



AMERICANBARASSOCIATION

Death Penalty
Representation Project

Ethical Capital Representation: Why a Guidelines-Compliant Approach is Required

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ABA Death Penalty
Representation Project

The Guidelines: An Introduction

What the Guidelines are:

- Well-established norms of capital defense practice that provide a guide to counsel performance
- Designed to reflect the *minimum* requirements for effective and zealous advocacy
- Developed by a large group of experienced and well-respected capital practitioners from across the country
- Useful to guide your own practice; relevant to counsel eligibility, appointment, and monitoring; and support for IAC arguments
- A key benchmark for courts assessing *Strickland* reasonableness

What the Guidelines are not:

- Aspirational / “Best Practices”
- Description of a “Cadillac Defense”
- Invented by the ABA

Structure of the Guidelines



Guidelines 1.1 and 10.2: Scope & Applicability of the Guidelines



Guidelines 2.1–10.1 & 10.3–10.4: Effective defender systems & defense teams



Guidelines 10.5–10.15.2: Obligations of Defense Counsel

Blackletter Text & Commentary: Blackletter Text represents official ABA policy. Commentary explains the history of the Guideline, why it's important, supporting authority for the existence of the norm

Scope of the Guidelines

Guideline 1.1(B):

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

Guideline 10.2:

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

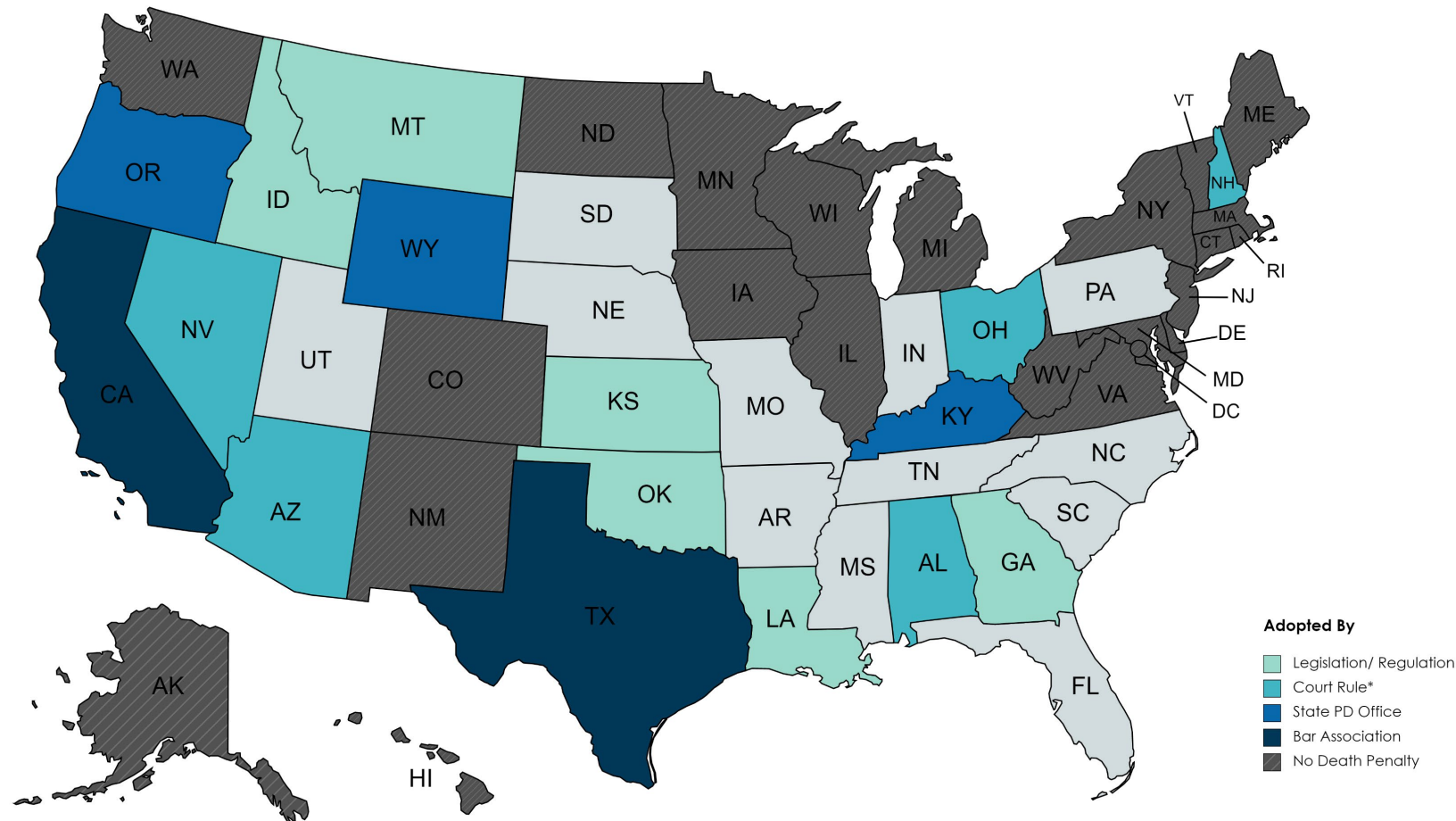
Remember:

- The Guidelines can apply even if the state has not yet decided whether to seek the death penalty
- The Guidelines apply even where there may be no right to counsel

Are the Guidelines Mandatory?



Formal adoption of the ABA Guidelines



Also:

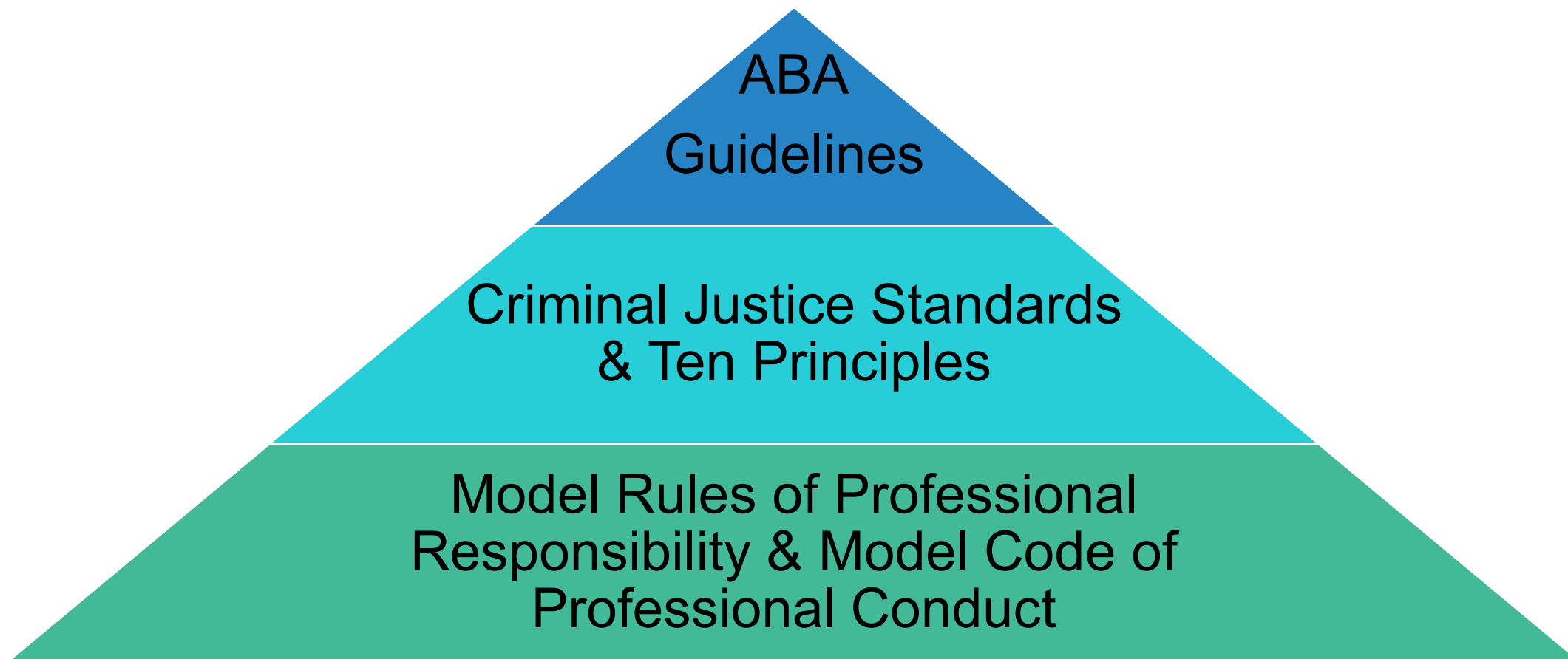
- Federal Defender Services Strategic Plan
- Regional/Local defender offices
- Congressional Statement to the Secretary of Defense (military cases)
- Judicial opinions from every federal circuit court of appeals and the large majority of state high courts

