



STATE BAR *of* TEXAS

# GUIDELINES AND STANDARDS *for* TEXAS CAPITAL COUNSEL



*Standing Committee on Legal Services to the Poor in Criminal Matters  
Adopted by the State Bar Board of Directors  
April 21, 2006*



On April 21, 2006, the Board of Directors of the State Bar of Texas adopted the *Guidelines and Standards for Texas Capital Counsel*. These guidelines and standards articulate the statewide standard of practice for the defense of capital cases in order to ensure high quality representation for all persons facing the death penalty in the State of Texas. The *Guidelines and Standards for Texas Capital Counsel* are a Texas-specific version of the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, as drafted by the State Bar of Texas Standing Committee on Legal Services to the Poor in Criminal Matters. The adoption of these guidelines is an important accomplishment for the State Bar of Texas and the criminal justice system of the state.

Through its research in this area, the committee determined that a clear outline of necessary defense attorney performance standards in capital cases would benefit not only defendants, most of whom are indigent, but also the legal profession and the justice system as a whole. As the guidelines point out, successful representation requires conducting a factual investigation, often involving highly specialized forensic science, cultivating a range of witnesses, utilizing mitigation specialists highly trained in mental health and mental retardation issues, and making use of a team approach that combines members from several disciplines.

The committee, which includes defense attorneys, judges, prosecutors, and public members, determined the need for a comprehensive tool to guide counsel representing defendants in death penalty cases. To this end, the committee designed the *Guidelines and Standards for Texas Capital Counsel*, which pro-

vides detailed practice standards for competent representation in these critical cases.

The committee adapted the ABA's guidelines to fit the needs of capital litigation in Texas. For example, recognizing that some people facing the death penalty in Texas are citizens of other countries, a section was added detailing the additional obligations of counsel representing foreign nationals in capital cases. In addition, the committee included an expanded section instructing attorneys on how to adequately investigate and present a writ of habeas corpus in capital cases.

The *Guidelines and Standards for Texas Capital Counsel* provide guidance on the necessary qualifications of defense counsel and detail who should be included on a defense team. They warn that the workload of attorneys representing defendants in death penalty cases must be monitored and that attorneys should give priority to death penalty clients. The guidelines detail the types of training defense counsel should obtain and also instruct attorneys on funding and compensation matters.

The guidelines then detail the steps counsel must take in trial preparation, the duty to seek an agreed-upon disposition, and the special issues concerning the penalty stage of capital trials. The duties of post-trial counsel, including separate sections for direct appeal, habeas, and clemency counsel, are also presented. The guidelines extensively detail each of these duties, in an easy to understand, step-by-step style.

The committee appreciates the support of the State Bar of Texas Board of Directors in adopting the guidelines and standards. The committee is confident that these guidelines will elevate the quality of representation of indigent people, and all people, in capital cases in Texas.

### GUIDELINE 1.1 Objective and Scope of Guidelines

- A. The objective of these Guidelines is to set forth a statewide standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any State of Texas jurisdiction.
- B. These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the State of Texas 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 2.1 Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases

- A. Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines (the "Legal Representation Plan").

- B. The Legal Representation Plan should set forth how the jurisdiction will conform to each of these Guidelines.
- C. All elements of the Legal Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.

### GUIDELINE 3.1 The Defense Team and Supporting Services

- A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.
  1. The defense team should consist of no fewer than two attorneys qualified in accordance with GUIDELINE 4.1, an investigator, and a mitigation specialist.
  2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.



B. The Legal Representation Plan should provide for counsel to 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. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

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

#### **GUIDELINE 4.1 Qualifications of Defense Counsel**

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.

#### **GUIDELINE 5.1 Workload**

A. Effectual mechanisms should be implemented to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.

#### **GUIDELINE 6.1 Monitoring; Removal**

A. The performance of all defense counsel should be monitored to ensure that the client is receiving high quality legal representation. Where there is evidence that an attorney is not providing high quality legal representation, appropriate action should be taken to protect the interests of the attorney's current and potential clients.

B. A regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others should be established and publicized, should defense counsel fail to provide high quality representation.

