

NO. 89590-2

THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of
Cecil Emile Davis,

Petitioner.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

SUBMITTED BY THE WASHINGTON DEFENDER ASSOCIATION
AND WASHINGTON ASSOCIATION of CRIMINAL DEFENSE
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Amici refer the Court to their Motion for Leave to File Amici Curiae Brief where the interests of the Amici are described.

II. ISSUE TO BE ADDRESSED BY AMICUS CURIAE

Whether the right to counsel for a capital defendant in a state post-conviction personal restraint petition requires appointment of capital-qualified counsel with prior experience and training in personal restraint petitions?

III. STATEMENT OF THE CASE PERTINENT TO ISSUE OF CONCERN TO AMICUS CURIAE

Amici refer the Court to pages 50 through 59 of Mr. Davis's Motion for Reconsideration.

IV. ARGUMENT

A. The Right to Counsel Includes the Right to Qualified Counsel.

Washington takes seriously the requirement that assigned counsel in every case has the knowledge and skill necessary, through training and experience, to provide quality representation to indigent defendants at all stages and all levels of criminal cases. The Washington Supreme Court, in particular, has made an increasingly clear commitment to providing not only counsel, but qualified and able counsel to all criminal defendants at every level for which counsel is guaranteed.

B. All Attorneys Must Meet Standards for Indigent Defense.

In June of 2012, this Court adopted new Standards for Indigent Services (SID) “to aid in the prompt and orderly administration of justice.” These Standards, adopted “to address certain basic elements of public defense practice related to the effective assistance of counsel” are incorporated into the court rules for Superior Courts (CrR 3.1), Courts of Limited Jurisdiction (CrRLJ 3.1) and Juvenile Courts (JuCR 9.2). Every appointed attorney must meet the minimum qualification requirements of Standard 14.1:

In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:

Satisfy (A) the minimum requirements for practicing law in Washington . . . ; and be familiar with (B) “the statutes, court rules, constitutional provisions, and case law relevant to their practice area”; (C) “the Washington Rules of Professional Conduct”; (D) “the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association”; (E) “the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction”; (F) “with mental health issues and be able to identify the need to obtain expert services; and (G) “[c]omplete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.”

Additional requirements are set forth in Standard 14.2 for severity and type of case. Standard 14.2 provides additional knowledge, experience and

skill requirements for death penalty representation and for many other practice areas.

The Standards not only address minimum qualifications of counsel, they address capacity of counsel by limiting the number of cases a lawyer may have and limits the extent of a mixed practice. Standards 3.2, 3.3, 3.4, 3.5 and 13.1. The Standards also direct attorneys to utilize investigators and to have sufficient resources, such as an office space for confidential client meetings, and adequate phone services to ensure prompt responses to client contact. Standard 5.2.

Trial courts must enforce the Standards. Every attorney who is appointed to represent an indigent person in a felony, misdemeanor or juvenile criminal action in a Washington trial court must certify on a quarterly basis that he or she meets the requirements of the Standards. CrR 3.1(d)(4), CrRLJ 3.1(d)(4) and JuCR 9.3(d)(1). These rules demonstrate Washington State's and this Court's commitment to ensuring that every defendant receives the effective assistance of counsel to which they are constitutionally entitled.

C. Separate Rules for Capital Case Representation

In any capital or potential capital case, separate and additional Washington rules apply. These rules provide that *capital-qualified* counsel must be appointed to represent the accused both at the trial level and on

appeal, whether in a direct appeal or in a pending collateral proceeding. SPRC 1, SPRC 2, RAP 16.25. Superior Court Special Proceedings Rules – Criminal (SPRC) govern appointment of capital defense counsel at the trial level and on direct appeal. These rules “apply to all stages of proceedings in criminal cases in which the death penalty has been or may be decreed.” SPRC 1. Trial court “shall appoint” capital qualified attorneys from a list of attorneys recruited and maintained by a panel created by this Court. SPRC 2. A trial court may appoint counsel not on the list only if it is in the defendant’s interest and if appointed counsel is “otherwise qualified” and “learned in the law of capital punishment.” *Id.*

This Court amended and strengthened the rule governing appointment of counsel in capital trials and direct appeals in June of 2002:

[T]he rule changes specify that trial courts in capital cases must appoint two attorneys with a minimum of five years of experience. One of the two must be on a list approved by a committee appointed by the Supreme Court. . . . In announcing the rule changes, Supreme Court Chief Justice Gerry Alexander said, “The new standards are an important step forward in our effort to ensure that indigent defendants charged with capital crimes are provided with an adequate legal defense in Washington State” Seen as a resource for trial judges up until this time, the revised rule will make appointment from this list mandatory. . . .¹

RAP 16.25 specifically governs the appointment of qualified counsel for state PRPs in capital cases. When appointing counsel, the

¹ See notice of rule change announcement, dated June 6, 2002, found at <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.judetail&newsid=24>

Washington Supreme Court must consider a list of capital PRP qualified counsel, maintained by a panel created by the Supreme Court, however the Court will have the final discretion in determining the appointment.

Appointed counsel must have demonstrated the necessary proficiency and commitment which exemplifies the quality of representation appropriate to capital cases. At least one appointed attorney must have at least three years of experience in handling appeals or collateral reviews and must be learned in the law of capital punishment.

RAP 16.25. Trial counsel are ineligible to be appointed as PRP counsel; appellate counsel may be appointed only if expressly requested by the client and appellate counsel. *Id.* These requirements show this Court's understanding of the need for PRP counsel to have post-conviction experience and for counsel to review both the performance and choices of trial and appellate counsel.

D. Qualified Counsel Must Also Have Experience with PRPs.

Death is different; unlike in other criminal cases, when the death penalty is imposed, there is a statutory right in Washington to appointed counsel for a PRP. RAP 16.25, *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 143, 196 P.3d 672 (2008); RCW 10.73.150(3). Thus, RAP 16.25 demonstrates that the court takes seriously the importance of counsel at this critical stage. As the rule is written, an attorney may be qualified with as little as three years of appellate experience and some training in the law

of capital punishment. But this alone is not sufficient. Competent qualified counsel must also be proficient in the law and procedure as it relates to state PRPs. This Court should take this opportunity to strengthen or clarify the required qualifications for capital counsel in state post-conviction personal restraint petitions.

Counsel in a PRP has a very different assignment than counsel on a direct appeal. PRP counsel's task is to present to this Court any claims: that the conviction or death sentence was imposed in violation of the state or federal constitutions or laws of Washington, that there is newly discovered evidence that requires that the conviction or sentence be overturned, that there has been a significant change in the law which should apply to the case, and that there are other significant grounds to challenge the judgment and sentence. RAP 16.4(c). These claims are not only more limited, they must also meet a higher standard of review than issues in a direct appeal. *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 506, 301 P.3d 450 (2013); *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132-33, 267 P.3d 324 (2011). Counsel must demonstrate in the PRP, by the preponderance of the evidence, the existence of actual and substantial prejudice due to constitutional error or the existence of a fundamental non-constitutional error that resulted in a complete miscarriage of justice. *Finstad*, 177 Wn.2d at 506; *In re Pers. Restraint of Yates*, 177 Wn.2d 1,

17, 296 P.3d 872 (2013); *Coats*, 173 Wn.2d at 132; *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). PRP counsel bears the burden of demonstrating prejudice -- that more likely than not that the petitioner was prejudiced by the error. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 539, 309 P.3d 498 (2013).

Counsel must state in the PRP “facts upon which the claim of unlawful restraint of petitioner is based and *the evidence available to support the factual allegations.*” RAP 16.7(a)(2) (emphasis added); *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Factual assertions and conclusory allegations are simply not sufficient. *Id.*; *Yates*, 177 Wn.2d at 18. It is fundamental that if claims rest on allegations outside the existing record, PRP counsel must demonstrate support for the petition’s claims with competent, admissible evidence. *Yates*, 177 Wn.2d at 18. If the evidence is based on knowledge in the possession of others, the petitioner must present their affidavits, with admissible statements, or other corroborative evidence. *Id.* Factual allegations may not be based on inadmissible hearsay or speculation. *Id.* This rule is not new. *See Rice*, 118 Wn.2d at 886.

This showing of competent, admissible evidence must be made in order to obtain a reference hearing; not the other way around. A reference hearing is not the vehicle to investigate for evidence to support the PRP

claims. *Yates* at 118. While the appellate court may direct the state to admit or deny specific allegations in the petition, this is not a substitute for the investigation necessary to discover the competent and admissible evidence required to substantiate PRP claims. RAP 16.9(b). And to make a showing sufficient to be entitled to discovery at public expense, PRP counsel must demonstrate there is a substantial likelihood the discovery would lead to evidence entitling the petitioner to relief; *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 392, 972 P.2d 1250 (1999). Any attorney who is not familiar with these fundamental requirements of presenting PRP claims is not qualified to represent a capital client in post-conviction personal restraint proceedings.

Besides being knowledgeable of PRP requirements and limitations, PRP counsel's obligations are demanding.

[PRP] Counsel must be prepared to thoroughly reinvestigate the entire case to ensure that an innocent person is not at risk to be executed nor convicted or sentenced to death in violation of either state or federal law. This requires counsel to obtain and read the entire record of the trial, including all transcripts, motions and court proceedings. Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, scrutinizing them for what is missing as well as what is present. Similar to a trial counsel, the PRP counsel must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel's obligation to make an independent examination of all available evidence – both that which the jury heard and that which it did not – to determine whether the decision-maker at trial made a fully informed decision of the issues of both guilt and punishment.²

² *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death*

States acknowledging the difference between appellate and PRP analysis and obligations have implemented requirements for qualified PRP counsel to have more experience than being learned in the law of capital defense. In Arizona, for example, PRP counsel must, in three years before appointment as counsel where a death sentence was imposed, have previous post-conviction experience which resulted in an evidentiary hearing. Arkansas also requires PRP counsel to have previously represented a petitioner in at least three post-conviction proceedings, one of which resulted in an evidentiary hearing. *ABA State Standards for Appointment of Counsel in Death Penalty Cases*.³

The Supreme Court of California concisely explains the difficulty in retaining qualified counsel in their state habeas proceedings, the equivalent to Washington PRP proceedings:

But our task of recruiting counsel has been made difficult by a serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case. Quite few in number are the attorneys who meet this court's standards for representation and are willing to represent capital inmates in habeas corpus proceedings. The reasons are these: First, work on a capital habeas petition demands a unique combination of skills. The tasks of investigating potential claims and interviewing potential witnesses require the skills of a trial attorney, but the task of writing the petition, supported by points and

Penalty Cases, Guideline 1.1, Commentary, found in 31 Hofstra Law Rev. 913, 932.

³Attached as Appendix A, found on line at:

https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/state_standards_memo_apr2016.authcheckdam.pdf

authorities, requires the skills of an appellate attorney. Many criminal law practitioners possess one of these skills, but few have both.

In re Morgan, 50 Cal. 4th 932, 937-938, 237 P.3d 933 (2010).

Because representing a capital defendant in a PRP requires specialized knowledge about the PRP process, qualified capital counsel should not only be learned in the law of capital punishment by training and experience, capital PRP counsel must also be learned in the law and procedure of PRPs.

V. CONCLUSION

For the foregoing reasons WDA and WACDL urge this Court to grant the relief requested by Mr. Davis and to take this opportunity to address and clarify the appointment qualifications of counsel in state capital post-conviction personal restraint proceedings.

Respectfully submitted this 12 day of September, 2017.

