.

Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

4. The Police and Prosecution

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so. Counsel should establish a reliable system of tracking the receipt of all information.

5. Physical Evidence

Counsel should, immediately upon entry into the case, make a prompt request to the police or investigative agency and prosecutor for preservation of all physical evidence, field notes, electronic recordings of police dispatch and emergency

numbers or expert reports made in connection with the investigation, unless a sound tactical reason exists for refraining from doing this.

6. The Scene

   Where possible, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (weather, time of day, and lighting conditions).

7. Expert Assistance

   Counsel should secure the assistance of experts where it is necessary or appropriate for:

   a. preparation of the defense;

   b. adequate understanding of the prosecution's case;

   c. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial;

   d. presentation of mitigation.

   Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

5. Close Contact with Client

Commentary. See also *Compendium* Volume II, "Standards for Attorney Performance."

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

Guideline 11.4.2 Client Contact

Trial counsel should maintain close contact with the client throughout preparation of the case, discussing (*inter alia*) the investigation, potential legal issues that exist or develop, and the development of a defense theory.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.4.2 Client Contact

Trial counsel should maintain close contact with the client throughout preparation of the case, discussing (*inter alia*) the investigation, potential legal issues that exist or develop, and the development of a defense theory.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VIII. Performance Standards for Counsel in Capital Cases

…

C. Capital Standard No. 3: Client Contact

Trial counsel should maintain close contact with the client throughout preparation of the case, discussing (*inter alia*) the investigation, potential legal issues that exist or develop, and the development of a defense theory. Maintenance of good relations with the client and his/her family is absolutely essential to effect a comp etent defense.

6. Pretrial Motions

Commentary. See also *Compendium* Volume II, "Standards for Attorney Performance."

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

Guideline 11.5.1 The Decision To File Pretrial Motions

A. Counsel should consider filing a pretrial motion whenever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief.

B. Counsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and postconviction relief will be sought in the event of conviction and imposition of a death sentence. Among the issues that counsel should consider addressing in a pretrial motion are:

1. the pretrial custody of the accused;
2. the constitutionality of the implicated statute or statutes;
3. the potential defects in the charging process;
4. the sufficiency of the charging document;
5. the propriety and prejudice of any joinder of charges or defendants in the charging document;
6. the discovery obligations of the prosecution including disclosure of aggravating factors to be used in seeking the death penalty, and any reciprocal discovery obligations of the defense;
7. the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, including:
    a. the fruits of illegal searches or seizures;
    b. involuntary statements or confessions; statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
    c. unreliable identification testimony which would give rise to a substantial likelihood of irreparable misidentification;
8. suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

9. access to resources which may be denied to the client because of indigency and which may be necessary in the case, including independent and confidential investigative resources, jury selection assistance, and expert witnesses concerning not only the charged offense(s) and the client's mental condition, but also the criminal justice system itself;
10. the defendant's right to a speedy trial;
11. the defendant's right to a continuance in order to adequately prepare his or her case;
12. matters of evidence or procedure at either the guilt/innocence or penalty phase of trial which may be appropriately litigated by means of a pretrial motion in limine. including requests for sequestered, individual voir dire as to the death qualification of jurors and any challenges to overly restrictive rules or procedures;
13. matters of trial or courtroom procedure;
14. change of venue;
15. abuse of prosecutorial discretion in seeking the death penalty;
16. challenges to the process of establishing the jury venire.

Guideline 11.6.2 The Contents of Plea Negotiations

A. In order to develop an overall negotiation plan, counsel should be fully aware of and make sure the client is fully aware of:
   1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
   2. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as 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.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.5.1 The Decision to File Pretrial Motions

(a) Counsel should consider filing a pretrial motion wherever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief.

(b) Counsel should consider all pretrial motions potentially available, and should evaluate them in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and postconviction relief will be sought in the event of conviction and imposition of a death sentence. Among the issues that counsel should consider addressing in a pretrial m otion are:

1. the pretrial custody of the accused;
2. the constitutionality of the implicated statute or statutes;
3. the potential defects in the charging process;
4. the sufficiency of the charging document;
5. the propriety and prejudice of any joinder of charges or defendants in the charging document;
6. the discovery obligations of the prosecution including disclosure of aggravating factors to be used in seeking the death penalty, and any reciprocal discovery obligations of the defense;
7. the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, i ncluding:
   A. the fruits of illegal searches or seizures;
   B. involuntary statements or confessions; statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
   C. unreliable identification testimony which would give rise to a substantial likelihood of irreparable misidentification;
8. suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;
9. access to resources which may be denied to the client because of indigency and which may be necessary in the case, including independent and confidential investigative resources, jury selection assistance, and expert witnesses concerning not only the charged offense(s) and the client's mental condition, but also the criminal justice system itself;
10. the defendant's right to a speedy trial;
11. the defendant's right to a continuance in order to adequately prepare his or her case;
12. matters of evidence or procedure at either the guilt/innocence or penalty phase of trial which may be appropriately litigated by means of a pretrial motion *in limine*, including requests for sequestered, individual voir dire as to the death qualification of jurors and any challenges to overly restrictive rules or procedures;
13. matters of trial or courtroom procedure;