C. The rosters of attorneys who have been certified to accept appointments in capital cases should be periodically reviewed to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments.

D. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, written notice should be given that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.

E. An attorney or defender office sanctioned pursuant to this Guideline should be restored to the roster only in exceptional circumstances.

F. This Guideline should be implemented consistently with GUIDELINE 2.1, so that an attorney's zealous representation of a client cannot be cause for the imposition of sanctions pursuant to this guideline.

#### **GUIDELINE 7.1 Training**

A. The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive



training program in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law;
  2. pleading and motion practice;
  3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
  4. jury selection;
  5. trial preparation and presentation, including the use of experts;
  6. ethical considerations particular to capital defense representation;
  7. preservation of the record and of issues for post-conviction review;
  8. counsel's relationship with the client and his family;
  9. post-conviction litigation in state and federal courts;
  10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
  11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.
- C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program that focuses on the defense of death penalty cases.
- D. All non-attorneys wishing to be eligible to participate on defense teams should receive continuing professional education appropriate to their areas of expertise.

### **GUIDELINE 8.1 Funding and Compensation**

- A. The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.
- B. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.
1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
  2. Attorneys 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.
  3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate

commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

- C. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases, such as:
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.
  4. Additional compensation should be provided in unusually protracted or extraordinary cases.
  5. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

### **GUIDELINE 9.1 Establishment of Performance Standards**

- A. The standards of performance should be formulated so as to insure that all counsel provide high quality legal representation in capital cases in accordance with these Guidelines. The standards of performance should include, but not be limited to, the specific standards set out in these Guidelines.

### **GUIDELINE 9.2 Applicability of Performance Standards**

- A. 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.

### **GUIDELINE 9.3 Obligations of Counsel Respecting Workload**

- A. Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines.
- B. Counsel representing the death penalty clients must, due to the severity of nature of the case and the necessity for time-consuming research and preparation, give priority to





death penalty clients over their other caseload.

- C. In the event that counsel's caseload becomes overextended after acceptance of a death penalty case, so that reasonable time is not available to properly complete the tasks necessary for providing maximum quality representation, counsel should notify the court and request additional legal assistance, or seek to withdraw, or take steps to reduce other caseload matters which conflict with his death penalty representation.

#### **GUIDELINE 10.1 The Defense Team**

- A. After the appearance of Lead counsel, either by court appointment or being retained to represent the defendant, lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.
1. Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Guidelines, unless:
  2. The Guideline specifically imposes the duty on "lead counsel," or the Guideline specifically imposes the duty on "all counsel" or "all members of the defense team."
- B. As soon as possible after designation, lead counsel should assemble a defense team by:
1. Requesting the court to appoint associate counsel to assist lead counsel with the responsibilities of representation. Lead counsel should consult with available potential associate counsel to insure their qualifications, desire and availability to properly assist in the representation.
  2. Lead counsel, in consultation with associate counsel, should make application to the Court for financial assistance for securing the following additional services for the defense team:
    - a. A private investigator to conduct factual investigations of the case on guilt-innocence and punishment issues;
    - b. A qualified "mitigation expert" should be enlisted, if the existing defense team does not have the present expertise in obtaining and evaluating such mitigation evidence, pursuant to the standards set out in *Wiggins v. Smith*, 539 U.S. 510 (2003).
    - c. A mental health associate, qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments, should be enlisted to determine the client's mental health history for the purposes of pursuing issues of mental retardation, competency to stand trial, insanity at the time of the offense and other mitigating mental health problems for punishment consideration. In the event that the mental health

associate determines the possibility of legitimate mental health issues, lead counsel should then make application to the Court that the appropriate experts be appointed by the Court for making expert of valuations of the defendant's condition, and

- d. any other members needed to provide high quality legal representation.

- C. 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.