Amicus Curiae
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the)	No. 89590-2
)	
Personal Restraint of)	APPENDICES TO WDA and
CECIL EMILE DAVIS,)	WACDL AMICUS
)	BRIEF IN SUPPORT OF
)	MOTION TO
Petitioner.)	RECONSIDER
_____)	

APPENDIX A

ABA STATE STANDARDS FOR APPOINTMENT OF COUNSEL
IN DEATH PENALTY CASES (Last Updated April 2016)

STATE STANDARDS FOR APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES
LAST UPDATED: APRIL 2016

INTRODUCTION

This memo was prepared by the ABA Death Penalty Representation Project. It contains counsel appointment standards in states with the death penalty (including those that have repealed the death penalty but where prisoners remain on death row). Where practical, we have quoted the relevant language and provided citations. If the cited language does not come from a readily available source or is too long to reprint in full, we have attempted to provide an active link where the standards can be found. These links may become inactive over time, but copies of the documents are maintained separately by the Death Penalty Representation Project. *Every effort has been made to provide complete and current information as of the date of publication, but we urge you to independently confirm that the information is still current before relying on anything contained in this memo.* If you believe that any information in this memo is incorrect or missing, or if you have further questions, please contact the Death Penalty Representation Project at (202) 662-1738 or deathpenaltyproject@americanbar.org.

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Alabama:

Section 13A-5-54 (2008) of the Code of Alabama states that any person indicted for a capital felony who is unable to afford a lawyer “must be provided with court appointed counsel having no less than five years’ prior experience in the active practice of criminal law.”

Section 13A-5-54 applies only to representation at trial and the “first appeal as of right”:

Clearly, the Legislature, by enacting this provision, intended that an indigent defendant charged with a capital offense have experienced appointed counsel at all critical phases of the initial adjudicative process for which a defendant is entitled to effective assistance of counsel. . . .

Thus, we conclude that a capital defendant is clearly entitled to the representation called for by § 13A-5-54 at all stages of the trial, including sentencing and other critical posttrial proceedings. . . .

Based on the plain language of § 13A-5-54 and on the general purpose of the Act from which that Code section was taken, we conclude that the requirements of that Code section apply only to appellate representation for a defendant who has been sentenced to death, upon the first appeal as of right.

Ex parte Berryhill, 801 So.2d 7, 10-12 (Ala. 2001).

Arizona:

Sections 13-4041(B) and (C) of the Arizona Revised Statutes (2008) requires the court to appoint counsel “to represent the capital defendant in the state postconviction relief proceeding.” If counsel cannot be appointed from the state capital postconviction defender office, the court must appoint counsel who meets the following qualifications:

1. Be a member in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.
2. Have practiced in the area of state criminal appeals or postconviction proceedings for at least three years immediately preceding the appointment.
3. Not previously have represented the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued representation and waive all potential issues

Section 13-4041(C) provides that the supreme court “may establish by rule more stringent standards of competency for the appointment of postconviction counsel in capital cases than are provided by this subsection.” In 2006 the Arizona Supreme Court amended Rule of Criminal Procedure 6.8 to require the following qualifications of post-conviction counsel:

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

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

b. Trial Counsel.

(1) **Lead counsel.** To be eligible for appointment as lead counsel, an attorney must meet the qualifications set forth in section (a) of this rule and the following:

- (i) Shall have practiced in the area of state criminal litigation for five years immediately preceding the appointment;
- (ii) Shall have been lead counsel in at least nine felony jury trials that were tried to completion and have been lead counsel or co-counsel in at least one capital murder jury trial;
- (iii) Shall be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases; and
- (iv) Shall have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense.

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

c. Appellate and Post-conviction Counsel. To be eligible for appointment as appellate or post-conviction counsel, an attorney must meet the qualifications set forth in section (a) of this rule and the following:

- (1) Within three years immediately preceding the appointment have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings.
 - (2) Have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least twelve hours of relevant training or educational programs in the area of criminal defense.
 - (3) Shall be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.
-

Arkansas:

The Arkansas Public Defender Commission has set minimum standards for attorney qualifications to handle capital cases:

A. Lead trial counsel assignments:

1. Are members of the bar admitted to practice in the jurisdiction.
2. Are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and
3. Have prior experience as lead counsel in no fewer than five jury trials of serious and complex cases where 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. The attorney should have been lead counsel in at least two cases in which the charge was murder or capital murder; or alternatively, at least one was a murder or capital murder trial and an additional two others were felony jury trials; and
4. Are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
5. Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
6. Have attended and successfully completed within one year from the time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually.
7. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Trial co-counsel assignments:

1. Are members of the bar admitted to practice in the jurisdiction; and
2. 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 two years litigation experience in the field of criminal defense; and
 - b. have prior experience as lead counselor co- counsel in no fewer than three jury trials, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a 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 attended and successfully completed within one year from the time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually.
 - e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(Available at <http://www.arkansas.gov/apdc/news/qualifications.html#Cases>)

Rule 37.5(c)(1) of the Arkansas Rules of Criminal Procedure (2000) applies only to state post-conviction cases and outlines the qualifications of an appointed attorney in death penalty cases for appeals and post-conviction:

(A) Within ten (10) years immediately preceding the appointment, the attorney shall have:

- (i) represented a petitioner under sentence of death in a state or federal post-conviction proceeding; or
 - (ii) actively participated as defense counsel in at least five (5) felony jury trials tried to completion, including one trial in which the death penalty was sought;
- and

(B) Within ten (10) years immediately preceding the appointment, the attorney shall have:

- (i) represented a petitioner in at least three state or federal post-conviction proceedings, one of which proceeded to an evidentiary hearing and all of which involved a conviction of a violent felony, including one conviction of murder; or
- (ii) represented a defendant in at least three (3) appeals involving a conviction of a violent felony, including one conviction of murder, and represented a petitioner in at least one evidentiary hearing in a state or federal post-conviction proceeding; and

(C) The attorney shall have been actively engaged in the practice of law for at least three (3) years; and

(D) Within two (2) years immediately preceding the appointment, the attorney shall have completed at least six (6) hours of continuing legal education or other professional training in the representation of persons in capital trial, capital appellate, or capital post-conviction proceedings.

California:

Rules 8.605(d)-(e) of the California Rules of Court (2008) set forth qualifications for appointed appellate and post-conviction counsel:

Qualifications for appointed appellate counsel

An attorney appointed as lead or associate counsel in a death penalty appeal must have at least the following qualifications and experience:

- (1) Active practice of law in California for at least four years.
- (2) Either:
 - (A) Service as counsel of record for a defendant in seven completed felony appeals, including one murder case; or
 - (B) Service as counsel of record for a defendant in five completed felony appeals and as supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service as supervised counsel in a death penalty appeal will apply toward this qualification only if lead or associate counsel in that appeal attests that the supervised attorney performed substantial work on the case and recommends the attorney for appointment.
- (3) Familiarity with Supreme Court practices and procedures, including those related to death penalty appeals.

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense training, continuing education, or course of study, at least six hours of which involve death penalty appeals. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.

(5) Proficiency in issue identification, research, analysis, writing, and advocacy, taking into consideration all of the following:

(A) Two writing samples--ordinarily appellate briefs--written by the attorney and presenting an analysis of complex legal issues;

(B) If the attorney has previously been appointed in a death penalty appeal or death penalty-related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigents in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

Qualifications for appointed habeas corpus counsel

An attorney appointed as lead or associate counsel to represent a person in death penalty-related habeas corpus proceedings must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years.

(2) Either:

(A) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder case, and service as counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or

(B) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings and service as supervised counsel in two death penalty-related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a death penalty-related habeas corpus proceeding will apply toward this qualification only if lead or associate counsel in that proceeding attests that the attorney performed substantial work on the case and recommends the attorney for appointment.

(3) Familiarity with the practices and procedures of the California Supreme Court and the federal courts in death penalty-related habeas corpus proceedings.

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which address death penalty habeas corpus proceedings. If the Supreme Court has previously appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years before the request for a new appointment, the court, after reviewing counsel's previous work, may find that such representation constitutes compliance with this requirement.

(5) Proficiency in issue identification, research, analysis, writing, investigation, and advocacy, taking into consideration all of the following:

- (A) Three writing samples--ordinarily two appellate briefs and one habeas corpus petition--written by the attorney and presenting an analysis of complex legal issues;
 - (B) If the attorney has previously been appointed in a death penalty appeal or death penalty-related habeas corpus proceeding, the evaluation of the assisting counsel or entity in that proceeding;
 - (C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and
 - (D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.
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Colorado:

Colorado Revised Statutes 16-12-205 (IV)(2) (2008) states that in appointing new post conviction counsel to represent an indigent defendant, the trial court shall appoint one or more attorneys who, alone or in combination, meet all of the following qualifications:

- (a) Each appointed attorney shall be licensed to practice law in Colorado or be admitted to practice in Colorado solely for the purpose of representing the defendant;
- (b) At least one of the appointed attorneys shall have a minimum of five years' experience in criminal law litigation, including work on trials and postconviction proceedings;
- (c) At least one of the appointed attorneys shall have a minimum of three years' experience in trying felony cases, including having tried at least five felony cases to verdict in the preceding five years or having tried a minimum total of twenty-five felony cases; and
- (d) At least one of the appointed attorneys shall have a minimum of three years' experience in handling appeals of felony cases, having served as counsel in at least five appeals in felony cases.

The court may also consider the following factors:

- (a) Whether the attorney under consideration has previously appeared as counsel in a class 1 felony case in which the death penalty was sought;
- (b) Whether the attorney under consideration has tried at least one first degree murder case to verdict;
- (c) Whether, within the preceding five years, the attorney under consideration has taught or attended a continuing legal education course that dealt in substantial part with the trial, appeal, and postconviction review of class 1 felony cases in which the death penalty is sought;
- (d) The workload of the attorney under consideration and how that workload would affect the attorney's representation of the defendant;
- (e) The diligence and ability of the attorney under consideration; and
- (f) Any other factor that may be relevant to a determination of whether the attorney under consideration will fairly, efficiently, and effectively represent the defendant for purposes of postconviction review.

Colorado Revised Statutes 16-12-205 (IV)(3) (2008).

Delaware:

The State of Delaware Public Defender's Office uses a capital defense team, as specified by the ABA Guidelines. "[E]ach capital defendant who faces the death penalty is represented by a capital defense team as specified by the American Bar Association. The team consists of a lead attorney, an associate attorney, a Mitigation Specialist, a Psycho-Forensic Evaluator, a fact investigator and, at least, one outside mental-health expert."

<http://publicdefender.delaware.gov/services/legalservices.shtml>

Delaware Superior Court Rules of Criminal Procedure, Rule 61(a)

The judge shall appoint counsel for an indigent movant's first timely postconviction motion and request for appointment of counsel if the motion seeks to set aside: (i) a judgment of conviction after a trial that has been affirmed by final order upon direct appellate review and is for a crime designated as a class A, B, or C felony under 11 Del. C. § 4205(b); (ii) a judgment of conviction after a trial that has been affirmed by final order upon direct appellate review and resulted in the imposition of a sentence under 11 Del. C. § 4214(b); or (iii) a sentence of death.

