

American Bar Association

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

Revised Edition
February 2003

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Only the text of the black-letter guidelines has been formally approved by the American Bar Association House of Delegates as official policy. Although it does not express the formal position of the American Bar Association, the commentary serves as useful explanation of the black-letter Guidelines. The text of the commentary published herein is the final version, which was officially released by the ABA on October 24, 2003. It supersedes all prior drafts which had been distributed for informational purposes.

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GUIDELINE 10.5—RELATIONSHIP WITH THE CLIENT

- A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.**
- B.**
- 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.**
 - 2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.**
 - 3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.**
- C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:**
- 1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;**
 - 2. current or potential legal issues;**
 - 3. the development of a defense theory;**
 - 4. presentation of the defense case;**

- 5. potential agreed-upon dispositions of the case;**
- 6. litigation deadlines and the projected schedule of case-related events; and**
- 7. relevant aspects of the client's relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists).**

History of Guideline

This Guideline collects, and slightly expands upon, material that was found in Guidelines 11.4.2, 11.6.1, and 11.8.3 of the original edition. The major revisions make this standard apply to all stages of a capital case and note expressly counsel's obligation to discuss potential dispositions of the case with the client.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.1 ("Establishment of Relationship"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.2 ("Interviewing the Client"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.8 ("Duty to Keep Client Informed"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-5.2 ("Control and Direction of the Case"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

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ABA GUIDELINES

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NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.3(c) (1995) ("General Duties of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 2.2 (1995) ("Initial Interview").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2000) ("Clients Are Screened for Eligibility, and Defense Counsel Is Assigned and Notified of Appointment, as Soon as Feasible After Clients' Arrest, Detention, or Request For Counsel") (footnote omitted).

Commentary

The Problem

Immediate contact with the client is necessary not only to gain information needed to secure evidence and crucial witnesses, but also to try to prevent uncounseled confessions or admissions and to begin to establish a relationship of trust with the client.

Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. 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 mentally retarded 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. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired."¹⁷⁸ There will also often be significant cultural

178. Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, THE ADVOCATE, Mar. 2000, at 31, available at <http://www.dpa.state.ky.us/library/advocate/mar00/plea.html>; see also Lewis, *supra* note 93, at 840 (finding forty percent of death row inmates to be chronically psychotic); Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 586-87 (1988) (finding fifty percent of death sentenced juveniles in survey suffered from psychosis and almost all were severely abused as children).

and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.

Counsel's Duty

Although, as described *supra* in the text accompanying notes 103-07, ongoing communication by non-attorney members of the defense team is important, it does not discharge the obligation of counsel at every stage of the case to keep the client informed of developments and progress in the case, and to consult with the client on strategic and tactical matters. Some decisions require the client's knowledge and agreement,¹⁷⁹ others, which may be made by counsel, should nonetheless be fully discussed with the client beforehand.

Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea.¹⁸⁰ Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client. 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, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls. 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.

179. See, e.g., *Nixon v. Singletary*, 758 So. 2d 618, 624-25 (Fla. 2000) (ineffective assistance for counsel to fail to obtain client's explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing); *People v. Hattery*, 488 N.E.2d 513, 519 (Ill. 1985) (same).

180. See ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-5.2 & cmt., in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); see also Kevin M. Doyle, *Heart of the Deal: Ten Suggestions for Plea Bargaining*, THE CHAMPION, Nov. 1999, at 68 (counsel should not expect client to accept plea bargain unless opinion is founded on experience and leg work investigating the case); White, *supra* note 3, at 371, 374 (thorough investigation and relationship of trust key to persuading client to accept appropriate plea offer).

Often, so-called “difficult” clients are the consequence of bad lawyering—either in the past or present.¹⁸¹ Simply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation.¹⁸²

Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation. Even apart from the need to obtain vital information,¹⁸³ the lawyer must understand the client and his life history.¹⁸⁴ 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.¹⁸⁵

Counsel’s Duties Respecting Uncooperative Clients

Some clients will initially insist that they want to be executed—as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to

181. See White, *supra* note 3, at 338 (“Often, capital defendants have had bad prior experiences with appointed attorneys, leading them to view such attorneys as ‘part of the system’ rather than advocates who will represent their interests. Appointed capital defense attorneys sometimes exacerbate this perception by harshly criticizing their clients’s [sic] conduct or making it clear that they are reluctant to represent them. A capital defendant who experiences, or previously has experienced, these kinds of judgments understandably will be reluctant to trust his attorney.”) (footnotes omitted); *infra* note 313.