Not everyone is convinced.

- “I join the Court’s per curiam opinion but emphasize my understanding that the opinion in **no way suggests that the [ABA Guidelines] have special relevance** in determining whether an attorney’s performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, **a private group with limited membership**. . . . It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see **no reason why the ABA Guidelines should be given a privileged position** in making that determination.”
- *Bobby v. Van Hook*, 558 US 4 (2009) (Alito, J., concurring)



Foundation for the Guidelines

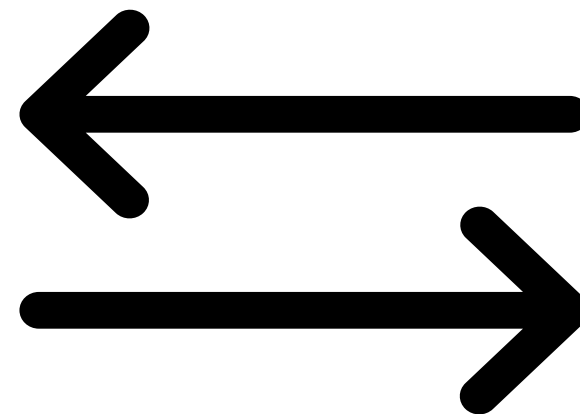


“Mutually reinforcing responsibilities”

“One way, the ABA Guidelines can be seen as simply the very specific implementation of the ethical rules. ... The other way, the ABA Guidelines can be seen as providing a wonderful example of how some of the more general but, notwithstanding their generality, no less important rules of professional conduct should be evaluated in particular contexts. ...

[T]he core principles expressed in the ABA Guidelines, commentary, and Supplementary Guidelines are no more than detailed, contextualized explanations of counsel's existing obligations under the Model Rules of Professional Conduct.”

Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 Hofstra L. Rev. 775, 776 (2008)



Duty of Diligence: Timeliness

MODEL RULES

Rule 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.

ABA GUIDELINES

Guideline 1.1: Scope

Guideline 10.5: Relationship with Client

Scope of the Guidelines

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Guideline 10.2:

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

Prompt Entry Into Case

Guideline 10.5(b):

1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.
2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

Duty of Competence: Qualifications and Skills

MODEL RULES

Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the **legal knowledge, skill**, thoroughness and preparation reasonably necessary for the representation.

Comment: In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the **relative complexity and specialized nature of the matter**, [and] the lawyer's general experience, the lawyer's **training and experience in the field** in question...

(See also Comment 8 re: CLE)

ABA GUIDELINES

Guideline 4.1: Necessary Services

Guideline 5.1: Qualifications

Guideline 8.1: Training

Guideline 10.4: The Defense Team

The Defense Team

Guideline 4.1 & 10.4

“The defense team should consist of **no fewer than two attorneys** . . . , an **investigator**, and a **mitigation specialist**.” At least one member must be qualified to “screen individuals for the presence of mental or psychological disorders or impairments.”

Counsel should “receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings.”

“Counsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.”

Qualifications & Training

Guideline 5.1 & 8.1

“Every attorney representing a capital defendant” should have “demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases” and have satisfied training requirements.