Florida:

Rules 3.112 (f), (g) and (h) of the Florida Rules of Criminal Procedure (2000) outline the minimum standards for trial counsel and appellate counsel (with minor technical edits effective as of 2016):

(f) Lead Counsel. Lead trial counsel assignments should be given to attorneys who:

- (1) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (2) are experienced and active trial practitioners with at least five years of litigation experience in the field of criminal law; and
- (3) have prior experience as lead counsel in no fewer than nine state or federal jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead defense counsel or co-counsel in at least two state or federal cases tried to completion 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 alternatively, of the nine jury trials, at least one was a murder trial and an additional five were felony jury trials; and
- (4) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and
- (5) are familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence; and
- (6) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, including but not limited to the investigation and presentation of evidence in mitigation of the death penalty; and
- (7) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

- (g) **Co-counsel.** Trial co-counsel assignments should be given to attorneys who:
- (1) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
 - (2) qualify as lead counsel under paragraph (f) of these standards or meet the following requirements:
 - (A) are experienced and active trial practitioners with at least three years of litigation experience in the field of criminal law; and
 - (B) have prior experience as lead counsel or cocounsel in no fewer than three state or federal 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 alternatively, of the three jury trials, at least one was a 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 demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, and
 - (E) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.
- (h) **Appellate Counsel.** Appellate counsel assignments should be given to attorneys who:
- (1) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
 - (2) are experienced and active trial or appellate practitioners with at least five years of experience in the field of criminal law; and
 - (3) have prior experience 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 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 conviction; and
 - (4) are familiar with the practice and procedure of the appellate courts of the jurisdiction; and
 - (5) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and
 - (6) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

Georgia:

The “Unified Appeal” process became effective in January of 2000 by the Supreme Court of Georgia. Standards for attorneys appointed to handle death penalty cases were incorporated in the new UA procedures. Any attorney appointed to serve as either lead or co-counsel is required to meet the following minimum qualifications pursuant to Unified Appeal Rule II (2014):

1. *Trial.*

a. *Lead Counsel.*

- (1) must be a member in good standing of the State Bar or admitted to practice *pro hac vice*, and must have at least five years criminal litigation experience as a criminal defense attorney or a prosecuting attorney; and

- (2) must have been lead counsel on at least one death penalty murder trial to verdict or three capital (non-death penalty) trials to verdict, one of which must have been a murder case, or been co-counsel on two death penalty cases; and
- (3) must be familiar with the Unified Appeal Procedure; and
- (4) must be familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
- (5) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death penalty defense or, upon appointment agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-recorded instruction and written materials and certifying to the trial court that the materials have been reviewed; and
- (6) must have demonstrated the necessary proficiency and commitment that exemplify the quality of representation appropriate to capital cases.

b. Co-counsel.

- (1) must be a member in good standing of the State Bar with combined three years of criminal trial experience either as a criminal defense attorney or a prosecuting attorney; and
- (2) must have been lead or co-counsel in at least one (non-death penalty) murder trial to verdict, or in at least two felony jury trials; and
- (3) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death penalty defense or, upon appointment, agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-recorded instruction and written materials and certifying to the trial court that the materials have been reviewed.

2. *Direct Appeal.*

a. Lead Counsel.

- (1) must be a member in good standing of the State Bar or admitted to practice pro hac vice and must have at least five years criminal litigation experience as a criminal defense attorney or a prosecuting attorney; and
- (2) must have been co-counsel, or have actively assisted in the direct appeal of at least one death penalty case and have been counsel of record in at least three felony appeals; and
- (3) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs relating to post-conviction appeals and appellate procedures relating to post-conviction appeals or, upon appointment, agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-recorded instruction and written materials and certifying to the trial court that the materials have been reviewed.

b. Co-counsel.

- (1) must be a member in good standing of the State Bar with combined three years of criminal trial experience either as a criminal defense attorney or a prosecuting attorney; and

- (2) must have experience as counsel of record in three felony appeals either as a criminal defense attorney or a prosecuting attorney; and
 - (3) must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs relating to post-conviction appeals and appellate procedures relating to post-conviction appeals or, upon appointment, agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-recorded instruction and written materials and certifying to the trial court that the materials have been reviewed.
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Idaho:

Idaho Criminal Rule 44.3(3) (2003), Standards for the Qualification of Appointed Counsel in Capital Cases sets forth the qualifications for appointed counsel at trial, on direct appeal and in post-conviction:

(a) *Trial.*

- (1) Lead trial counsel assignments shall be made to attorneys who:
 - (A) Are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice pro hac vice; and
 - (B) Are experienced and active trial practitioners with at least five (5) years litigation experience in criminal defense or prosecution; and
 - (C) Have served as lead counsel in no fewer than four (4) felony jury trials of cases which were tried to completion; and have served either as lead or co-counsel in one case in which the death penalty might have been imposed and which was tried through to completion, or served as lead counsel in the sentencing phase of a death penalty case.
 - (D) Are familiar with the rules, practice and procedure of the district courts of the state of Idaho; and
 - (E) Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
 - (F) Have attended and successfully completed at least twelve (12) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two (2) years; and
 - (G) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.
- (2) Co-counsel assignments shall be assigned to attorneys who:
 - (A) Are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice pro hac vice; and
 - (B) Qualify as lead counsel under paragraph 3 (a) of this Order or meet the following requirements:
 - (i) Are experienced and active trial practitioners with at least three (3) years litigation experience in criminal defense or prosecution; and
 - (ii) Have prior experience as lead counsel in no fewer than three (3) felony jury trials of cases which were tried to completion; and
 - (iii) Are familiar with the rules, practice and procedure of the district courts of the state of Idaho; and

- (iv) Have attended and successfully completed at least six (6) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two years; and
- (v) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(3) Alternate Procedures. Applications for lead and co-counsel assignments may be made by persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the Idaho Supreme Court or the Court's designee that competent representation will be provided in a capital case. Lawyers appointed under this paragraph shall meet either of the following qualifications:

- (A) Experience in some stage of death penalty litigation which does not meet the levels required in paragraphs (a)(1) or (a)(2) above, or
- (B) Specialized post-graduate training in the defense or prosecution of persons accused of capital crimes.

(b) Appeal/Post-Conviction.

(1) Appellate or post convictions counsel must either qualify as "lead trial counsel" under Section 3 (a) or meet the following requirements:

- (A) Be a member in good standing of the Idaho State Bar, be admitted to practice in Idaho or admitted to practice pro hac vice.
- (B) Be familiar with the rules, practice and procedure of the appellate courts of the State of Idaho.
- (C) Be experienced and active post-conviction and appellate practitioners with at least three (3) years experience in criminal defense or prosecution.
- (D) Have served as court appointed or retained counsel in the appeal or the post conviction review of a case in which the death penalty was imposed, or have served as counsel in a habeas corpus death penalty case in Federal Court.
- (E) Have attended and successfully completed at least twelve (12) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two (2) years.
- (F) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases. If the court in its discretion appoints co-counsel for appeal or post conviction, these requirements do not apply to co-counsel.

In addition, appointed counsel workload is considered. "The appointing authority shall not make an appointment without assessing the impact of the appointment on the attorney's workload." Idaho Criminal Rule 44.3(4)

Indiana:

Indiana Criminal Procedure Rule 24 (2001) states that the presiding judge in a capital case must appoint attorneys to represent an indigent defendant in accordance with the following qualifications:

Trial Counsel

(1) *Lead Counsel; Qualifications.* One (1) of the attorneys appointed by the court shall be designated as lead counsel. To be eligible to serve as lead counsel, an attorney shall:

- (a) be an experienced and active trial practitioner with at least five (5) years of criminal litigation experience;
- (b) have prior experience as lead or co-counsel in no fewer than five (5) felony jury trials which were tried to completion;
- (c) have prior experience as lead or co-counsel in at least one (1) case in which the death penalty was sought; and
- (d) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

(2) *Co-Counsel, Qualifications.* The remaining attorney shall be designated as co-counsel. To be eligible to serve as co-counsel, an attorney shall:

- (a) be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience;
- (b) have prior experience as lead or co-counsel in no fewer than three (3) felony jury trials which were tried to completion; and
- (c) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

Appellate Counsel

Qualifications of Appellate Counsel. An attorney appointed to serve as appellate counsel for an individual sentenced to die, shall:

- (a) be an experienced and active trial or appellate practitioner with at least three (3) years experience in criminal litigation;
- (b) have prior experience within the last five (5) years as appellate counsel in no fewer than three (3) felony convictions in federal or state court; and
- (c) have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

Kansas:

The Kansas State Board of Indigents' Defense Services is responsible for providing "standards of competency and qualification for the appointment of counsel in capital cases." Kansas Statutes Chapter 22-4505(d)(1)(B) (2008).

Kan. Admin. Regulation §105-3-2(a)(4)-(6) (2012) sets forth qualification standards based on the 2003 ABA Guidelines that apply to trial (4), direct appeal (5), and post-conviction (6) counsel:

Each attorney assigned or appointed to the defense of any indigent person accused of a capital murder, as defined by K.S.A. 2011 Supp. 21-5401 and amendments thereto, 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 murder, pursuant to "guideline 5.1 qualifications of defense counsel," as published on pages 35 and 36 in the February 2003 edition of the American bar association (ABA) "guidelines for the appointment and performance of defense counsel in death penalty cases" and hereby adopted by reference, except for the history of guideline, related standards, and commentary on page 36. Each attorney who is eligible to

serve on the capital appointments panel shall be prequalified by the board as meeting this regulation.

Kentucky:

The Kentucky Department of Public Advocacy (DPA) provides and supervises indigent defense in capital cases (as well as other cases) in Kentucky. Pursuant to section 31.030(4) of Kentucky Revised Statutes, the DPA has the responsibility for "[d]eveloping and promulgating standards and regulations, rules, and procedures for administration of the defense of indigent defendants in criminal cases."

The goal of the Kentucky Department of Public Advocacy is to meet the ABA Standard for appointment and performance of counsel in death penalty cases. They have developed a policy and procedure manual that deals with the guidelines they adopted in November 1999 for the handling of capital cases, which states:

The Trial Division formally adopted the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty cases* with the direction that only that portion of the Guidelines that deals with performance of counsel shall be formally adopted. The portion of the Guidelines, which address appointment of counsel in death penalty cases, shall not be formally adopted, but are to be utilized for reference as the standard toward which to strive in representing our clients. Those Guidelines which refer to the appointment of defense counsel in a capital case, though not formally adopted, should nonetheless be considered with the full weight and effect of the operational goals in order to insure the best possible representation for our clients.

Louisiana:

Louisiana Supreme Court Rule XXXI (2008) sets the standards for indigent defendants. Section (A)(1) states:

In any capital case in which a defendant is found to be indigent, the court shall appoint no less than two attorneys to represent the defendant. At least two of the appointed attorneys must be certified as qualified to serve in capital cases as provided below. The court shall designate one of the appointed attorneys to be lead counsel, the other(s) as associate counsel. The court shall only designate as lead and associate counsel those attorneys who have either been previously certified by the Louisiana Indigent Defender Board and whose certification is still in good standing or those attorneys who, after December 31, 1997, may be certified by the district court judge handling the case pursuant to Paragraph (b) of Subsection 1 of this Section. The certification of attorneys by district court judges shall remain in effect until such time as the Indigent Defense Supplemental Assistance Board is able to review and evaluate the standards and capital certification procedures for either continuation, discontinuation, or modification.

Until such time as the Indigent Defense Supplement Assistance Board shall address this matter, each district judge, presiding over a capital case, shall maintain and enforce the capital certification procedures previously developed by the Louisiana Indigent Defender Board.