182. A lawyer can also frequently earn a client’s trust by assisting him with problems he encounters in prison, or otherwise demonstrating concern for his well being and a willingness to advocate for him. See *id.*; Lee Norton, *Mitigation Investigation*, in FLORIDA PUBLIC DEFENDER ASS’N, DEFENDING A CAPITAL CASE IN FLORIDA 25 (2001). Accordingly, such advocacy is an appropriate part of the role of defense counsel in a capital case. Indeed, a lawyer who displays a greater concern with habeas corpus doctrine than with recovering the radio that prison authorities have confiscated from the client is unlikely to develop the sort of relationship that will lead to a satisfactory legal outcome.

183. One important example is the fact that the client is mentally retarded—a fact that the client may conceal with great skill, see, e.g., James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-31 (1985), but one which counsel absolutely must know. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that mentally retarded defendants may not constitutionally be executed). The issue of mental illness presents a very similar set of challenges.

184. See Goodpaster, *supra* note 3, at 321.

185. See Norton, *supra* note 182, at 5; White, *supra* note 3, at 375 (jury will be less likely to empathize with defendant if it does “not perceive a bond between the defendant and his attorney”).

simply acquiesce to such wishes, 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.¹⁸⁶ Counsel should initially try to identify the source of the client's hopelessness. Counsel should consult lawyers, clergy or others who have worked with similarly situated death row inmates. Counsel should try to obtain treatment for the client's mental and/or emotional problems, which may become worse over time. One or more members of the defense team should always be available to talk to the client; members of the client's family, friends, or clergy might also be enlisted to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had), may also be a valuable source of information about the possibility of making a constructive life in prison. A client who insists on his innocence should be reminded that a waiver of mitigation will not persuade an appellate court of his innocence, and securing a life sentence may bar the state from seeking death in the event of a new trial.¹⁸⁷

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.¹⁸⁸

The Temporal Scope of Counsel's Duties

The obligations imposed on counsel by this Guideline apply to all stages of the case. Thus, post-conviction counsel, from direct appeal through clemency, must not only consult with the client but also monitor the client's personal condition for potential legal consequences.¹⁸⁹ For example, actions by prison authorities (e.g., solitary confinement, administration of psychotropic medications) may impede the ability to present the client as a witness at a hearing or have legal implications,¹⁹⁰

186. See *infra* Guideline 10.7(A) and accompanying commentary; Kammen & Norton, *supra* note 178.

187. See *Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981); see also *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). Moreover, if a mitigation investigator is productive, it may persuade the prosecutor to forgo the death penalty. In that event, the jury will not be "death-qualified" and the client's chances of an acquittal will be enhanced.

188. See *generally* *Godinez v. Moran*, 509 U.S. 389, 396-402 (1993) (setting forth minimum competency standard that the Constitution requires).

189. See *infra* text accompanying notes 341.

190. Cf. *Sell v. United States*, 123 S. Ct. 2174, 2184 (2003) (holding that "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if

and changes in the client's mental state (e.g., as a result of the breakup of a close relationship or a worsening physical condition) may bear upon his capacity to assist counsel and, ultimately, to be executed.¹⁹¹ In any event, as already discussed, maintaining an ongoing relationship with the client minimizes the possibility that he will engage in counter-productive behavior (e.g., attempt to drop appeals, act out before a judge, confess to the media). Thus, the failure to maintain such a relationship is professionally irresponsible.¹⁹²

the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests"); *Riggins v. Nevada*, 504 U.S. 127, 137-38 (1992) (defendant was constitutionally entitled to have administration of anti-psychotic drugs cease before trial). The Supreme Court has not addressed the application of these principles to phases of the criminal process other than the trial itself, but those cases should alert capital defense counsel to do so. *See, e.g., Rohan v. Woodford*, 334 F.3d 803, 818-19 (9th Cir. 2003) (Kozinski, J.) (holding as a matter of statutory construction that mentally incompetent federal habeas petitioner is entitled to a stay of execution and of proceedings until he recovers).

191. *See infra* text accompanying note 341.

192. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2002) ("A lawyer shall . . . keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.").