- D. Counsel should recognize that under Texas law, application to the Court for financial assistance for experts with regard to some of the above issues may be requested in an ex parte proceeding, under seal, to preserve the attorney-client privileged information. Counsel should be prepared to submit ex parte requests for funding, accompanied by the appropriate affidavits, showing the need for the financial assistance sought, and be prepared to make a record to the court in-chambers of the necessity for such financial assistance. Counsel should also be aware that due to the constraints of the budgets of most counties, while a court may deny an initial request for funds, that subsequent, follow-up requests should be submitted to the court, based upon the exigencies of the case. See Article 26.052 f), V.A.C.C.P.

#### **GUIDELINE 10.2 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.
1. Barring exceptional circumstances, the client should be contacted within 24 hours of initial counsel's entry into the case, with full and complete interviews of the client to be conducted as soon as practically possible.
  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.
- B. 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).

### GUIDELINE 10.3 Additional Obligations of Counsel Representing a Foreign National

- A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.
- B. Counsel representing a foreign national should:
  1. Immediately determine if the client's ability to communicate with counsel, in English, is sufficient to allow counsel and the client to adequately communicate. Counsel must recognize that some foreign nationals speak in dialects of which counsel may be unfamiliar, resulting in unintended miscommunication.
  2. If there are any language conflicts, counsel should immediately request the court to appoint an appropriate interpreter to assist the defense in all stages of the proceeding, or counsel may request permission to withdraw due to language problems. It is highly recommended that both lead and associate counsel have adequate communication with the defendant, rather than just one of counsel.
  3. Immediately advise the client of his or her right to communicate with the relevant consular office; and
  4. Obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.

### GUIDELINE 11.1 Trial Investigation

- 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 for the guilt-innocence phase of the trial should generally encompass the following aspects:
  - a. Extensive interviews with the client to determine: the background information in the case; any potential defenses; the identity of any witnesses available for guilt-innocence, or on punishment; the names and addresses of all available family members; medical history; educational history; criminal history, etc.;
  - b. Informal discovery requests (before indictment if possible) should be immediately made to law enforcement and the district attorney for witness statements, police reports, witness lists, physical evidence, names of co-defendants (and any deals made with witnesses to testify); search and arrest warrant documents, copies of written or oral statements of the defendant, and any other information immediately available to permit commencement of the defense investigation. After indictment, formal discovery motions should be immediately submitted to the Court for resolution and ruling.
  - c. Interviewing as soon as practically possible any potential witnesses relevant to the issues of guilt-innocence, properly preserving such witness information by written statement, affidavit or audio/video recording.
  - d. Reviewing the scene of the crime, recording exact locations of relevant events, lighting conditions, physical layout, etc.
  - e. Interviewing family members and other relevant witnesses to the defendant's mental health condition.
  - f. Conducting review of entire client's entire criminal history, including obtaining copies of prior conviction records, arrests, etc.
  - g. Research and preparation of pretrial strategy for suppression motions, motions to quash, discovery requests, both formal and informal, etc.
  - h. Plan trial strategy, including discovery requests, pretrial motion practice, jury selection, cross examination techniques of State witnesses, probable legal issues arising during trial, presentation of defense case (including defendant's possible testimony), possible rebuttal issues, jury charge issues, final argument strategy.
  - i. Conducting a review of the client's possible mental retardation, in view of the decision of *Atkins v. Virginia*, 536 U.S. 304 (2002). Counsel are advised that the issue of mental retardation may not easily be determined from the attorneys' interviews with the client. The client will generally attempt to "mask" such condition. Special expertise in recognizing actual mental retardation is required. Counsel are advised to pursue pretrial hearings to challenge any attempt by the State to seek death, if there is credible evidence of mental retardation, until such time as the Texas Legislature sets a statu-



tory procedure, or the U.S. Supreme Court determines that pretrial hearings are not constitutionally required on the mental retardation issue.