The Board's standards are set forth at La. Admin. Code tit. 22, pt. XV (2011)

§1901. Purpose, Findings and Intentions

A. The Standards for attorneys representing indigent defendants in capital cases are intended to serve several purposes. First and foremost, the Standards are intended to encourage public defenders, assistant public defenders, and assigned counsel to perform to a high standard of representation and to promote professionalism in the representation of indigent capital defendants. These Standards apply to trial level, appellate, and postconviction representation. It is the intention of these rules to adopt and apply the Standards for capital defense set out by the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, its associated commentary, and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases

§1903. General Standards for Capital Defense Counsel

1. In order to provide high quality legal representation, counsel should have a mastery of any substantive criminal law and laws of criminal procedure that may be relevant to counsel's representation. Counsel should also be familiar with the prevailing customs or practices of the relevant court, and the policies and practices of the prosecuting agency.
 2. In providing representation at any stage in a capital case, counsel should be familiar with all applicable areas of law relevant to capital trials, appeals, and state and federal post-conviction relief.
 3. Prior to agreeing to undertake representation in a capital case, counsel should have sufficient experience or training to provide high quality representation. Counsel should not accept a capital case assignment unless he or she has been certified for the specific level of representation assigned, and has the necessary knowledge and skills to handle the particular case.
 4. If after being assigned a case counsel finds that the case involves particular issues or procedures in which counsel does not have the experience or training necessary to provide high quality legal representation, counsel should acquire the necessary knowledge or skills or request resources for another attorney to provide such services.
 5. In providing high quality representation, counsel should consult with and take advantage of the skills and experience of other members of the criminal defense community and certified capital defenders, in particular. Further, where considerations of timing, resources or the interests of the client make it appropriate, counsel should request assignment of an additional attorney(s). Similarly, where appropriate, counsel should request assignment of an additional attorney(s) with specialized experience or knowledge to assist directly in particular aspects of the representation.
 6. Capital defense counsel should complete a comprehensive training program in the defense of capital cases as required by the Capital Guidelines. Counsel should, on an ongoing basis, attend and successfully complete specialized training programs in the defense of capital cases. In addition to specific training, counsel should stay abreast of changes and developments in the law and other matters relevant to the defense of capital cases.
 7. As a component of acquiring and maintaining adequate training, counsel should consult with other attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about practices of judges, prosecutors, and other court personnel. More experienced counsel should offer to mentor less experienced attorneys.
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Mississippi:

Mississippi Rules of Appellate Procedure 22(d) and (e) set forth the standards for post-conviction counsel in a death penalty case:

(d) Standards and Qualifications for Attorneys Appointed or Retained to Represent Those Under Sentence of Death in Post-conviction Proceedings.

Counsel representing those under a sentence of death seeking post-conviction relief shall,

- (1) Be admitted to practice law in Mississippi, being a member in good standing of the Bar for at least five years immediately preceding the appointment, or admitted pro hac vice pursuant to order entered under M.R.A.P. 46 and being a member in good standing of that attorney's home jurisdiction for a like period immediately preceding the appointment,
- (2) Be admitted to practice in the federal courts of Mississippi and before the Fifth Circuit, or, in the case of attorneys appearing pro hac vice, admitted to the federal district courts and the circuit court of appeals having jurisdiction in their home areas,
- (3) Have practiced in the area of state criminal appeals or post-conviction proceedings for three years immediately preceding appointment,
- (4) Have not previously represented the capital petitioner in the case either in the trial court or in the direct appeal, unless the petitioner and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation, and
- (5) Have within five years immediately preceding the appointment been counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and have prior experience as counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding; or, in the alternative, have within such period been counsel in the appeal of at least six felony convictions, at least two of which were appeals from murder convictions and counsel in at least two post-conviction proceedings.

Provided, however, under exceptional circumstances, and with the consent of the Supreme Court, an attorney may be appointed who does not meet the stated qualifications upon a showing that the attorney's experience, stature and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in the rule.

(e) Education and Training of Attorneys Appointed or Retained to Represent Those Under Sentence of Death in Post-conviction Proceedings. Effective July 31, 2000, an attorney serving as post-conviction counsel in a case wherein the petitioner is under a sentence of death shall have within one year prior to his appointment or employment successfully completed twelve hours training or educational programs in the area of capital defense through a program accredited by the Mississippi Commission on Continuing Legal Education or by the American Bar Association.

No such similar standards exist for trial or appellate-level counsel.

Missouri:

When a motion is filed to set aside a sentence of death following conviction on a plea of guilty or conviction after trial, Supreme Court Rules 24.036(a) and 29.16(a) (2001), respectively, provide that the court shall appoint two attorneys. Rule 24.036(b) (and the identical Rule 29.16(b)) provides that:

- (b) All counsel appointed as provided in this Rule 24.036 shall be members of The Missouri Bar or shall be admitted to practice in the particular case as provided in this Court's Rule 9. At least one of the counsel shall meet the following qualifications:
- (1) Have attended and successfully completed within two years immediately preceding the appointment at least twelve hours of training or educational programs on the post-conviction phase of a criminal case and federal and state aspects of cases in which the death penalty is sought; and
 - (2) Have at least three years litigation experience in the field of criminal law; and
 - (3) Have participated as counsel or co-counsel to final judgment in at least five post-conviction motions involving class A felonies in either state or federal trial courts; and
 - (4) Have participated in either state or federal court as counsel or co-counsel to final judgment in at least:
 - (A) three felony jury trials; or
 - (B) five direct criminal appeals in felony cases.

Montana:

In Montana, various statutes grant the Public Defender Commission and the Office of Public Defender Standards the authority to create standards for the qualifications and performance of counsel in death penalty cases.

From Office of Public Defender Standards: available at:
<http://publicdefender.mt.gov/2012GovReport/Standards.pdf>

VI. QUALIFICATIONS AND DUTIES OF COUNSEL

Goal: Counsel must meet these minimum standards before accepting a case. In order to provide effective representation, counsel must engage in regular and ongoing training.

- A. In order to assure that clients receive the effective assistance of counsel to which they are constitutionally and statutorily entitled, counsel providing public legal representation should meet the following minimum professional qualifications:
- a. Satisfy the minimum requirements for practicing law in Montana as determined by the Montana Supreme Court;
 - b. Complete twenty hours of continuing legal education within each calendar year from courses, offered or approved by the Office of the State Public Defender, relating to public defender practice or representing persons whose liberty is at risk as a result of State-initiated proceedings;
 - c. Comply with all other training requirements established by the Training Coordinator of the Office of the State Public Defender and approved by the Public Defender Commission; including, but not limited to, mental health disabilities, cultural competency, and drug dependency.

d. In order to provide quality legal representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the State of Montana. Counsel has a continuing obligation to stay abreast of changes and developments in the law;

e. The foregoing requirements shall be deemed satisfied if counsel is representing clients pursuant to the Student Practice Rule and is being directly supervised by a supervising attorney who meets the standards required for felony defense set forth below.

B. Additional trial attorneys' qualifications according to type of case:

a. Death penalty representation. Each attorney acting as lead counsel in a death penalty case shall meet the standards for competency of counsel for indigent persons in death penalty cases adopted by the Montana Supreme Court, and those set forth in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003);

The Montana Supreme Court set forth its own standards in two separate orders: *IN THE MATTER OF THE PROPOSED ORDER ESTABLISHING STANDARDS FOR COMPETENCY OF COUNSEL APPOINTED TO REPRESENT INDIGENT PERSONS IN PROCEEDINGS UNDER TITLE 46, CHAPTER 21, WHO ARE SENTENCED TO DEATH* and *IN THE MATTER OF THE PROPOSED ORDER ESTABLISHING STANDARDS FOR COMPETENCY OF TRIAL AND APPELLATE COUNSEL APPOINTED TO REPRESENT INDIGENT PERSONS IN CAPITAL CASES* (published in 24-AUG Mont. Law. 23 (1999));

Trial Phase

2. Upon establishment of indigency as provided in Title 46, Chapter 8, Part 1, Montana Code Annotated, and identification of a case as one in which the prosecutor believes sufficient evidence exists to show that one or more statutory aggravating factors under beta 46-18-303, MCA, can be proved to the *24 appropriate standard of proof, the district court shall appoint two counsel to represent the defendant.

3. In selecting appointed counsel, the district court shall secure sufficient information from counsel to be appointed, either in writing or on the record, to satisfy the district court that counsel possess the following minimum qualifications:

A. Both appointed attorneys must be members in good standing of the State Bar of Montana or admitted to practice before the district court pro hac vice.

B. Both counsel must have completed or taught, in the two-year period prior to appointment or within 90 days after the appointment, a continuing legal education course or courses, approved for credit by the appropriate authority under the rules adopted by the Montana Supreme Court, at least 12 hours of which deal with subjects related to the defense of persons accused or convicted of capital crimes.

C. Counsel, either individually or in combination, must have had significant experience within the past 5 years in the trial of criminal cases to conclusion, including a capital case or a case involving charges of or equivalent to deliberate homicide under Montana law.

D. The nature and volume of the workload of both appointed counsel is such that they will have the ability to spend the time necessary to defend a capital case.

E. Counsel are familiar with and have a copy of the current American Bar Association standards for the defense of capital cases. By adoption of this provision, the Montana Supreme Court does not hold that adherence to the guidelines is required as a condition of providing effective assistance of counsel, or that failure to adhere to the guidelines gives rise to an inference of ineffective assistance of counsel.

Direct Appeal

1. If a defendant is sentenced to death and is determined by the district court to be indigent, the district court shall appoint two attorneys to represent the defendant on direct appeal.

2. In selecting appointed counsel for appeal, the district court shall secure sufficient information from counsel to be appointed, either in writing or on the record, to satisfy the district court that counsel possess sufficient appellate experience to provide adequate representation to the defendant on appeal and the following minimum qualifications:

A. Both appointed attorneys must be members in good standing of the State Bar of Montana or admitted to practice before the district court pro hac vice.

B. Both counsel must have completed or taught, in the two-year period prior to appointment or within 90 days after the appointment, a continuing legal education course or courses, approved for credit by the appropriate authority under the rules adopted by the Montana Supreme Court, at least 12 hours of which deal with subjects related to the defense of persons accused or convicted of capital crimes.

C. Counsel, either individually or in combination, must have had significant experience within the past 5 years in the appeal of criminal cases, including a capital case or a case involving charges of or equivalent to deliberate homicide under Montana law.

D. The nature and volume of the workload of both appointed counsel is such that they will have the ability to spend the time necessary to appeal a capital case.

E. Counsel are familiar with and have a copy of the current American Bar Association standards for the defense of capital cases.

By adoption of this provision, the Montana Supreme Court does not hold that adherence to the guidelines is required as a condition of providing effective assistance of counsel, or that failure to adhere to the guidelines gives rise to an inference of ineffective assistance of counsel.

Post-Conviction

2. The district court shall appoint two counsel.

One of the appointed counsel may be an attorney who has been admitted pro hac vice. Lead counsel shall satisfy all of the following:

- A. He or she must be an active member in good standing of the Montana State Bar or be admitted pro hac vice.
- B. He or she must have at least 5 years criminal trial, criminal appellate, or state or federal postconviction experience, which experience may have been obtained in Montana or in another jurisdiction.
- C. He or she must have completed or taught, in the two-year period prior to appointment or within 90 days after the appointment, a continuing legal education course or courses, approved for credit by the appropriate authority under the rules adopted by the Montana Supreme Court, at least 12 hours of which deal with Subjects related to the defense of persons accused or convicted of capital crimes.

3. In addition, the appointed counsel, either individually or in combination, shall have the following qualifications obtained in Montana or another jurisdiction:

- A. Experience as Counsel for either the defendant or the state in the trial of one deliberate Homicide case;
- B. Experience as counsel for either the defendant or the state in the trial of three felony cases;
- C. Experience as counsel for either the defendant or the state in the direct appeal of three felony convictions; and
- D. Experience as counsel for either the petitioner or the state in three cases involving claims for state postconviction or federal habeas corpus review.

Nebraska:

In Nebraska, standards/qualifications for death penalty counsel are established by the Nebraska Commission on Public Advocacy, working in conjunction with the Indigent Defense Standards Advisory Council. Exact standards are not available. However, the statutes authorizing the Commission on Public Advocacy and the Indigent Defense Standards Advisory Council to establish the standards appear below:

Statute outlining duties of Nebraska Commission on Public Advocacy:

29-3927 Commission; duties. (1) With respect to its duties under section 29-3923, the commission shall:

- (g) Adopt guidelines and standards, for county indigent defense systems, including, but not limited to, standards relating to the following: The use and expenditure of funds appropriated by the Legislature to reimburse counties which qualify for reimbursement; attorney eligibility and qualifications for court appointments;**

compensation rates for salaried public defenders, contracting attorneys, and court-appointed attorneys and overall funding of the indigent defense system; maximum caseloads for all types of systems; systems administration, including rules for appointing counsel, awarding defense contracts, and reimbursing defense expenses; conflicts of interest; continuing legal education and training; and availability of supportive services and expert witnesses.