Skills:

- knowledge and understanding of the relevant law governing capital cases;
- management and conduct of complex negotiations and litigation;
- legal research, analysis, and the drafting of litigation documents;
- oral advocacy;
- use of expert witnesses and familiarity with common areas of forensic investigation;
- investigation, preparation, and presentation of evidence bearing upon mental status;
- investigation, preparation, and presentation of mitigating evidence;
- trial advocacy

Training:

- relevant state, federal, and international law;
- pleading and motion practice;
- pretrial investigation, preparation, and theory development
- jury selection;
- trial preparation and presentation, including the use of experts;
- ethical considerations particular to capital defense representation;
- preservation of the record and of issues for post-conviction review;
- counsel’s relationship with the client and his family;
- post-conviction litigation in state and federal courts;
- the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science

Duty of Competence & Funding

MODEL RULES

Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, **thoroughness and preparation** reasonably necessary for the representation.

Rule 1.5: The factors to be considered in determining the **reasonableness** of a fee include ... the **time and labor required**, the novelty and **difficulty of the questions involved**, and the **skill requisite** to perform the legal service properly ... the likelihood ... that the acceptance of the particular employment will **preclude other employment by the lawyer...**

ABA GUIDELINES

Guideline 9.1: Funding & Compensation

Funding: Counsel Compensation

Guideline 9.1(B):

“Counsel . . . should be fully compensated at a rate commensurate with the provision of high quality legal representation and which reflects the extraordinary responsibilities inherent in death penalty representation.”

- Flat fees, fee caps, and lump sum contracts are improper
- Defender organization salary should be on a scale commensurate with the prosecutor’s office
- Appointed counsel should be fully compensated for actual time and service performed
- Hourly rate should be commensurate with prevailing rates for retained counsel in the jurisdiction
- No distinction between rates for in court or out of court
- Periodic billing should be available

Funding: Non-Attorney Team Members

Guideline 9.1(C):

Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

1. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
2. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.
3. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

Funding



Tip: Use the forceful commentary language to supplement the blackletter text.

“[A]ny compensation system that fails to reflect the extraordinary responsibilities and commitment required of all members of the defense team in death penalty cases, that does not provide for extra payments when unusually burdensome representation is provided, or that does not provide for the periodic payment of fees to all members of the defense team will not succeed in obtaining the high quality legal representation required by these Guidelines. **For better or worse, a system for the provision of defense services in capital cases will get what it pays for.**” Guideline 9.1, Commentary, at 981.

Duty of Competence: Workload

MODEL RULES

Rule 1.3, Comment 2: A lawyer's **workload must be controlled** so that each matter can be handled competently.

ABA GUIDELINES

Guideline 6.1: Workload

Guideline 10.3: Obligations of Counsel Respecting Workload

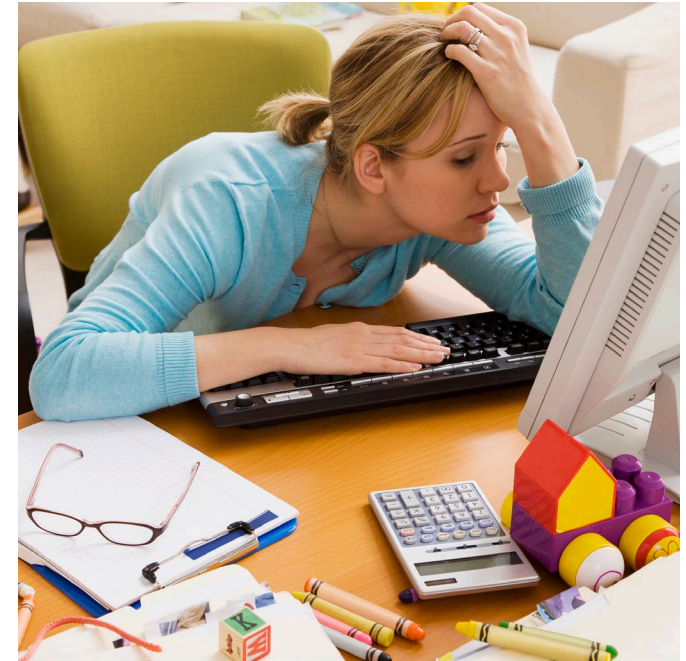
Workload

Guidelines 6.1 & 10.3:

Workload must be “maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.”