- j. In view of the decision of *Roper v. Simmons*, \_\_\_ U.S. \_\_\_ (No. 03-633, 3/1/05), especially in cases involving aliens, where the client's date of birth may be difficult to document, a special investigation may be required to ascertain the true "age" of the defendant to ensure that he is "death eligible" and if not, ensure that the prosecution is aware of such evidence. Counsel are advised that it may be necessary to pursue special pretrial hearings to challenge any attempt by the State to seek death, if there is credible evidence that the client is under 18 years of age, or if there is no credible evidence to show his exact birthdate, as it would appear that the State has the burden to prove an accurate date of birth before death is sought.
3. 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.
    - a. Discovery — all efforts should be made to determine, well in advance of trial, the evidence the State intends to use during the punishment phase of the trial, extraneous offenses, prior criminal convictions, and expert witnesses.
    - b. The investigation for the punishment phase of the trial should generally encompass the following aspects:
      - i. Development of character witnesses and family background evidence, and where applicable, relevant records and witnesses from additional sources, including military, school, hospital, past employment, etc., to corroborate mitigating evidence theory;
      - ii. Development of expert witnesses on mental health issues, if any;
      - iii. Development of rebuttal witnesses for State's extraneous offenses, if any;
      - iv. Development of the defendant's testimony, if necessary;
      - v. Planning of cross examination of State witnesses;
      - vi. Preparation for jury charge issues; or,
      - vii. Preparation of final argument.
  - B. Counsel at every stage 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.
  - C. 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.

### GUIDELINE 11.2 The Duty to Assert Legal Claims

- 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;
    - 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;
    - 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; and,
    - d. Any other professionally appropriate costs and benefits to the assertion of the claim.
- B. Counsel who decide to assert a particular legal claim should:
  1. Present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law; and
  2. Ensure that a full record is made of all legal proceedings in connection with the claim.
- C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:
  1. Asserting legal claims whose basis has only recently become known or available to counsel; and
  2. Supplementing claims previously made with additional factual or legal information.

### GUIDELINE 11.3 The Duty to Seek an Agreed-Upon Disposition

- A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.
- B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:
  1. The maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;



2. Any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement, and good-time credits;
  3. The general range of sentences for similar offenses committed by defendants with similar backgrounds;
  4. The governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentences;
  5. The types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;
  6. Whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;
  7. The practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;
  8. Concessions that the client might offer, such as:
    - a. An agreement to waive trial by jury and to plead guilty to particular charges;
    - b. An agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;
    - c. An agreement to forego in whole or part legal remedies such as appeals, or for post-conviction relief, and/or parole or clemency applications;
    - d. An agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;
    - e. An agreement to engage in or refrain from any particular conduct, as appropriate to the case;
    - f. An agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;
    - g. Agreements such as those described in Subsection (8) (a)-(f) respecting actual or potential charges in another jurisdiction;
  9. Benefits the client might obtain from a negotiated settlement, including:
    - a. A guarantee that the death penalty will not be imposed;
    - b. An agreement that the defendant will receive a specific sentence;
    - c. An agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
    - d. An agreement that one or more of multiple charges will be reduced or dismissed;
    - e. An agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
    - f. An agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
    - g. An agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement;
    - h. Agreements such as those described in Subsection (9) (a)-(g) respecting actual or potential charges in another jurisdiction.
- C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.
- D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.
- E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.
- F. Counsel should not accept any agreed-upon disposition without the client's express authorization.
- G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

#### GUIDELINE 11.4 Entry of a Plea of Guilty

- A. The informed decision whether to enter a plea of guilty lies with the client. In the event the client determines to enter a plea of guilty:
1. Prior to the entry of the plea, counsel should:
    - a. Make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent.





- b. Ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea.
  - c. Explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court and providing a statement concerning the offense.
  - d. Ensure that the client is mentally competent and psychologically capable of making a decision to enter a plea of guilty.
2. During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

#### **GUIDELINE 11.5 Trial Preparation Overall**

- A. As the investigations mandated by GUIDELINE 11.1 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

#### **GUIDELINE 11.6 Voir Dire and Jury Selection**

- A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.
- B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's belief about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.
- C. Counsel should consider seeking expert assistance in the jury selection process.

#### **GUIDELINE 11.7 The Defense Case Concerning Penalty**

- A. As set out in GUIDELINE 11.1, counsel at every stage of the case have a continuing duty to investigate issues bear-

ing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.