Nevada:

The Supreme Court of Nevada adopted standards and qualifications for counsel in capital cases. The standards and qualifications are available at the following website:

<http://www.co.washoe.nv.us/repository/files/36/ADKT411.CapPerfStds.pdf>

The qualification requirements appear to be consistent with the ABA Guidelines. See Standard 2-2.

New Hampshire:

In 2007, the New Hampshire Public Defender sent a letter to the presiding trial court judge confirming that the office complies with the ABA Guidelines, which includes the qualification requirements for capital defense counsel. See:

<http://www.courts.state.nh.us/caseinfo/pdf/addison/2007/july/AddisonNHPDapp'tconfirmLTR-KAM.pdf>

In 2015, the New Hampshire Judicial Council adopted post-conviction performance and eligibility standards (available at <https://www.nh.gov/judicialcouncil/documents/capital-post-conviction-counsel.pdf>). The eligibility section provides:

In order to serve as lead counsel for a defendant in a capital post-conviction proceeding:

- Counsel shall have been a member of any bar for at least 5 years and must possess at least 3 years of experience in the field of post-conviction litigation.
- Counsel must be familiar with all state and federal appellate and post-conviction options available to clients and must demonstrate a familiarity with legal developments locally and nationally that may be relevant to the persuasive presentation of claims in state post-conviction proceedings.
- Counsel must provide a written proposal in advance of appointment that shows, based on the volume of the record and the circumstances of the defendant's case, that he or she can reasonably forecast, and meet, the demands of providing high quality representation.

- Counsel should be familiar with the procedure for setting execution dates and providing notice of them. Counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.
- Counsel must demonstrate a thorough understanding of how to preserve a client's right to federal review, including ensuring that a client is not time-barred from seeking relief.
- Counsel must be familiar with the capital post-conviction performance standards promulgated by the New Hampshire Judicial Council.

New Mexico: (Death Penalty Repealed 2009)

Public defender standards created in 1998 provided that capital defense counsel must comply with NLADA standards for death penalty cases: "Attorneys handling death penalty cases should consult the National Legal Aid and Defender Association's Standards for Appointment and Performance of Counsel in Death Penalty Cases (1987, amended 1988)." These standards were previously available on the public defender's website, but they have since been removed.

In 2004, a State Bar of New Mexico Task Force to Study the Administration of the Death Penalty in New Mexico prepared a report that it submitted to the Board of Bar Commissioners. The report recommended enhanced qualification requirements for capital defense counsel. This report is on file with the ABA Death Penalty Representation Project.

North Carolina:

North Carolina provides detailed standards for counsel at all stages of a capital case:

2A.1 (App.) Trial Qualifications and Experience

(a) Lead Counsel

To be eligible to be appointed as lead counsel in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as lead counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2A.1(c) (App.) below.

A candidate for appointment must demonstrate that he or she:

- (i) has at least six years of criminal or civil litigation experience; or has at least four years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a capital defense organization;
- (ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and Supreme Court of North Carolina;
- (iii) has participated as trial counsel in at least ten jury trials to verdict or to hung jury;

(iv) has tried a capital case to verdict or to hung jury as lead defense counsel; or has tried two capital cases to verdict or to hung jury as associate defense counsel; or has represented to disposition at the trial level defendants in four homicides cases; and

(v) has substantial familiarity with and experience in the use of expert witnesses and scientific and medical evidence, including mental health, social history, and pathology evidence.

(b) Associate Counsel

To be eligible to be appointed as associate counsel in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as associate counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2A.1(c) (App.) below.

A candidate for appointment must demonstrate that he or she:

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

(ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and Supreme Court of North Carolina;

(iii) has participated as trial counsel in at least four jury trials to verdict or to hung jury; or has spent two years in practice in a capital defense organization; and

(iv) has substantial familiarity with scientific and medical evidence, including mental health, social history, and pathology evidence.

Appendix 2B

Standards for Appellate Counsel in Capital Cases

2B.1 (App.) Appellate Qualifications and Experience

(a) Appellate Counsel

To be eligible to be appointed as appellate counsel on direct appeal in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as appellate counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2B.1(b) (App.) below.

A candidate for appointment must demonstrate that he or she:

(i) has at least five years of criminal, appellate, or post-conviction experience; or has at least three years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a capital defense organization; or is currently serving as the Appellate Defender or an Assistant Appellate Defender;

(ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and the Supreme Court of North Carolina;

(iii) is familiar with practice and procedure in the trial and appellate courts of North Carolina; and

(iv) 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.

Appendix 2C

Standards for State Post-Conviction Counsel in Capital Cases

2C.1 (App.) State Post-Conviction Qualifications and Experience

(a) State Post-Conviction Counsel

To be eligible to be appointed as counsel on a Motion for Appropriate Relief and any appeal therefrom in a capital case, an attorney must demonstrate that he or she has the required legal knowledge and skill necessary for representation as post-conviction counsel in a capital case and will apply that knowledge and skill with appropriate thoroughness and preparation, and that he or she meets the requirements listed below. However, if an attorney cannot meet one or more of the requirements set forth below, the IDS Director may waive any requirement(s) pursuant to paragraph 2C.1(b) (App.) below.

A candidate for appointment must demonstrate that he or she:

- (i) has at least five years criminal or civil trial experience; or has at least five years criminal or civil appellate experience; or has at least five years state or federal post-conviction experience; or has at least three years of concentrated criminal litigation experience as a public defender, prosecutor, or attorney in a public or private capital defense organization; or is currently in practice in a capital defense organization;
- (ii) is familiar with ethics requirements, current criminal practice and procedure in North Carolina, and capital jurisprudence established by the Supreme Court of the United States and the Supreme Court of North Carolina;
- (iii) is familiar with the practice and procedure of the trial and appellate courts of North Carolina, including the practice and procedure for filing a Motion for Appropriate Relief, and with the practice and procedure of the federal courts with regard to federal habeas corpus petitions;
- (iv) has had primary responsibility for representing a party in at least three criminal or civil appeals, or criminal post-conviction proceedings; and
- (v) has substantial familiarity with and experience in the use of expert witnesses and scientific and medical evidence, including mental health, social history, and pathology evidence.

<http://www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%202%20Appendix.pdf>

Ohio:

Qualifications for counsel in capital cases appear in the 2015 Rules for Appointment of Counsel in Capital Cases. These replace the old Rules of Superintendence “Rule 20” standards. The rules are structured to first provide general qualification standards and then specific qualification standards for lawyers at each stage:

General Qualification Standards (App.Coun.R. 3.01)

- (1) Admission to the practice of law in Ohio or admission to practice pro hac vice;
- (2) Demonstrated commitment to providing high quality legal representation in the defense of capital cases;

- (3) Substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases;
- (4) Skill in the management and conduct of complex negotiations and litigation;
- (5) Skill in legal research, analysis, and the drafting of litigation documents;
- (6) Skill in oral advocacy;
- (7) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, arson, forensic pathology, and DNA evidence;
- (8) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- (9) Skill in the investigation, preparation, and presentation of mitigating evidence;
- (10) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

Lead Trial Counsel (App.Coun.R. 3.02)

- (1) Possess at least five years of criminal litigation experience in Ohio courts of common pleas or criminal appellate experience in Ohio courts of appeals or the Supreme Court;
- (2) Possess either of the following qualifications:
 - (a) Experience as trial lead counsel in the trial of at least one capital case;
 - (b) Experience as trial co-counsel in the trial of at least two capital cases.
- (3) Possess either of the following qualifications:
 - (a) Experience as trial lead counsel in the jury trial of at least one murder or aggravated murder case in the ten years prior to making application;
 - (b) Experience as trial lead counsel in three aggravated or first or second-degree felony jury trials in a court of common pleas in the five years prior to making application.
- (4) Comply with the general certification requirements of Appt.Coun.R. 3.01;
- (5) Comply with the training requirements of Appt.Coun.R. 4.01.

Trial Co-Counsel (App.Coun.R. 3.03)

- (1) Possess at least three years of criminal litigation experience in Ohio courts of common pleas or criminal appellate experience in Ohio courts of appeals or the Supreme Court;
- (2) Possess at least one of the following qualifications:
 - (a) Experience as trial co-counsel in one murder or aggravated murder trial in the ten years prior to making application;
 - (b) Experience as trial lead counsel in one first or second-degree felony jury trial in the five years prior to making application;
 - (c) Experience as trial lead or co-counsel in at least two felony jury trials in a court of common pleas in the five years prior to making application.
- (3) Comply with the general certification requirements of Appt.Coun.R. 3.01;
- (4) Comply with the training requirements of Appt.Coun.R. 4.01.

Appellate Counsel (App.Coun.R. 3.04)

- (1) Possess at least three years of criminal litigation experience in Ohio courts of

- common pleas or criminal appellate experience in Ohio courts of appeals or the Supreme Court;
- (2) Have experience as counsel in the appeal of at least three felony convictions in the three years prior to making application;
 - (3) Comply with the general certification requirements of Appt.Coun.R. 3.01;
 - (4) Comply with the training requirements of Appt.Coun.R. 4.03.

Oklahoma:

The capital trial counsel application form, which is promulgated by the Oklahoma Indigent Defense System, provides, “ the Oklahoma indigent defense system board has adopted the American Bar Association guidelines for the appointment and performance of counsel in death penalty cases. This application and questionnaire is designed to facilitate the determination of whether an attorney possesses the minimum necessary qualifications under those guidelines to be included on the roster of attorneys who are willing to accept appointments as either lead counsel or co-counsel to represent an indigent defendant at the trial level in capital murder cases.”

See http://www.ok.gov/OIDS/documents/ques_trl.pdf

This language is particularly relevant because the Oklahoma Indigent Defense System has the statutory authority to set standards for the qualifications of counsel in capital cases. See Okla. Stat. §§ 22-1355.1 through 22-1355.7.

Oregon:

The Oregon Office of Public Defense Services has adopted the ABA Guidelines’ requirements for qualifications of counsel in death penalty cases. See <http://courts.oregon.gov/OPDS/docs/Reports/pdscdeathpenaltyreportandplan.pdf>

Pennsylvania:

Rule 801 of the Pennsylvania Rules of Criminal Procedure provide qualification requirements for capital defense counsel:

Rule 801. Qualifications for Defense Counsel in Capital Cases.

In all cases in which the attorney for the Commonwealth has filed a Notice of Aggravating Circumstances pursuant to Rule 802, before an attorney may participate in any stage of the case either as retained or appointed counsel, the attorney must meet the educational and experiential criteria set forth in this rule.

- (1) EXPERIENCE: Counsel shall
 - (a) be a member in good standing of the Bar of this Commonwealth;

- (b) be an active trial practitioner with a minimum of 5 years criminal litigation experience; and
- (c) have served as lead or co-counsel in a minimum of 8 significant cases that were given to the jury for deliberations. If representation is to be only in an appellate court, prior appellate or post-conviction representation in a minimum of 8 significant cases shall satisfy this requirement. A “significant case” for purposes of this rule is one that charges murder, manslaughter, vehicular homicide, or a felony for which the maximum penalty is 10 or more years.