14. change of venue;
15. abuse of prosecutorial discretion in seeking the death penalty;
16. challenges to the process of establishing the jury venire.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

…

D. Capital Standard No. 4: The Decision to File Pretrial Motions

1. Counsel should file pretrial motions whenever there exists reason to believe that applicable law may entitle the client to relief or that legal and/or policy arguments can be made that the law should provide the requested relief.
2. Counsel should consider every pretrial motion potentially available, and should evaluate all motions in light of the unique circumstances of a capital case, including the potential impact of any pretrial motion or ruling on the strategy for the sentencing phase, and the likelihood that all available avenues of appellate and postconviction relief will be sought in the event of conviction and imposition of a death sentence. Among the issues that counsel should consider addressing in a pretrial motion are:
    a. the pretrial custody of the accused;
    b. the constitutionality of the implicated statute or statutes;
    c. the potential defects in the charging process;
    d. the sufficiency of the charging document;
    e. the propriety and prejudice of any joinder of charges or defendants in the charging document;
    f. the discovery obligations of the prosecution including disclosure of aggravating factors to be used in seeking the death penalty, and any reciprocal discovery obligations of the defense;
    g. the suppression of evidence gathered as the result of violations of the Fourth, Fifth, or Sixth Amendments to the United States Constitution, including:
        (i) the fruits of illegal searches or seizures
        (ii) involuntary statements or confessions; statements or confessions in violation of the accused's right to counsel or privilege against self incrimination;
        (iii) unreliable identification testimony which would give rise to substantial likelihood of irreparable misidentification;

h. suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

i. access to resources which may be denied to the client because of indigency and which may be necessary in the case, including independent and confidential investigative resources, jury selection assistance, and expert witnesses concerning not only the charged offense(s) and the client's mental condition, but also the criminal justice system itself;

j. the defendant's right to a speedy trial;

k. the defendant's right to continuance in order to adequately prepare his or her case;

l. matters of evidence or procedure at either the guilt/innocence or penalty phase of trial which may be appropriately litigated by means of a pretrial motion *in limine*, including requests for sequestered, individual voir dire, especially as to publicity and the death qualification of jurors and any challenges to overly restrictive rules or procedures;

m. matters of trial or courtroom procedure;

n. change of venue;

o. abuse of prosecutorial discretion in seeking the death penalty;

p. challenges to the process of establishing the jury venire.

7. Plea Negotiations

Commentary. Most criminal cases are resolved by guilty pleas. Cases involving homicide charges are no different in this regard.

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

Guideline 11.6.1 The Plea Negotiation Process

A. Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial. In so doing, counsel should fully explain the rights that would be waived by a decision to enter a plea instead of proceeding to trial, and should explain the legal and/or factual considerations that bear on the potential results of going to trial.

B. Counsel should ordinarily obtain the consent of the client before entering into any plea negotiations.

C. Counsel should keep the client fully informed of any continued plea discussion or negotiations, convey to the client any offers made by the prosecution for a negotiated settlement and discuss with the client possible strategies for obtaining an offer from the prosecution.

D. Counsel should not accept any plea agreement without the client's express authorization.

E. The existence of ongoing plea negotiations with the prosecution does not relieve counsel of the obligation to take steps necessary to prepare a defense. 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.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.6.1 The Plea Negotiations Process

(a) Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial. In so doing, counsel should fully explain the rights that would be waived by a decision to enter a plea instead of proceeding to trial, and should explain the legal and/or factual considerations that bear on the potential results of going to trial.

(b) Counsel should ordinarily obtain the consent of the client before entering into any plea negotiations.

(c) Counsel should keep the client fully informed of any continued plea discussion or negotiations, convey to the client any offers made by the prosecution for a negotiated

settlement and discuss with the client possible strategies for obtaining an offer from the prosecution.

(d) Counsel should not accept any plea agreement without the client's express authorization.

(e) The existence of ongoing plea negotiations with the prosecu tion does not relieve counsel of the obligation to take steps necessary to prepare a defense. 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.

Standard 11.6.2 The Contents of Plea Negotiations

(a) In order to develop an overall negotiation plan, counsel should be fully aware of and make sure the client is fully aware of:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
2. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as 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.