Remember:

- Like qualifications & training: no quantitative measures
- Most useful in conjunction with the 10.x guidelines – set up the standard and then explain in detail how your workload prevents you from complying with prevailing professional norms
- Like assembly of the defense team, obligations on both the responsible agency and the attorney



Workload



Tip: Use the commentary to Guidelines 1.1, 6.1, & 10.7 to educate on the need for time

- “Several thousand hours are typically required to provide appropriate representation” in capital cases. Guideline 6.1, Commentary, at 970
- “Studies have consistently found that defending capital cases requires vastly more time and effort by counsel than noncapital matters.” Guideline 6.1, Commentary, at 969
- “Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.” Guideline 1.1, Commentary, at 923
- Support the above statements with the commentary to Guideline 10.7, which contains 8 full pages of description of investigative tasks that must be undertaken at every stage of a capital case.

Duties of Competence and Diligence: Zealous Advocacy

MODEL RULES

Rule 1.1, Comment 5: Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and **use of methods and procedures meeting the standards of competent practitioners**. It also includes adequate preparation. The **required attention and preparation are determined in part by what is at stake**

Rule 1.3, Comment 1: A lawyer must also act with commitment and dedication to the interests of the client and with **zeal in advocacy** upon the client's behalf.

ABA GUIDELINES

Guideline 10.7 Investigation
Guideline 10.8: Duty to Assert Legal Claims
Guideline 10.9.1 & 10.9.2: Pleas and Negotiations
Guideline 10.10.1: Trial Preparation
Guideline 10.11: Defense Case Concerning Penalty (and others!)

Legal claims

Guideline 10.8:

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and
2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
3. evaluate each potential claim in light of: a. the unique characteristics of death penalty law and practice; and b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited

Guideline 10.15.1(c)

Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

Model Rule 3.1: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, **which includes a good faith argument for an extension, modification or reversal of existing law.**” Comment [2]: “Such action is not frivolous **even though the lawyer believes that the client's position ultimately will not prevail.**”

Investigation

Guideline 10.7:

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B. 1. All post-conviction counsel have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

Also see Guidelines 10.10.1, 10.11, 10.15.1(4)



Investigation

- Courts refer to this Guideline more than any other when assessing IAC claims
 - Used by the U.S. Supreme Court in *Wiggins v. Smith* and *Rompilla v. Beard*
 - Key Points:
 - Investigation for both guilt and penalty phases must be conducted no matter what – even if the client objects
 - Counsel at every stage must conduct a thorough and independent investigation relating to guilt and penalty
 - Reliance on predecessor counsel’s work is not allowed
 - This obligation can be used to seek funding and resources at later stages
 - Related Guidelines
 - Guideline 10.10.1 reminds counsel to be developing a theory of the case as the investigation proceeds
 - Guideline 10.15.1(4) instructs post-conviction counsel to continue aggressive investigation of the case
-



Pleas and negotiations

- Guidelines 10.9.1 & 10.9.2
 - Key points:
 - Ongoing obligation of counsel to seek agreed-upon disposition, as appropriate
 - Client must be informed of consequences of pleading, including collateral consequences
 - Client must be informed of any negotiations or tentative offers
 - Counsel must not agree to anything without the client's authorization
 - Counsel must continue to fulfill all other obligations under the Guidelines while negotiating (i.e. keep investigating)
-



The Defense Case Concerning penalty

Guideline 10.11, includes duty to:

- Discuss penalty phase with client: strategy, procedure, relationship between guilt & penalty, decision to testify
- Investigate and development of mitigating evidence
- Challenge government's case for aggravation, including adequacy of statutory aggravators
- Challenge verdict forms and jury instructions
- Argue for life at every opportunity

Additional clarification and guidance from the 2008 Supplementary Guidelines

- Mirror the structure of the 2003 Guidelines
 - Explain in greater detail how certain Guidelines apply to the mitigation team and the penalty phase
 - Further details about the case concerning penalty, including witnesses and avenues of investigation
-

Duty of Confidentiality

MODEL RULES

Rule 1.6: (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ABA GUIDELINES

Guideline 4.1: The Defense Team and Supporting Services (Independence)

Guideline 10.4: The Defense Team (Independence)

Guideline 10.5: Relationship with the Client (Trust)

The Defense Team: Independence & Confidentiality

Guideline 4.1(B)

Counsel should have the right to have [expert, investigative & ancillary] services provided by persons independent of the government.