(2) EDUCATION:

- (a) During the 3-year period immediately preceding the appointment or entry of appearance, counsel shall have completed a minimum of 18 hours of training relevant to representation in capital cases, as approved by the Pennsylvania Continuing Legal Education Board.
- (b) Training in capital cases shall include, but not be limited to, training in the following areas:
 - (i) relevant state, federal, and international law;
 - (ii) pleading and motion practice;
 - (iii) pretrial investigation, preparation, strategy, and theory regarding guilt and penalty phases;
 - (iv) jury selection;
 - (v) trial preparation and presentation;
 - (vi) presentation and rebuttal of relevant scientific, forensic, biological, and mental health evidence and experts;
 - (vii) ethical considerations particular to capital defense representation;
 - (viii) preservation of the record and issues for post-conviction review;
 - (ix) post-conviction litigation in state and federal courts;
 - (x) unique issues relating to those charged with capital offenses when under the age of 18; and
 - (xi) counsel’s relationship with the client and family.

(c) The Pennsylvania Continuing Legal Education Board shall maintain and make available a list of attorneys who satisfy the educational requirements set forth in this rule.

Comment: The purpose of this rule is to provide minimum uniform statewide standards for the experience and education of appointed and retained counsel in capital cases, to thus ensure such counsel possess the ability, knowledge, and experience to provide representation in the most competent and professional manner possible. These requirements apply to counsel at all stages of a capital case, including pretrial, trial, post-conviction, and appellate.

An attorney may serve as “second chair” in a capital case without meeting the educational or experience requirements of this rule. “Second chair” attorneys may not have primary responsibility for the presentation of significant evidence or argument, but may present minor or perfunctory evidence or argument, if deemed appropriate in the discretion of the court. Service as a “second chair” in a homicide case will count as a trial for purposes of evaluating that attorney’s experience under paragraph (1)(c) of this rule.

Note: Adopted June 4, 2004, amended January 11, 2016, effective April 1, 2016.

South Carolina:

The relevant statute in South Carolina (Title 16-3-26(B)(1)) provides the following qualifications for capital defense counsel:

“Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.”

In addition, the South Carolina Appellate Court Rules provide additional guidance. Specifically, Rule 421 provides that for capital cases, “Lead counsel shall have at least five years experience as a licensed attorney and at least three years experience in the actual trial of felony cases,” and that co-counsel must “have at least three years experience as a licensed attorney. Second counsel is not required to be further certified to be eligible for appointment.”

Rule 608(f)(1) addresses the appointment of counsel for trial and post-conviction: “Lead Counsel in Death Penalty Cases. The appointment of a lead counsel to represent an indigent defendant in a death penalty case shall be made from the list of members specified in (c)(1)(A) above who have been death penalty certified as lead counsel by the Supreme Court; provided, however, that lawyers who are not certified may be appointed as lead counsel in a post-conviction relief action for a death-sentenced inmate if they have previously represented a death-sentenced inmate in a state or federal post-conviction relief proceeding as provided by S.C. Code Ann. § 17-27-160.”

South Dakota:

SDCL § 23A-40-7 provides for appointed counsel in criminal cases:

The board of county commissioners of each county and the governing body of any municipality shall provide for the representation of indigent persons described in § 23A-40-6. The board or body shall provide this representation by any or all of the following:

- (1) Establishing and maintaining an office of a public defender;
- (2) Arranging with the courts in the county to appoint attorneys on an equitable basis through a systematic, coordinated plan; or
- (3) Contracting with any attorney licensed to practice law in this state.

In those counties which have established an office of public defender, any proceedings after judgment may be assigned to the public defender.

Tennessee:

Rule 13, Section 3 of the Rules of the Tennessee Supreme Court provides qualification requirements for capital defense counsel:

Trial Counsel

(b)(1) The court shall appoint two attorneys to represent a defendant at trial in a capital case. Both attorneys appointed must be licensed in Tennessee and have significant experience in Tennessee criminal trial practice, unless in the sound discretion of the trial court, appointment of one attorney admitted under Tennessee Supreme Court Rule 19 is appropriate. The appointment order shall specify which attorney is "lead counsel" and which attorney is "co-counsel." Whenever possible, a public defender shall serve as and be designated "lead counsel."

(c) Lead counsel must:

- (1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;
- (2) have regularly participated in criminal jury trials for at least five years;
- (3) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter;
- (4) have at least one of the following:
 - (A) experience as lead counsel in the jury trial of at least one capital case;
 - (B) experience as co-counsel in the trial of at least two capital cases;
 - (C) experience as co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of at least one murder case;
 - (D) experience as lead counsel or sole counsel in at least three murder jury trials or one murder jury trial and three felony jury trials; or
 - (E) experience as a judge in the jury trial of at least one capital case.
- (5) The provisions of this subsection requiring lead counsel to have participated in criminal jury trials for at least five years, rather than three years, and requiring six (6) hours of specialized training shall become effective January 1, 2006.

(d) Co-counsel must:

- (1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;
- (2) have completed, prior to the appointment, a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense; and, complete a minimum of six (6) hours of specialized training in the defense of defendants charged with a capital offense every two years thereafter;
- (3) have at least one of the following qualifications:
 - (A) qualify as lead counsel under (c) above; or
 - (B) have experience as sole counsel, lead counsel, or co-counsel in a murder jury trial.
- (4) The provisions of this subsection requiring six (6) hours of specialized training shall become effective January 1, 2006.

Direct Appeal

(e) Attorneys who represent the defendant in the trial court in a capital case may be designated to represent the defendant on direct appeal, provided at least one trial attorney qualifies as new appellate counsel under section 3(g) of this rule and both attorneys are available for appointment. However, new counsel will be appointed to represent the defendant if the trial court, or the court in which the case is pending, determines that appointment of new counsel is necessary to provide the defendant with effective assistance of counsel or that the best interest of the defendant requires appointment of new counsel.

(f) If new counsel are appointed to represent the defendant on direct appeal, both attorneys appointed must be licensed in Tennessee, unless in the sound discretion of the judge, appointment of one attorney admitted under Tennessee Supreme Court Rule 19 is appropriate.

(g) Appointed counsel on direct appeal, regardless of any prior representation of the defendant, must have three years of litigation experience in criminal trials and appeals, and they must have at least one of the two following requirements: experience as counsel of record in the appeal of a capital case; or experience as counsel of record in the appeal of at least three felony convictions within the past three years and a minimum of six hours of specialized training in the trial and appeal of capital cases.

Post-Conviction

(h) Counsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as appointed appellate counsel, or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. Counsel also must have a working knowledge of federal habeas corpus practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts; and they must not have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made, unless the defendant and counsel expressly consent to continued representation.

Competency Hearings

(i) No more than two attorneys shall be appointed to represent a death-row inmate in a proceeding regarding competency for execution. See *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). At least one of the attorneys appointed shall be qualified as post-conviction counsel as set forth in section 3(h).

Texas:

Pursuant to the Texas Code of Criminal Procedure, Article 26.052, to be eligible to serve as lead counsel in a capital case (trial or direct appeal), counsel must:

Trial

(2) The standards must require that a trial attorney appointed as lead counsel to a capital case:
(A) be a member of the State Bar of Texas;

- (B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;
- (C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under Subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;
- (D) have at least five years of criminal law experience;
- (E) have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second or first degree felonies or capital felonies;
- (F) have trial experience in:
 - (i) the use of and challenges to mental health or forensic expert witnesses; and
 - (ii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and
- (G) have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.

Direct Appeal

Until January 1, 2017:

- (3) The standards must require that an attorney appointed as lead appellate counsel in the direct appeal of a capital case:
 - (A) be a member of the State Bar of Texas;
 - (B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;
 - (C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case, unless the local selection committee determines under Subsection (n) that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation;
 - (D) have at least five years of criminal law experience;
 - (E) have authored a significant number of appellate briefs, including appellate briefs for homicide cases and other cases involving an offense punishable as a capital felony or a felony of the first degree or an offense described by Section 3g(a)(1), Article 42.12;
 - (F) have trial or appellate experience in:
 - (i) the use of and challenges to mental health or forensic expert witnesses; and
 - (ii) the use of mitigating evidence at the penalty phase of a death penalty trial; and
 - (G) have participated in continuing legal education courses or other training relating to criminal defense in appealing death penalty cases.

Post-Conviction

Article 11.071 of the Texas Code of Criminal Procedure, which governs post-conviction proceedings, requires appointment of counsel from the Office of Capital and Forensic Writs. If that office is not appointed, the convicting court appoints counsel from a list pursuant to Texas Government Code § 78.056, which requires that attorneys on the list:

- (1) must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases; and
- (2) may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case.

In addition to this statute, the Board of Directors of the State Bar of Texas has adopted a version of the ABA Guidelines. Guideline 4.1 provides:

A. Qualification standards for defense counsel in capital cases should be developed and published. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation

B. In formulating qualification standards, the following principles should insure:

1. That every attorney representing a capital defendant has:
 - a. obtained a license or permission to practice in the jurisdiction;
 - b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and satisfied the training requirements set forth in GUIDELINE 7.1.
2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:
 - a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
 - b. skill in the management and conduct of complex negotiations and litigation;
 - c. skill in legal research, analysis, and the drafting of litigation documents;
 - d. skill in oral advocacy;
 - e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
 - f. skill in the investigation, preparation, and presentation of mitigating evidence;
 - g. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and,
 - h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

Guidelines available at

http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/State/TX_Bar_Association_adopied_version_of_ABA_Guidelines.authcheckdam.pdf.

Utah:

Rule 8 of the Utah Rules of Criminal Procedure set forth the required qualifications for counsel in capital cases:

- b) In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more

attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below that appointed counsel is proficient in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:

- (1) at least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total;
- (2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or a felony homicide case which was tried to a jury and which went to final verdict;
- (3) at least one of the appointed attorneys must have completed or taught within the past five years an approved continuing legal education course or courses at least eight hours of which deal, in substantial part, with the trial of death penalty cases; and
- (4) the experience of one of the appointed attorneys must total not less than five years in the active practice of law.

(c) In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:

- (1) whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;
- (2) the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;
- (3) the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;
- (4) the diligence, competency and ability of the attorneys being considered; and
- (5) any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

(d) In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is proficient in the appeal of capital cases. To be found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

- (1) at least one attorney must have served as counsel in at least three felony appeals; and
- (2) at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.

(e) In all cases in which counsel is appointed to represent an indigent petitioner pursuant to Utah Code Ann. § 78-35a-202(2)(a), the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

- (1) at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;
- (2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;
- (3) at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in

substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;

(4) at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and

(5) the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

(f) Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.

Virginia:

Virginia Code §19.2-163.8 instructs the Public Defender Commission, in conjunction with the Virginia State Bar to adopt standards for the appointment of counsel in capital cases. Virginia Administrative Code Title 6, Chapter 10 (6 VA ADC 30-10-10) sets forth these qualifications for trial, appellate and habeas counsel:

Pursuant to § 19.2-163.8 E of the Code of Virginia, the Public Defender Commission, in conjunction with the Virginia State Bar, hereby sets forth the following standards for appointed counsel determined to be qualified and possessing proficiency and commitment to quality representation in capital cases. While § 19.2-163.7 of the Code of Virginia, effective July 1, 1992, does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate and habeas proceedings. Thus, the standards often refer to "lead counsel" and "co-counsel." If a public defender is appointed as either "lead" or "co-counsel," the other attorney should be appointed from the private bar.