(b) In developing a negotiation strategy, counsel should be completely familiar with, *inter alia*:

1. concessions that the client might offer, such as:
    a. an agreement not to proceed to trial on the merits of the charges;
    b. an agreement not to assert or further litigate particular legal i ssues;
    c. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
    d. an agreement to engage in or refrain from any other conduct, appropriate to the case.
2. benefits the client might obtain from a negotiated settlement, including *inter alia*:
    a. a guarantee that the death penalty will not be imposed;
    b. an agreement that the defendant will receive, with the assent of the court, 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 di smissed;

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 issues affecting the validity of the conviction.

(c) In conducting plea negotiations, counsel should be familiar with:

1. 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;

2. the advantages and disadvantages of each available plea according to the circumstances of the case;

3. whether a plea agreement can be made binding on the court and on penal/parole authorities.

(d) In conducting plea negotiations, counsel should attempt to become familiar with the practice and policies of the particular jurisdiction, the judge and prosecuting authority, the family of the alleged victim and any other persons or entities which may affect the content and likely results of plea negotiations.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

E. Capital Standard No. 5: The Plea Negotiations Process

1. Counsel should explore with the client the possibility and desirability of reac hing a negotiated disposition of the charges rather than proceeding to a trial. In so doing, counsel should fully explain the rights that would be waived by a decision to enter a plea instead of proceeding to trial, and should explain the legal and/or factual considerations that bear on the pote ntial results of going to trial.

2. Counsel should ordinarily obtain the consent of the client before entering into any plea negotiations.

3. Counsel should keep the client fully informed of any continued plea discu ssion or negotiations, convey to the client any offers made by the prosecution for a negotiated settlement and discuss with the client possible strategies for obtaining an offer from the prosecution.

4. Counsel should not accept any plea agreement without the client's express authorization.

5. The existence of ongoing plea negotiations with the prosecution does not relieve counsel of the obligation to take steps necessary to prepare a defense. 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.

F. Capital Standard No. 6: The Contents of Plea Negotiations

…

2. In developing a negotiation strategy, counsel should be complet ely familiar with, *inter alia*:

   a. Concessions that the client might offer, such as:

      (i) an agreement not to proceed to trial on the merits of the charges;

      (ii) an agreement not to assert or further litigate particular legal issues;

      (iii) an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal acti vity;

      (iv) an agreement to engage in or refrain from any other conduct, appropriate to the case.

   b. Benefits the client might obtain from a negotiated settlement, including *inter alia*:

      (i) a guarantee that the death penalty will not be imposed;

      (ii) an agreement that the defendant will receive, with the assent of the court, a specified sentence;

      (iii) 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 se ntencing;

      (iv) an agreement that one or more of multiple charges will be reduced or dismissed;

      (v) an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal co nduct;

      (vi) an agreement that the client may enter a conditional plea to preserve the right to further contest certain issues affecting the validity of the conviction.

3. In conducting plea negotiations, counsel should be familiar with:

   a. 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;

   b. the advantages and disadvantages of each available plea according to the circumstances of the case;

   c. whether a plea agreement can be made binding on the court and on penal/parole authorities.

4. In conducting plea negotiations, counsel should attempt to become familiar with the practice and policies of the particular jurisdiction, the judge and prosecuting authority, the family of the alleged victim and any other persons or entities which may affect the content and likely results of plea negotiations.

8. Need to Inform Client of Plea Options

Commentary. The client is the final decision-maker as to whether to plead guilty. The attorney's responsibility is to make sure that the plea decision is an informed one. The standards here spell out what information the client must have for that decision to be an informed decision.

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

Guideline 11.6.2 The Contents of Plea Negotiations

A. In order to develop an overall negotiation plan, counsel should be fully aware of and make sure the client is fully aware of:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
2. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as 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.

Guideline 11.6.3 The Decision to Enter a Plea of Guilty

A. 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 agre ement.

B. The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.6.2 The Contents of Plea Negotiations

(a) In order to develop an overall negotiation plan, counsel should be fully aware of and make sure the client is fully aware of:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;
2. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as

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.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

…

F. Capital Standard No. 6: The Contents of Plea Negotiations

1. In order to develop an overall negotiation plan, counsel should be fully aware of and make sure the client is fully aware of:

   a. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included offenses;

   b. where applicable, any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation and civil liabilities, as well as direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good time credits;

   c. 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.

9. Explanation of Plea Contents and Implications

Commentary. Once the client determines that a plea of guilty is in her or his best interests, the standards require defense counsel to fully explain the exact terms of the plea agreement and what will occur in court when the plea is entered. There should be no surprises at the plea hearing for the client, for counsel, or for the court.

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

Guideline 11.6.4 Entry of the Plea Before the Court

A. Prior to the entry of the plea, counsel should:

1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
2. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences the accused will be exposed to by entering a plea;
3. 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 from the judge and providing a statement concerning the offense.