- B. Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt-innocence phase.
- C. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures and advise the client of steps being taken in preparation for sentencing.
- D. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing body, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.
- E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing body.
- F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:
1. Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutors, would present positive aspects of the client's life, or would otherwise support a sentence less than death;
  2. Expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs, or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;
  3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
  4. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones;
  5. Demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.



- G. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.
- H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.
- I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading, or not legally admissible.
- J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should carefully consider:
1. What legal challenges may appropriately be made to the interview or the conditions surrounding it;
  2. The legal and strategic issues implicated by the client's cooperation or non-cooperation;
  3. Ensure that the client understands the significance of any statements made during such and interview; and,
  4. Attend the interview.
- K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.
- L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

#### **GUIDELINE 11.8 Duty to Facilitate Work of Successor Counsel**

- A. In accordance with professional norms, all 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:

1. Maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
2. Providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
3. Sharing potential further areas of legal and factual research with successor counsel; and cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

#### **GUIDELINE 12.1 Duties of Trial Counsel After Conviction**

- A. Trial counsel should be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence.
- B. Trial counsel should take whatever action(s), such as filing of a motion for a new trial, will maximize the client's ability to obtain post-conviction relief.
- C. Trial counsel should not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated.
- D. Trial counsel should consider carefully whether they should accept appointment for the appeal of the case. While Texas law does permit trial counsel to be appointed for appeal upon a showing of "good cause," see Article 26.052 (k), V.A.C.C.P., the availability of some habeas issues may be negatively impacted by counsel's representation at both phases, resulting in claims conceivably being procedurally defaulted or waived. In the event that counsel and the appellant strongly desire that one of the trial counsel act as counsel on appeal, it is recommended that another independent counsel also be appointed as lead appellate counsel to prevent any conflicts.
- E. Trial counsel should take all appropriate action to ensure that the client obtains successor counsel as soon as possible.
- F. Trial counsel should cooperate with successor direct appeal, habeas and clemency counsel in providing relevant information to successor counsel, including trial counsel's prior representation files upon the client's consent, in order to maintain continuity of representation, and to assist future counsel in presentation of issues relevant to subsequent litigation efforts.

#### **GUIDELINE 12.2 Duties of Post-Trial Counsel**

- A. Duties of Direct Appeal Counsel
1. Counsel should, upon being contacted by the court or client concerning representation in a capital appeal, immediately consult with the court and/or the clerk of the court to ascertain relevant information concerning relevant filing deadlines, in order to ensure that counsel's acceptance of the case permits counsel the maximum opportunity for proper representation.