A. Trial counsel

1. Court-appointed "lead counsel" shall:

- 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:
 - (1) Experience as "lead counsel" in the defense of at least one capital case;
 - (2) Experience as "co-counsel" in the defense of at least two capital cases;
 - (3) 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 as set forth in subdivisions 1 b and 1 d.
 - b. Have at least one of the following qualifications:
 - (1) Experience as "lead counsel" or "co-counsel" in a murder trial;
 - (2) Experience as "lead" or "co-counsel" in at least two criminal jury trials.
- B. Appellate counsel. Attorneys qualifying as court appointed "lead counsel" under subsection 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 an 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 procedure of appellate practice.
- C. Habeas corpus counsel.
1. Habeas corpus "lead counsel" shall satisfy one of the following requirements:
 - a. Be qualified as "lead counsel" pursuant to subsection 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 post conviction 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" shall satisfy one of the following requirements:
 - a. Service as "lead" or "co-counsel" in at least one capital habeas corpus proceeding in Virginia or federal courts, or both, during the last three years;
 - b. Have at least seven years of civil trial and appellate litigation experience in the Courts of Record of the Commonwealth or federal courts, or both.

Washington:

Washington Superior Court Rules SPRC 2 (effective Jan. 1, 2003) states the requirements for appointment of counsel in death penalty cases "for trial and appeal":

All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant's interest to appoint otherwise qualified counsel learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

At least one counsel on appeal must have three years' experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or

experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the appointment of counsel.

Wyoming:

The Wyoming Office of the Public Defender has adopted the 2003 ABA Guidelines with respect to qualifications for the appointment of counsel in capital cases. “Furthermore, the Public Defender must provide high quality representation in capital cases pursuant to the federal and state constitutional law and the ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition, February, 2003, as well as the ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases. During FY13, the Public Defender provided representation in 7 capital cases. Providing this representation requires the appointment of at least 2 qualified attorneys, a fact investigator and mitigation specialist to each defense team. One member of the defense team must be qualified by training and experience in screening for mental illness and impairment.”

http://will.state.wy.us/slpub/strategic_plans/2013/2013_008_strategic%20plan%202015%202016.pdf

APPENDIX B

ORDER 25700-A-1004 ADOPTING NEW STANDARDS FOR
INDIGENT DEFENSE AND CERTIFICATION OF COMPLIANCE

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE ADOPTION OF NEW)
STANDARDS FOR INDIGENT DEFENSE AND)
CERTIFICATION OF COMPLIANCE)
_____)
_____)

ORDER
NO. 25700-A- 1004

The Washington State Bar Association having recommended the adoption of New Standards for Indigent Defense and Certification of Compliance, and the Court having considered the amendments and comments submitted thereto, and having determined that the proposed amendments will aid in the prompt and orderly administration of justice;

Now, therefore, it is hereby

ORDERED:

- (a) That the standards and certificate as attached hereto are adopted.
- (b) That the New Standards for Indigent Defense, except Standard 3.4, will be published in the Washington Reports and will become effective September 1, 2012. New Standard 3.4 will be published in the Washington Reports and become effective on September 1, 2013.

DATED at Olympia, Washington this 15th day of June, 2012.

FILED
SUPREME COURT
STATE OF WASHINGTON
12 JUN 15 AM 8:00
BY RONALD R. CARPENTER
CLERK

639/7

IN THE MATTER OF THE ADOPTION OF NEW STANDARDS FOR INDIGENT DEFENSE
AND CERTIFICATION OF COMPLIANCE

Madsen, C. J.

Chambers, J.

M. Johnson

Wiggins, J.

Stephens, J.

Stephens, J.

Gonzalez, J.

STANDARDS FOR INDIGENT DEFENSE

The following Standards for Indigent Defense are adopted pursuant to CrR 3.1, CrRLJ 3.1 and JuCR 9.2 and shall have an effective date concurrent with the effectiveness of amendments to those rules approved by the Court July 8, 2010 (effective July 1, 2012);

Standard 3: Caseload Limits and Types of Cases

3.1 The contract or other employment agreement or government budget shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle.

3.2 The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. As used in this Standard, "quality representation" is intended to describe the minimum level of attention, care, and skill that Washington citizens would expect of their state's criminal justice system.

3.3 General Considerations

Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year.

The increased complexity of practice in many areas will require lower caseload limits. The maximum caseload limit should be adjusted downward when the mix of case assignments is weighted toward offenses or case types that demand more investigation, legal research and writing, use of experts, use of social workers, or other expenditures of time and resources. Attorney caseloads should be assessed by the workload required, and cases and types of cases should be weighted accordingly.

If a defender or assigned counsel is carrying a mixed caseload including cases from more than one category of cases, these standards should be applied proportionately to determine a full caseload. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the caseload should be based on the percentage of time the lawyer devotes to public defense.

The experience of a particular attorney is a factor in the composition of cases in the attorney's caseload.

The following types of cases fall within the intended scope of the caseload limits for criminal and juvenile offender cases in Standard 3.4 and must be taken into account when assessing an attorney's numerical caseload: partial case representations, sentence violations, specialty or therapeutic courts, transfers, extraditions, representation of material witnesses, petitions for conditional release or final discharge, and other matters that do not involve a new criminal charge.

STANDARDS FOR INDIGENT DEFENSE

Definition of case: A case is defined as the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation. In courts of limited jurisdiction multiple citations from the same incident can be counted as one case.

3.4 Caseload Limits

The caseload of a full-time public defense attorney or assigned counsel should not exceed the following:

150 Felonies per attorney per year; or

300 Misdemeanor cases per attorney per year or, in jurisdictions that have not adopted a numerical case weighting system as described in this Standard, 400 cases per year; or

250 Juvenile Offender cases per attorney per year; or

80 open Juvenile Dependency cases per attorney; or

250 Civil Commitment cases per attorney per year; or

1 Active Death Penalty trial court case at a time plus a limited number of non death penalty cases compatible with the time demand of the death penalty case and consistent with the professional requirements of Standard 3.2 or

36 Appeals to an appellate court hearing a case on the record and briefs per attorney per year. *(The 36 standard assumes experienced appellate attorneys handling cases with transcripts of an average length of 350 pages. If attorneys do not have significant appellate experience and/or the average transcript length is greater than 350 pages, the caseload should be accordingly reduced.)*

Full time Rule 9 interns who have not graduated from law school may not have caseloads that exceed twenty-five percent (25%) of the caseload limits established for full time attorneys. *[Effective September 1, 2013]*

3.5 Case Counting

The local government entity responsible for employing, contracting with or appointing public defense attorneys should adopt and publish written policies and procedures to implement a numerical case-weighting system to count cases. If such policies and procedures are not adopted and published, it is presumed that attorneys are not engaging in case weighting. A numerical case weighting system must:

- A. recognize the greater or lesser workload required for cases compared to an average case based on a method that adequately assesses and documents the workload involved;
- B. be consistent with these Standards, professional performance guidelines, and the Rules of Professional Conduct;

STANDARDS FOR INDIGENT DEFENSE

- C. not institutionalize systems or practices that fail to allow adequate attorney time for quality representation; and
- D. be periodically reviewed and updated to reflect current workloads; and
- E. be filed with the State of Washington Office of Public Defense.

Cases should be assessed by the workload required. Cases and types of cases should be weighted accordingly. Cases which are complex, serious, or contribute more significantly to attorney workload than average cases should be weighted upwards. In addition, a case weighting system should consider factors that might justify a case weight of less than one case.

Notwithstanding any case weighting system, resolutions of cases by pleas of guilty to criminal charges on a first appearance or arraignment docket are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients, and must be counted as one case.

3.6 Case Weighting

The following are some examples of situations where case weighting might result in representations being weighted as more or less than one case. The listing of specific examples is not intended to suggest or imply that representations in such situations should or must be weighted at more or less than one case, only that they may be, if established by an appropriately adopted case weighting system.

- A. **Case Weighting Upwards:** Serious offenses or complex cases that demand more-than-average investigation, legal research, writing, use of experts, use of social workers and/or expenditures of time and resources should be weighted upwards and counted as more than one case.
- B. **Case Weighting Downward:** Listed below are some examples of situations where case weighting might justify representations being weighted less than one case. However, care must be taken because many such representations routinely involve significant work and effort and should be weighted at a full case or more.
 - i. Cases that result in partial representations of clients, including client failures to appear and recommencement of proceedings, preliminary appointments in cases in which no charges are filed, appearances of retained counsel, withdrawals or transfers for any reason, or limited appearances for a specific purpose (not including representations of multiple cases on routine dockets).
 - ii. Cases in the criminal or offender case type that do not involve filing of new criminal charges, including sentence violations, extraditions,

STANDARDS FOR INDIGENT DEFENSE

representations of material witnesses, and other matters or representations of clients that do not involve new criminal charges. Non-complex sentence violations should be weighted as at least 1/3 of a case.

- iii. Cases in specialty or therapeutic courts if the attorney is not responsible for defending the client against the underlying charges before or after the client's participation in the specialty or therapeutic court. However, case weighting must recognize that numerous hearings and extended monitoring of client cases in such courts significantly contribute to attorney workload and in many instances such cases may warrant allocation of full case weight or more.
- iv. Cases on a criminal or offender first appearance or arraignment docket where the attorney is designated, appointed or contracted to represent groups of clients on that docket without an expectation of further or continuing representation and which are not resolved at that time (except by dismissal). In such circumstances, consideration should be given to adjusting the caseload limits appropriately, recognizing that case weighting must reflect that attorney workload includes the time needed for appropriate client contact and preparation as well as the appearance time spent on such dockets.
- v. Representation of a person in a court of limited jurisdiction on a charge which, as a matter of regular practice in the court where the case is pending, can be and is resolved at an early stage of the proceeding by a diversion, reduction to an infraction, stipulation on continuance, or other alternative non-criminal disposition that does not involve a finding of guilt. Such cases should be weighted as at least 1/3 of a case.

Related Standards

American Bar Association, *Standards for Criminal Justice*, 4-1.2, 5-4.3.

American Bar Association *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. [\[Link\]](#)

American Bar Association, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation*, May 13, 2006, *Formal Opinion 06-441*. [\[Link\]](#)

The American Council of Chief Defenders *Statement on Caseloads and Workloads*, (2007). [\[Link\]](#)

American Bar Association *Eight Guidelines of Public Defense Related to Excessive Caseloads*. [\[Link\]](#)

National Advisory Commission on Criminal Standards and Goals, *Task Force on Courts*, 1973, Standard 13.12.

American Bar Association *Disciplinary Rule 6-101*.

American Bar Association *Ten Principles of a Public Defense Delivery System*. [\[Link\]](#)

STANDARDS FOR INDIGENT DEFENSE

ABA Standards of Practice for Lawyers who Represent Children in Abuse & Neglect Cases, (1996)
American Bar Association, Chicago, IL.

The American Council of Chief Defenders Ethical Opinion 03-01 (2003).

National Legal Aid and Defender Association, *Standards for Defender Services*, Standards IV-I.

National Legal Aid and Defender Association, *Model Contract for Public Defense Services* (2002). [\[Link\]](#)

NACC Recommendations for Representation of Children in Abuse and Neglect Cases (2001). [\[Link\]](#)

City of Seattle Ordinance Number: 121501 (2004). [\[Link\]](#)

Seattle-King County Bar Association Indigent Defense Services Task Force, Guideline Number 1.

Washington State Office of Public Defense, *Parents Representation Program Standards Of Representation* (2009). [\[Link\]](#)

Keeping Defender Workloads Manageable, Bureau of Justice Assistance, U.S. Department of Justice, Indigent Defense Series #4 (Spangenberg Group, 2001). [\[Link\]](#)

5.2 Administrative Costs

- A. Contracts for public defense services shall provide for or include administrative costs associated with providing legal representation. These costs should include but are not limited to travel, telephones, law library, including electronic legal research, financial accounting, case management systems, computers and software, office space and supplies, training, meeting the reporting requirements imposed by these standards, and other costs necessarily incurred in the day-to-day management of the contract.
- B. Public defense attorneys shall have 1) access to an office that accommodates confidential meetings with clients and 2) a postal address, and adequate telephone services to ensure prompt response to client contact.