B. During entry of the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.6.3 The Decision to Enter a Plea of Guilty

(a) 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.

(b) The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest.

Standard 11.6.4 Entry of the Plea Before the Court

(a) Prior to the entry of the plea, counsel should:

1. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

2. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences the client will be exposed to by entering a plea;

3. 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 from the judge and providing a statement concerning the offense.

(b) During entry of the plea, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

…

G. Capital Standard No. 7: The Decision to Enter a Plea of Guilty

1. 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.

2. The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest.

H. Capital Standard No. 8: Entry of the Plea Before the Court

1. Prior to the entry of the plea, counsel should:

   a. make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

   b. make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences the accused will be exposed to by ente ring a 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 from the judge and providing a statement concerning the offense.

2. During entry of the pleas, counsel should make sure that the full content and conditions of the plea agreement are placed on the record before the court.

G. Attorney Performance: Trial

The standards in this section address the following:

1. Preparing for voir dire
2. Preserving objections to error
3. Establishing a plan to avoid death sentence

In addition to the standards herein, *Compendium* Volume II, "Standards for Attorney Performance," includes several other trial-related topics such as presenting evidence, responding to prosecution's case, etc.

1. Preparing for Voir Dire

Commentary. Jury selection may be the most important responsibility of the trial attorney. Jury selection in capital cases is especially complex as the standards in this section indicate.

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

Guideline 11.7.2 Voir Dire and Jury Selection

A. Counsel should consider, along with potenti al legal challenges to the procedures for selecting the jury that would be available in any criminal case, whether any procedures have been instituted for selection of juries in capital cases that present potential legal bases for challenge.

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 for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.7.2 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, whether any procedures have been instituted for selection of juries in capital cases that present potential legal bases for challenge.

(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 for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

J. Capital Standard No. 10: Voir Dire and Jury Selection

1. Counsel should consider, along with potential legal challenges to the pro cedures for selecting the jury that would be available in any criminal case, whether any procedures have been instituted for selection of juries in capital cases that present potential legal bases for challenge.

2. Preserving Objections to Error

Commentary. Implicit in these standards is the requirement that defense counsel protect the client from being prejudiced by erroneous entry of evidence detrimental to the client's interests. The Nebraska standard also suggests that counsel may have strategic reasons for not always making objections.

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

Guideline 11.7.3 Objection to Error and Preservation of Issues for Postjudgment Review

Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that postjudgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state and federal grounds, any given question for review.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.7.3 Objection to Error and Preservation of Issues for Postjudgment Review

Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that postjudgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state and federal grounds, any given question for review.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

…

K. Capital Standard No. 10: Objection to Error and Preservation of Issues for Postjudgment Review

1. Counsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that postjudgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state

and Federal grounds, any given question for review. While there may be a sound reason to forgo an objection, counsel should presume that all possible objections should be made.

3. Establishing a Plan to Avoid Death Sentence

Commentary. Trials in capital cases involve two separate hearings—determination of guilt/innocence and sentencing. Standards for formulating a theory of the case for the guilt phase were presented earlier. Similarly, counsel must also establish a plan to avoid a death sentence should a finding of guilty occur. As the NLADA and Nebraska standards make plain, these two trial components may have inherent conflicts that will need to be minimized.

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

Guideline 11.8.3 Preparation for the Sentencing Phase

A. As set out in Guideline 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

B. Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.7.1 General Trial Preparation

…

(b) If inconsistencies between guilt/innocence and penalty phase defense arise, counsel should seek to minimize them by procedural or substantive tactics.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

I. Capital Standard No. 9: General Trial Preparation

…

(2) If inconsistencies between guilt/innocence and penalty phase defense arise, counsel should seek to minimize them by procedural or substantive tactics.

H. Attorney Performance: Sentencing

The standards in this section address the following:

1. Preparing for sentencing
2. Conducting sentencing investigation
3. Considering own sentencing report
4. Preparing for prosecutor arguments at sentencing
5. Considering full scope of defense arguments

Compare the standards set forth here to those set forth in *Compendium* Volume II, "Standards for Attorney Performance."

1. Preparing for Sentencing

Commentary. The ABA, NLADA, and Nebraska standards present the same recommendations for sentencing preparation. Perhaps the most significant of these is the requirement that counsel begin preparation for the sentencing hearing as soon as possible because the issues and evidence presented at a sentencing hearing are both different from and sometimes more difficult to identify than those presented at the guilt phase. This requirement goes hand in hand with the requirement to identify and present all mitigating factors.

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

Guideline 11.8.1 Obligation of Counsel at the Sentencing Phase of Death Penalty Cases

Counsel should be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases.