2. Counsel should immediately contact trial counsel to obtain background information on the client, the nature of the issues presented and the possibility of filing a motion for new trial with regard to any issues that need to be raised in such proceeding.
  3. Counsel should, upon acceptance of appellate representation, immediately inform the court and the prosecution of his representation by filing the appropriate designation of counsel with the court, along with the proper designation of the Clerk's Record and Court Reporter's Record as mandated by the Texas Rules of Appellate Procedure.
  4. Counsel should immediately request the trial court to appoint habeas corpus counsel, under Article 11.071, Code of Criminal Procedure, to represent the client in the parallel capital habeas proceedings. It is recommended that counsel on appeal contact qualified attorneys, certified by the Texas Court of Criminal Appeals for habeas representation, to determine their availability for representation and their desire to assist counsel in the particular case.
  5. Counsel should consult and cooperate with habeas corpus counsel in order to maximize proper presentation of the respective appellate issues and habeas corpus issues to secure the best possible post-conviction review for the client.
  6. Counsel should be cognizant of decisions with regard to capital murder issues from the U.S. Supreme Court, Fifth Circuit Court of Appeals, and from across the country, maintaining current research capabilities, including law library facilities, online legal resources, and all other resources for presentation of all available issues to the Court.
  7. Counsel must recognize that errors are often committed by the clerk in preparation of the clerk's transcript, and by the court reporter in compiling the reporter's transcript, therefore counsel must ensure that the record is true, correct and complete in all respects. If errors or omissions are found, objections to the record must be immediately filed with the trial or appellate courts, to obtain corrections or hearings to insurer reliability of the record.
  8. Counsel should fully review the appellate record for all reviewable errors, preparing a well-researched and drafted appellate brief which conforms with Court of Criminal Appeals rules and policies, ensuring that the brief is filed in a timely manner, timely notifying the Court of Criminal Appeals of his desire to present oral argument in the case, if appropriate.
  9. Counsel should be prepared to prepare and file a Reply Brief in opposition to any brief filed by the District Attorney's Office within a timely manner.
  10. Should counsel desire to present oral argument to the Court of Criminal Appeals, counsel should be familiar with the rules and policies of the Court concerning arguments, and ensure that his argument presented is geared to issues that are worthy of presentation under current standards, and not wasteful of the Court's time.
  11. Counsel should be prepared to file a Motion for Rehearing with the Court of Criminal Appeals should the conviction be affirmed, or conversely, be prepared to defend against the State's Motion for Rehearing, should the Court of Criminal Appeals reverse the conviction on original submission.
  12. Counsel should be prepared to research, prepare and file a Petition for Writ of Certiorari in the U.S. Supreme Court should the conviction be affirmed, or ensure that counsel is obtained or appointed to seek certiorari to review, should original appellate counsel not be prepared to proceed with such representation.
  13. Should appellate relief be denied by the Court of Criminal Appeals and/or U.S. Supreme Court, counsel on appeal should consult with habeas counsel to ensure that federal habeas corpus counsel is assigned for future representation of the client.
- B. Duties of Habeas Corpus Counsel
1. General Responsibilities
    - a. Habeas corpus counsel must understand that the state habeas corpus proceeding is not a second direct appeal. Direct appeal-like, record-based claims are not cognizable in state habeas corpus and can be fatal to the capital client. Counsel should not accept an appointment if he or she is not prepared to undertake the comprehensive extra-record investigation that habeas corpus demands.
    - b. Habeas corpus counsel cannot rely on the previously compiled record, but must conduct a thorough and independent investigation. Specifically, habeas counsel cannot rely on the work of, or representations made by, prior counsel to limit the scope of the post-conviction investigation. Counsel must not assume that the trial record presents either a complete or accurate picture of the facts and issues in the case.
    - c. Habeas corpus counsel must treat the habeas corpus stage as both the first and last meaningful opportunity to present new evidence to challenge the capital client's conviction and sentence. Therefore, counsel has a duty to conduct a searching inquiry to assess whether any constitutional violations may have taken place, including — but not limited to — claims involving police and prosecutorial misconduct, faulty eyewitness evidence, unreliable jailhouse informant testimony, coerced confessions, dubious or flawed forensic scientific methods, inef-