6.1 Investigators

Public defense attorneys shall use investigation services as appropriate.

Standard 13: Limitations on Private Practice

Private attorneys who provide public defense representation shall set limits on the amount of privately retained work which can be accepted. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

Standard 14: Qualifications of Attorneys

14.1 In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:

- A. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and

STANDARDS FOR INDIGENT DEFENSE

- B. Be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area; and
- C. Be familiar with the Washington Rules of Professional Conduct; and
- D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association; and
- E. Be familiar with the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction; and
- F. Be familiar with mental health issues and be able to identify the need to obtain expert services; and
- G. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.

14.2 Attorneys' qualifications according to severity or type of case¹:

- A. **Death Penalty Representation.** Each attorney acting as lead counsel in a criminal case in which the death penalty has been or may be decreed and which the decision to seek the death penalty has not yet been made shall meet the following requirements:
 - i. The minimum requirements set forth in Section 1; and
 - ii. At least five years criminal trial experience; 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; and
 - iv. Have served as lead or co-counsel in at least one aggravated homicide case; and
 - v. Have experience in preparation of mitigation packages in aggravated homicide or persistent offender cases; and
 - vi. Have completed at least one death penalty defense seminar within the previous two years; and
 - vii. Meet the requirements of SPRC 2.²

¹ Attorneys working toward qualification for a particular category of cases under this standard may associate with lead counsel who is qualified under this standard for that category of cases.

²SPRC 2 APPOINTMENT OF COUNSEL

At least two lawyers shall be appointed for the trial and also for the direct appeal. The trial court shall retain responsibility for appointing counsel for trial. The Supreme Court shall appoint counsel for the direct appeal. Notwithstanding RAP 15.2(f) and (h), the Supreme Court will determine all motions to withdraw as counsel on appeal.

STANDARDS FOR INDIGENT DEFENSE

The defense team in a death penalty case should include, at a minimum, the two attorneys appointed pursuant to SPRC 2, a mitigation specialist and an investigator. Psychiatrists, psychologists and other experts and support personnel should be added as needed.

B. Adult Felony Cases - Class A

Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:

- i. The minimum requirements set forth in Section 1; and
- ii. Either:
 - a. has served two years as a prosecutor; or
 - b. has served two years as a public defender; or two years in a private criminal practice; and
- iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

C. Adult Felony Cases – Class B Violent Offense

Each attorney representing a defendant accused of a Class B violent offense as defined in RCW 9A.20.020 shall meet the following requirements.

- i. The minimum requirements set forth in Section 1; and
- ii. Either:
 - a. has served one year as a prosecutor; or
 - b. has served one year as a public defender; or one year in a private criminal practice; and
- iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.

D. Adult Sex Offense Cases

A list of attorneys who meet the requirements of proficiency and experience, and who have demonstrated that they are learned in the law of capital punishment by virtue of training or experience, and thus are qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant's interest to appoint otherwise qualified counsel learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

At least one counsel on appeal must have three years' experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the appointment of counsel. [\[Link\]](#)

STANDARDS FOR INDIGENT DEFENSE

Each attorney representing a client in an adult sex offense case shall meet the following requirements:

- i. The minimum requirements set forth in Section 1 and Section 2(C); and
- ii. Been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

E. Adult Felony Cases - All other Class B Felonies, Class C Felonies, Probation or Parole Revocation

Each attorney representing a defendant accused of a Class B felony not defined in Section 2(C) or (D) above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:

- i. The minimum requirements set forth in Section 1, and
- ii. Either:
 - a. has served one year as a prosecutor; or
 - b. has served one year as a public defender; or one year in a private criminal practice; and
- iii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and
- iv. Each attorney shall be accompanied at his or her first felony trial by a supervisor if available.

F. Persistent Offender (Life Without Possibility of Release) Representation

Each attorney acting as lead counsel in a “two-strikes” or “three strikes” case in which a conviction will result in a mandatory sentence of life in prison without parole shall meet the following requirements:

- i. The minimum requirements set forth in Section 1;³ and
- ii. Have at least:
 - a. four years criminal trial experience; and
 - b. one year experience as a felony defense attorney; and
 - c. experience as lead counsel in at least one Class A felony trial; and
 - d. experience as counsel in cases involving each of the following:
 1. Mental health issues; and

³ RCW 10.101.060 (1)(a)(iii) provides that counties receiving funding from the state Office of Public Defense under that statute must require “attorneys who handle the most serious cases to meet specified qualifications as set forth in the Washington state bar association endorsed standards for public defense services or participate in at least one case consultation per case with office of public defense resource attorneys who are so qualified. The most serious cases include all cases of murder in the first or second degree, persistent offender cases, and class A felonies.”

STANDARDS FOR INDIGENT DEFENSE

2. Sexual offenses, if the current offense or a prior conviction that is one of the predicate cases resulting in the possibility of life in prison without parole is a sex offense; and
3. Expert witnesses; and
4. One year of appellate experience or demonstrated legal writing ability.

G. Juvenile Cases - Class A

Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:

- i. The minimum requirements set forth in Section 1, and
- ii. Either:
 - a. has served one year as a prosecutor; or
 - b. has served one year as a public defender; one year in a private criminal practice; and
- iii. Has been trial counsel alone of record in five Class B and C felony trials; and
- iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor, if available.

H. Juvenile Cases - Classes B and C

Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:

- i. The minimum requirements set forth in Section 1; and
- ii. Either:
 - a. has served one year as a prosecutor; or
 - b. has served one year as a public defender; or one year in a private criminal practice, and
- iii. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and
- iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor if available.

I. Juvenile Sex Offense Cases

Each attorney representing a client in a juvenile sex offense case shall meet the following requirements:

- i. The minimum requirements set forth in Section 1 and Section 2(H); and
- ii. Been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

STANDARDS FOR INDIGENT DEFENSE

J. Juvenile Status Offenses Cases. Each attorney representing a client in a “Becca” matter shall meet the following requirements:

- i. The minimum requirements as outlined in Section 1; and
- ii. Either:
 - a. have represented clients in at least two similar cases under the supervision of a more experienced attorney or completed at least three hours of CLE training specific to “status offense” cases; or
 - b. have participated in at least one consultation per case with a more experienced attorney who is qualified under this section.

K. Misdemeanor Cases

Each attorney representing a defendant involved in a matter concerning a simple misdemeanor or gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.

L. Dependency Cases

Each attorney representing a client in a dependency matter shall meet the following requirements:

- i. The minimum requirements as outlined in Section 1; and
- ii. Attorneys handling termination hearings shall have six months dependency experience or have significant experience in handling complex litigation.
- iii. Attorneys in dependency matters should be familiar with expert services and treatment resources for substance abuse.
- iv. Attorneys representing children in dependency matters should have knowledge, training, experience, and ability in communicating effectively with children, or have participated in at least one consultation per case either with a state Office of Public Defense resource attorney or other attorney qualified under this section.

M. Civil Commitment Cases

Each attorney representing a respondent shall meet the following requirements:

- i. The minimum requirements set forth in Section 1; and
- ii. Each staff attorney shall be accompanied at his or her first 90 or 180 day commitment hearing by a supervisor; and
- iii. Shall not represent a respondent in a 90 or 180 day commitment hearing unless he or she has either:
 - a. served one year as a prosecutor, or
 - b. served one year as a public defender, or one year in a private civil commitment practice, and
 - c. been trial counsel in five civil commitment initial hearings; and

STANDARDS FOR INDIGENT DEFENSE

- iv. Shall not represent a respondent in a jury trial unless he or she has conducted a felony jury trial as lead counsel; or been co-counsel with a more experienced attorney in a 90 or 180 day commitment hearing.

N. Sex Offender “Predator” Commitment Cases

Generally, there should be two counsel on each sex offender commitment case. The lead counsel shall meet the following requirements:

- i. The minimum requirements set forth in Section 1; and
- ii. Have at least:
 - a. Three years criminal trial experience; and
 - b. One year experience as a felony defense attorney or one year experience as a criminal appeals attorney; and
 - c. Experience as lead counsel in at least one felony trial; and
 - d. Experience as counsel in cases involving each of the following:
 - 1. Mental health issues; and
 - 2. Sexual offenses; and
 - 3. Expert witnesses; and
 - e. Familiarity with the Civil Rules; and
 - f. One year of appellate experience or demonstrated legal writing ability.

Other counsel working on a sex offender commitment cases should meet the Minimum Requirements in Section 1 and have either one year experience as a public defender or significant experience in the preparation of criminal cases, including legal research and writing and training in trial advocacy.

O. Contempt of Court Cases

Each attorney representing a respondent shall meet the following requirements:

- i. The minimum requirements set forth in Section 1; and
- ii. Each attorney shall be accompanied at his or her first three contempt of court hearings by a supervisor or more experienced attorney, or participate in at least one consultation per case with a state Office of Public Defense resource attorney or other attorney qualified in this area of practice.

P. Specialty Courts

Each attorney representing a client in a specialty court (e.g., mental health court, drug diversion court, homelessness court) shall meet the following requirements:

- i. The minimum requirements set forth in Section 1; and
- ii. The requirements set forth above for representation in the type of practice involved in the specialty court (e.g., felony, misdemeanor, juvenile); and
- iii. Be familiar with mental health and substance abuse issues and treatment alternatives.

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14.3 Appellate Representation.

Each attorney who is counsel for a case on appeal to the Washington Supreme Court or to the Washington Court of Appeals shall meet the following requirements:

- A. The minimum requirements as outlined in Section 1; and
- B. Either:
 - i. has filed a brief with the Washington Supreme Court or any Washington Court of Appeals in at least one criminal case within the past two years; or
 - ii. has equivalent appellate experience, including filing appellate briefs in other jurisdictions, at least one year as an appellate court or federal court clerk, extensive trial level briefing or other comparable work.
- C. Attorneys with primary responsibility for handling a death penalty appeal shall have at least five years' criminal experience, preferably including at least one homicide trial and at least six appeals from felony convictions, and meet the requirements of SPRC 2.

RALJ Misdemeanor Appeals to Superior Court: Each attorney who is counsel alone for a case on appeal to the Superior Court from a Court of Limited Jurisdiction should meet the minimum requirements as outlined in Section 1, and have had significant training or experience in either criminal appeals, criminal motions practice, extensive trial level briefing, clerking for an appellate judge, or assisting a more experienced attorney in preparing and arguing an RALJ appeal.

14.4 Legal Interns

- A. Legal interns must meet the requirements set out in APR 9.
- B. Legal interns shall receive training pursuant to APR 9 and in offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held.

STANDARDS FOR INDIGENT DEFENSE

CERTIFICATION OF COMPLIANCE

“Applicable Standards” required by CrR3.1/ CrRLJ 3.1 / JuCR9.2

For criminal and juvenile offender cases, a signed certification of compliance with Applicable Standards must be filed by an appointed attorney by separate written certification on a quarterly basis in each court in which the attorney has been appointed as counsel.

The certification must be in substantially the following form:

SEPARATE CERTIFICATION FORM

<p>_____ Court of Washington for</p>
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Certification of Appointed Counsel of
Compliance with Standards Required by
CrR 3.1 / CrRLJ 3.1 / JuCR 9.2

The undersigned attorney hereby certifies:

1. Approximately ____% of my total practice time is devoted to indigent defense cases.
2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:
 - a. **Basic Qualifications:** I meet the minimum basic professional qualifications in Standard 14.1.
 - b. **Office:** I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.
 - c. **Investigators:** I have investigators available to me and will use investigation services as

STANDARDS FOR INDIGENT DEFENSE

appropriate, in compliance with Standard 6.1.

- d. **Caseload:** I will comply with Standard 3.2 during representation of the defendant in my cases.
[Effective 9/1/13: I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]

Defendant's Lawyer, WSBA#

Date