Guideline 11.8.2 Duties of Counsel Regarding Sentencing Options, Consequences and Procedures

A. Counsel should be familiar with the procedures for capital sentencing in the given jurisdiction, with the prosecutor's practice in preparing for and presenting the prosecution's case at the sentencing phase, and with the case law and rules regarding what information may be presented to the sentencing entity or entities, and how that information may be presented. Counsel should insist that the prosecutor adhere to the applicable evidentiary rules unless a valid strategic reason exists for counsel not to insist.

B. If the client has chosen not to proceed to trial and a plea of guilty or its equivalent has been negotiated and entered by counsel in accordance with Standards 11.6.1 through 11.6.4, counsel should seek to ensure compliance with all portions of the plea agreement beneficial to the client.

C. Counsel should seek to ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed.

D. Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity or entities in the most effective possible way.

Guideline 11.8.3 Preparation for the Sentencing Phase

…

C. Prior to the sentencing phase, 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. Counsel should discuss with the client the

accuracy of any information known to counsel that will be presented to the sentencing entity or entities, and the strategy for meeting the prosecution's case.

D. If the client will be interviewed by anyone other than people working with def ense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

E. Counsel should consider, and discuss with the client , the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

F. In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

1. Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

2. Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

3. Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;

4. Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.8.1 Obligation of Counsel at the Sentencing Phase of Death Penalty Cases

Counsel should be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases.

Standard 11.8.2 Duties of Counsel Regarding Sentencing Options, Consequences and Procedures

(a) Counsel should be familiar with the procedures for capital sentencing in the given jurisdiction, with the prosecutor's practice in preparing for and presenting the prosecution's case at the sentencing phase, and with the case law and rules regarding what information may be presented to the sentencing entity or entities, and how that information may be presented. Counsel should insist that the prosecutor adhere to the applicable evidentiary rules unless a valid strategic reason exists for counsel not to insist.

(b) If the client has chosen not to proceed to trial and a plea of guilty or its equivalent has been negotiated and entered by counsel in accordance with Standards 11.6.1 through 11.6.4, counsel should seek to ensure compliance with all portions of the plea agreement beneficial to the client.

(c) Counsel should seek to ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed.

(d) Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity or entities in the most effective possible way.

(e) Counsel should develop a plan for seeking to avoid the death penalty and to achieve the least restrictive and burdensome sentencing alternative which can reasonably be obtained.

Standard 11.8.3 Preparation for the Sentencing Phase

(a) As set out in Standard 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

(b) Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.

(c) Prior to the sentencing phase, counsel should discuss with the client specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing. Counsel should discuss with the client the accuracy of any information known to counsel that will be presented to the sentencing entity or entities, and the strategy for meeting the prosecution's case.

(d) If the client will be interviewed by anyone other than people working with defense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

(e) Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

(f) In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

1. Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

2. Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a

favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

3. Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;

4. Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

…

L. Capital Standard No. 12: Obligation of Counsel at the Sentencing Phase of Death Penalty Cases

1. Counsel must be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases. Complete familiarity with U.S. Supreme Court precedents is required.

M. Capital Standard No. 13: Duties of Counsel Regarding Sentencing Options, Consequences and Procedures

1. Counsel should be familiar with the procedures for capital sentencin g in the given jurisdiction, with the prosecutor's practice in preparing for and presenting the prosecutor's case at the sentencing phase, and with the case law and rules regarding what information may be presented to the sentencing entity or entities, and how that information may be presented. Counsel should insist that the prosecutor adhere to the applicable evidentiary rules unless a valid strategic reason exists for counsel not to insist.

2. If the client has chosen not to proceed to trial and a plea o f guilty or its equivalent has been negotiated and entered in accordance with Standards 5 through 8, counsel must seek to ensure compliance with all portions of the plea agreement beneficial to the client.

3. Counsel must seek to ensure that the client is not harmed by improper, inaccurate or misleading information being considered by the sentencing jury and judge in determining the sentence to be imposed.

4. Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing jury and judge in the most effective possible way.

N. Capital Standard No. 14: Preparation for the Sentencing Phase

1. As set out in Standard 2, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel must seek information to present to the sentencing jury and judge in

mitigation or explanation of the offense and to rebut the prosecution's se ntencing case.

2. Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.

3. Prior to the sentencing phase, counsel should discuss with t he client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing. Counsel should discuss with the client the accuracy of any information known to counsel that will be presented to the sentencing jury and judge, and the strategy for meeting the prosecution's case.

4. If the client will be interviewed by anyone other than people working with defense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

5. Counsel should consider, and discuss with the client , the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

6. In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

    a. Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

    b. Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

    c. Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;

    d. Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

2. Conducting Sentencing Investigation

Commentary. The NLADA standards require two separate but related investigations, one for the guilt stage and one for the sentencing stage of the trial. No further detail is provided. In contrast, the Nebraska standards provide specific guidelines for the investigation. See also *Attorney Performance Standards*, Volume II.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.4.1 Investigation

a. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued exped itiously.