Counsel should have the right to protect confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

- Insist on expert assistance independent from the government

The Defense Team: Independence & Confidentiality



Tip: Use Guidelines 4.1 and 10.4 to make funding requests *in camera* and *ex parte*

“Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources, it is counsel’s obligation to insist upon making such requests *ex parte* and *in camera*.” Guideline 10.4, Commentary at 1004.

“Any procedures for the auditing of public funds should be structured so as to preserve this confidentiality.” Guideline 4.1, Commentary at 958.

If this argument fails, *make a record*.

Relationship with the client

Guideline 10.5(A):

Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.

Duty to Communicate

MODEL RULES

Rule 1.4, Comment 1:
Reasonable communication between the lawyer and the client is **necessary for the client effectively to participate in the representation.**

Comment 5: The guiding principle is that **the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests,** and the client's overall requirements as to the character of representation.

ABA GUIDELINES

Guideline 10.5: Relationship with the Client

Relationship with the client

Guideline 10.5(A), commentary:

Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.

To communicate effectively on the client's behalf in negotiating a plea, addressing a jury, arguing to a post-conviction court, or urging clemency, counsel must be able to humanize the defendant. That cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him.

Relationship with the Client



Tip: Use this commentary to explain need for multiple trips to visit family members & friends

- Relationship building is equally important with friends & family
- Courts can be reluctant to allow multiple trips when such individuals are far away
- “An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Even if counsel manages to ask the right questions a client will not—with good reason—trust a lawyer who visits only a few times before trial...” Guideline 10.5, Commentary, at 1010.
- “It is also essential to develop a relationship of trust with the client’s family or others on whom the client relies for support and advice.” Guideline 10.5, Commentary, at 1011.

Duty to Clients with Diminished Capacity

MODEL RULES

Rule 1.14: (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, **is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action**, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

ABA GUIDELINES

Guideline 10.5: Relationship
with the Client

Relationship with Client

Guideline 10.5, commentary:

Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be [intellectually disabled] or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. ...

It is ineffective assistance for counsel to simply acquiesce to [a client's wishes to waive mitigation or be executed] , which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide....

Counsel in any event should be familiar enough with the client's mental condition to make a reasoned decision—fully documented, for the benefit of actors at later stages of the case—whether to assert the position that the client is not competent to waive further proceedings.

See also...

ABA Formal Ethics Opinion 96-404: Client Under a Disability

Rule 1.14(b) permits the client-lawyer relationship to continue even in the face of the client's incapacity, authorizing the lawyer to initiate protective action appropriate to the circumstances, including seeking the appointment of a legal representative having some degree of power over the client's affairs

Duty to Former Clients

MODEL RULES

Rule 1.16: (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests

ABA GUIDELINES

Guideline 10.13: Duty to Facilitate the Work of Successor Counsel

Duty to Facilitate the work of successor counsel

Guideline 10.13:

[A]ll persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

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

ABA Guidelines Resources

Death Penalty Representation Project Website:

www.americanbar.org/deathpenalty >>
Resources >> ABA Guidelines

- Full versions of 1989 and 2003 Guidelines with commentary
- 2008 Supplementary Guidelines for the Mitigation Function
- Web versions of each numbered Guideline
- Implementation Fact Sheet
- List of Cases Citing the Guidelines
- Articles about the Guidelines

The screenshot shows the ABA American Bar Association website. At the top, the ABA logo and 'AMERICAN BAR ASSOCIATION' are visible. A blue navigation bar contains 'Death Penalty Representation', 'Get Involved', and 'Resources'. The 'Resources' link is circled in yellow and labeled with a large '1'. Below the navigation bar, the heading 'Project Resource Libraries' is displayed, followed by the text 'Use the links below to access resources pages related to specific sul'. A large '2' is positioned to the left of a yellow oval that encircles the link 'ABA Guidelines Resources'. Other visible links include 'ABA Amicu' and 'ABA Stater'.



ABA Guidelines Resources, cont.

National Capital Standards Database:

www.capstandards.org

- Requires registration & approval
 - For capital defense practitioners only
 - Large, searchable library of current & historical standards, articles, and training materials (designed to use when there is a “Van Hook” problem)
 - Separate searchable database of summaries of opinions citing to the ABA Guidelines
-

Questions?

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