…

c. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

Standard 11.8.3 Preparation for the Sentencing Phase

(a) As set out in Standard 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

B. Capital Standard No. 2: Investigation

Counsel should conduct independent investigations relating to the guilt/innocence and the penalty phases of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

The investigation for the sentencing phase must be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

Sources of investigative information may include the following:

1. Charging Documents

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable statutes and precedents, to identify (*inter alia*):

   1.1 The elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   1.2 The defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty ;

   1.3 Any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

2. The Accused

   An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In the event there is a good reason to postpone this interview, it should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover 2.1-2.5 below (if this is not possible during the initial interview, these steps should be accomplished as soon as poss ible thereafter):

   2.1 Seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

   2.2 Explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;

   2.3 Collect information relevant to the sentencing phase of trial including, but not limited to: medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services); and religious and cultural influences.

2.4 Seek necessary releases for securing confidential records relating to any of the relevant histories.

2.5 Obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in 2.3 above.

3. Potential Witnesses

Counsel generally should interview potential witnesses, including:

3.1 Eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

3.2 Witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), possible mitigating evidence to show why the client should not be sentenced to death;

3.3 Members of the victim's family.

Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

4. The Police and Prosecution

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so. Counsel should establish a reliable system of tracking the receipt of all information.

5. Physical Evidence

Counsel should, immediately upon entry into the case, make a prompt request to the police or investigative agency and prosecutor for preservation of all physical evidence, field notes, electronic recordings of police dispatch and emergency numbers or expert reports made in connection with the investigation, unless a sound tactical reason exists for refraining from doing this.

6. The Scene

Where possible, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (weather, time of day, and lighting conditions).

7. Expert Assistance

Counsel should secure the assistance of experts where it is necessary or appropriate for:

a. preparation of the defense;

b. adequate understanding of the prosecution's case;

c. rebuttal of any portion of the prosecution's case at the guilt/innocence phase

or the sentencing phase of the trial;

d. presentation of mitigation.

Experts assisting in investigation and other preparation of the defen se should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

3. Considering Own Sentencing Report

Commentary. The ABA, NLADA, and Nebraska standards present identical recommendations for counsel's responsibilities to rebut any official sentencingreport that is detrimental to the client and to offer a defense sponsored report. See also *Compendium* Volume II, "Standards for Attorney Performance," for additional considerations.

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

Guideline 11.8.4 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 consider:

   1. The strategic implications of requesting that an optional report be prepared;

   2. The value of providing to the report preparer information favorable to the client.

B. Counsel should review any completed report and take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report.

C. Counsel should take steps to preserve and protect the client's interest regarding material that has been challenged by the defense as improper, inaccurate or misleading.

D. Counsel should consider whether the client should speak with the person preparing the report and, if so, whether counsel should be present.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.8.4 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 consider:

   1. The strategic implications of requesting that an optional report be prepared;

   2. The value of providing to the report preparer information favorable to the client.

(b) Counsel should consider whether the client should speak with the person preparing the report and, if so, whether counsel should be present.

(c) Counsel should review any completed report and take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report.

(d) Counsel should take steps to preserve and protect the client's interest regarding material that has been challenged by the defense as improper, inaccurate or misleading.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

…

O. Capital Standard No. 15: The Official Presentence Report

1. If an official presentence report or similar document may or will be presented to the court at any time, counsel should consider:
    a. The strategic implications of requesting that an optional report be prepared;
    b. The value of providing to the report preparer information favorable to the client.
2. Counsel should review any completed report and take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report.
3. Counsel should take steps to preserve and protect the client's interest regard ing material that has been challenged by the defense as improper, inaccurate or misleading.
4. Counsel should consider whether the client should speak with the person preparing the report and, if so, whether counsel should present.

4. Preparing for Prosecutor Arguments at Sentencing

Commentary. The adversarial system of justice for fact finding at trial extends to the sentencing phase of capital case proceedings. Defensecounsel are thus required to rebut as best they can the arguments made by the prosecution and the facts they rely on.

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

Guideline 11.8.5 The Prosecutor's Case at the Sentencing Phase

A. Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Guideline 11.3). If the jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance, and if such rules are inadequate, should consider challenging the adequacy of the rules.

B. If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.8.5 The Prosecutor's Case at the Sentencing Phase

(a) Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Standard 11.3). If the jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance, and if such rules are inadequate, should consider challenging the adequacy of the rules.

(b) If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

…

P. Capital Standard No. 16: The Prosecutor's Case at the Sentencing Phase

1. Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Refer to Standard 1, above).
2. If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should employ appropriate pretrial or trial strategies in response.

5. Considering Full Scope of Defense Arguments

Commentary. Imposition of the death penalty requires that the sentencing body consider both aggravating and mitigating circumstances. The standards herein provide a convenient checklist, albeit not complete, of potential mitigating factors that can be presented to the court or jury.

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

Guideline 11.8.6 The Defense Case at the Sentencing Phase

A. Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forgo some portion of such evidence.

B. Among the topics counsel should consider presenting are:

1. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);
2. Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof;
3. Military service (including length and type of service, conduct, and special training);
4. Employment and training history (including skills and performance, and barriers to employability);
5. Family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); other cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);
6. Rehabilitative potential of the client;
7. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses ;
8. Expert testimony concerning any of the above and the resulting im pact on the client, relating to the offense and to the client's potential at the time of sentencing.

C. Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the official presentence

report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

D. Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.8.6 The Defense Case at the Sentencing Phase

(a) Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forgo some portion of such evidence.

(b) Among the topics counsel should consider presenting are:

1. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);
2. Educational history (including achievement, performance and behavior), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof;
3. Military service (including length and type of service, conduct, and special training);
4. Employment and training history (including skills and performance, and barriers to employability);
5. Family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); other cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);
6. Rehabilitative potential of the client;
7. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses;
8. Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing.

(c) Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the official presentence report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

(d) Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

…

Q. Capital Standard No. 17: The Defense Case at the Sentencing Phase

1. Counsel should present to the sentencing jury and judge all reasonably available evidence in mitigation unless there are strong strategic reasons to forgo some portion of such evidence.
2. Among the topics counsel should consider presenting are:
    a. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);
    b. Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof;
    c. Military service (including length and type of service, conduct, and special training);
    d. Employment and training history (including skills and performance, and barriers to employability);
    e. Family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); other cultural or religious influence; professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);
    f. Rehabilitative potential of the client;
    g. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses ;
    h. Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing.
3. Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the

official presentence report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

4. Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

I. Attorney Performance: Postjudgment

The following standards relating to postjudgment are included in this section:

1. Trial counsel duties
2. Appellate counsel duties
3. Postconviction counsel duties
4. Clemency counsel duties
5. Related standards

1. Trial Counsel Duties

Commentary. The principle of continuity of representation ends in most jurisdictions once the trial is completed and sentence imposed. A new attorney will often be responsible for subsequent appellate proceedings. However, provision must be made for ensuring that the experiences of the trial attorney are not lost to the appellate process. These standards place the burden on the trial attorney to preserve the client's appeal right and to cooperate with appellate counsel.

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

Guideline 11.9.1 Duties of Trial Counsel in Postjudgment Proceedings

A. Counsel should be familiar with all state and federal postjudgment options available to the client. Counsel should consider and discuss with the client the postjudgment procedures that will or may follow imposition of the death sentence.

B. Counsel should take whatever action, such as filing a claim or notice of appeal, is necessary to preserve the client's right to postjudgment review of the conviction and sentence. Counsel should consider what other postjudgment action, if any, counsel could take to maximize the client's opportunity to seek appellate and postconviction relief.

C. Trial counsel should not cease acting on the client's behalf until subsequent counsel has entered the case or trial counsel's representation has been formally terminated.

D. Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.1 Duties of Trial Counsel in Postjudgment Proceedings

(a) Counsel should be familiar with all state and federal postjudgment options available to the client. Counsel should consider and discuss with the client the postjudgment procedures that will or may follow imposition of the death sentence.

(b) Counsel should take whatever action, such as filing a claim or notice of appeal, is necessary to preserve the client's right to postjudgment review of the conviction and sentence. Counsel should consider what other postjudgment action, if any, counsel could take to maximize the client's opportunity to seek appellate and postconviction relief.

(c) Trial counsel should not cease acting on the client's behalf until subsequent counsel has entered the case or trial counsel's representation has been formally term inated.

(d) Trial counsel should cooperate with subsequent counsel concerning information regarding trial-level proceedings and strategies.

Nebraska Commission on Public Advocacy, Standards for Indigent Defense Services in Capital and Non-Capital Cases

Standard VII. Performance Standards for Counsel in Capital Cases

…

R. Capital Standard No. 18: Duties of Trial Counsel in Postjudgment Proceedings

1. Counsel should be familiar with all state and federal postjudgment options available to the client. Counsel should consider and discuss with the client the postjudgment procedures that will or may follow imposition of the death sentence.
2. Counsel should take whatever action, such as filing a claim or notice of appeal, is necessary to preserve the client's right to postjudgment review of the conviction and sentence. Counsel should consider what other postjudgment action, if any, counsel could take to maximize the client's opportunity to seek appellate and postconviction relief.
3. Trial counsel should not cease acting on the client's behalf until subsequent counsel has entered the case or trial counsel's representation has been formally terminated.
4. Trial counsel should cooperate with subsequent co unsel concerning information regarding trial-level proceedings and strategies.

2. Appellate Counsel Duties

Commentary. See also *Compendium* Volume IV, "Standards for Appellate Representation."

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

Guideline 11.9.2 Duties of Appellate Counsel

A. Appellate counsel should be familiar with all state and federal appellate and postconviction options available to the client, and should consider how any tactical decision might affect later options.

B. Appellate counsel should interview the client, and trial counsel if possible, about the case, including any relevant matters that do not appear in the record. Counsel should consider whether any potential off-record matters should have an impact on how the appeal is pursued, and whether an investigation of any matter is warranted.

C. Appellate counsel should communicate with the client concerning both the substance and procedural status of the appeal.

D. Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules.

E. Appellate counsel should cooperate with any subsequent counsel concerning information about the appellate proceedings and strategies, and about information obtained by appellate counsel concerning earlier stages of the case.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.2 Duties of Appellate Counsel

(a) Appellate counsel should be familiar with all state and federal appellate and postconviction options available to the client, and should consider how any tactical decision might affect later options.

(b) Appellate counsel should interview the client, and trial counsel if possible, about the case, including any relevant matters that do not appear in the record. Counsel should consider whether any potential off-record matters should have an impact on how the appeal is pursued, and whether an investigation of any matter is wa rranted.

(c) Appellate counsel should communicate with the client concerning both the substance and procedural status of the appeal.

(d) Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules.

(e) Appellate counsel should cooperate with any subsequent counsel concerning information about the appellate proceedings and strategies, and about information obtained by appellate counsel concerning earlier stages of the case.

3. Postconviction Counsel Duties

Commentary. Even after the appeals court has upheld the conviction and sentence, the client still has postconviction remedies in federal court and in most state courts. Postconviction counsel's minimum duties are spelled out by these standards. However, they do not say whether the state is obligated to provide counsel at public expense at this stage of the process.

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

Guideline 11.9.3 Duties of Postconviction Counsel

A. Postconviction counsel should be familiar with all state and federal postconviction remedies available to the client.

B. Postconviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. Postconviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, postconviction counsel should obtain and review all prior counsel's file(s).

C. Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.3 Duties of Postconviction Counsel

(a) Postconviction counsel should be familiar with all state and federal postconviction remedies available to the client.

(b) Postconviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case relating to both the guilt/innocence and sentencing phases. Postconviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, postconviction counsel should obtain and review all prior counsels' file(s).

(c) Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.

4. Clemency Counsel Duties

Commentary. The last step in the process is executive clemency. Clemency is totally discretionary and not often granted. Nonetheless, diligent counsel should pursue this final avenue for reprieve from a death penalty judgment.

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

Guideline 11.9.4 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 interview the client, and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction.

C. Clemency counsel should take appropriate steps to ensure that clemency is sought i n as timely and persuasive a manner as possible.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.4 Duties of Clemency Counsel

(a) Clemency counsel should be familiar with the procedures for and permissib le substantive content of a request for clemency.

(b) Clemency counsel should interview the client and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction.

(c) Clemency counsel should take appropriate steps to ensure that clemency is sought in as timely and persuasive a manner as possible.

5. Related Standards

Commentary. The final responsibility of counsel is to seek stays of execution where this is possible. The standards' reference to the client's mental health is significant because present law does not permit execution of a defendant who is so mentally ill that he or she cannot appreciate the significance of what is occurring.

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

Guideline 11.9.5 Duties Common to All Postjudgment Counsel

A. Counsel representing a capital client at any point after imposition of the death sentence should he familiar with the procedures by which execution dates are set and how notification of that date is made. Counsel should also be familiar with the procedures for seeking a stay of execution from all courts in which the case may be lodged when an execution date is set.

B. Counsel should take immediate steps to seek a stay of execution, and to appeal from any denial of a stay, in any and all available courts when an execution date is set.

C. Counsel should continually monitor the client s mental, physical and emotional condition to determine whether any deterioration in the client's condition warrants legal action.

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases

Standard 11.9.5 Duties Common to All Postjudgment Counsel

(a) Counsel representing a capital client at any point after imposition of the death sentence should be familiar with the procedures by which execution dates are set and how notification of that date is made. Counsel should also be familiar with the procedures for seeking a stay of execution from all courts in which the case may be lodged when an execution date is set.

(b) Counsel should take immediate steps to seek a stay of execution, and to appeal from any denial of a stay, in any and all available courts when an execution date is set.

(c) Counsel should continually monitor the client's mental, physical and emotional condition to determine whether any deterioration in the client's condition warrants legal action.