- fective assistance of trial and appellate counsel, and juror misconduct.
- d. Because state habeas corpus is the first opportunity for a capital client to raise challenges to the effectiveness of trial or direct appeal counsel, state habeas corpus counsel should not accept the appointment if he or she represented the client at the capital murder trial or on direct appeal of the capital conviction and death sentence.
  - e. Habeas corpus counsel should assume that any meritorious issue not contained in the first state application for writ of habeas corpus will be waived or procedurally defaulted in subsequent federal habeas corpus litigation, or barred by strict rules governing successive state habeas corpus applications. State habeas corpus counsel's lack of diligence, mistakes, missteps, and omissions will be attributed to the capital client and will follow the client throughout all remaining proceedings in state and federal court.
  - f. Habeas corpus counsel must master the set of procedural rules and statutes that may restrict the capital client's opportunity for federal habeas corpus review, including the federal statute of limitations found in the Antiterrorism and Effective Death Penalty Act. State habeas corpus counsel's failure to understand AEDPA's implications may result in the unwitting forfeiture of a capital client's right to federal habeas corpus review.
  - g. Attorneys seeking to qualify to receive state habeas corpus appointments should be required to satisfactorily complete a comprehensive training program. At least once every two years, attorneys seeking to remain on the state habeas corpus appointment roster should be required to successfully complete a specialized training program that focuses on the representation of death row inmates in state and federal post-conviction proceedings.
2. Client Communication
    - a. Without exception, habeas corpus counsel has a duty to meet the capital client face-to-face as soon as possible after appointment. Counsel, or some member of the defense team, should make every effort to establish a relationship of trust with the client. It is also essential for counsel or some member of the defense team to develop a relationship of trust with the client's family or others on whom the client relies for support and advice.
    - b. Habeas corpus counsel has a duty to keep the capital client informed of case developments, the progress of the investigation, potential legal issues, and litigation deadlines. Although some strategic decisions require the client's knowledge and agreement, others, which may be made by counsel, should nonetheless be fully discussed with the client beforehand.
    - c. It is a dereliction of habeas corpus counsel's duty to simply acquiesce to a capital client's insistence that he or she wishes to be executed, or wants to challenge only the conviction but not the sentence. Counsel must try to identify the source of the client's feelings about these matters. Counsel should consult lawyers, clergy, mental health professionals, the client's family or others who have worked with similarly situated death row inmates.
    - d. Habeas corpus counsel should be familiar enough with the capital 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.
    - e. Habeas corpus counsel should make appropriate efforts to determine whether any foreign country might consider the capital client to be one of its nationals. Unless predecessor counsel has already done so, counsel representing a foreign national should immediately advise the client of his or her right to communicate with the relevant consular office; and obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's conviction and sentence.
  3. The Duty to Investigate
    - a. Because habeas corpus counsel must review what are, in essence, two different trials, providing quality representation in capital cases requires counsel to conduct a thorough and independent investigation of both the conviction and sentence. Habeas corpus counsel must promptly obtain the investigative resources necessary to examine both phases, including the assistance of a fact investigator and a mitigation specialist, as well as any appropriate experts.
    - b. Habeas corpus counsel must obtain and read the entire record of the trial, including all transcripts and motions. Counsel has an obligation to independently verify that the official record of all prior proceedings is complete, and to supplement it if necessary. 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. Counsel should interview prior counsel and members of the defense team.
    - c. Because the mental vulnerabilities of many death row inmates increase the possibilities for error, habeas corpus counsel must take seriously the possibility of the capital client's innocence, carefully analyze the quality of the prosecution's case in aggravation, and investigate all possible defenses and potentially mitigating evidence.

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- d. In short, habeas corpus counsel has a duty to make an independent examination of all of the available evidence — both that which the jury heard and that which it did not — to determine whether the jurors made a fully informed resolution of the issues at both guilt and punishment.
4. The Guilt-Innocence Phase Investigation
- a. Habeas corpus counsel should conduct a guilt-innocence phase investigation regardless of any admission or statement by the capital client about the facts of the crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be examined. Instead, counsel must independently investigate the circumstances of the crime and all evidence inculcating the client. Counsel should not assume the accuracy of the evidence admitted at trial.
- b. Informal discovery requests should be made to law enforcement and the district attorney for additional documentation not contained within the district clerk's file, such as: witness statements; police reports; physical evidence; search and arrest warrant documents; and any other information immediately available to permit commencement of the habeas investigation.
- c. Should the State not maintain a complete open file policy, formal discovery motions should be pursued to the Court for resolution and ruling. Counsel should further be aware that requests may be made for disclosure of district attorney files through the Texas Attorney General's Open Records Division.
- d. The assistance of a fact investigator with specialized training is indispensable to discovering and developing the facts that must be unearthed in habeas corpus proceedings.
- e. Habeas corpus counsel's obligation to reinvestigate the case will require counsel to interview most, if not all, of the critical witnesses for the prosecution and investigate their backgrounds. Counsel must determine if a witness's testimony bears scrutiny or whether motives for fabrication or bias were left uncovered at the time of trial.
- f. Habeas corpus counsel must also assess all of the non-testimonial evidence and consider whether to perform independent forensic testing, either because some technology, such as DNA testing, was unavailable at the time of trial, or because trial counsel failed to ensure that the necessary testing took place.
- g. Habeas corpus counsel should seek out and interview potential witnesses who might challenge the prosecution's version of events, including eyewitnesses or other witnesses having purported knowledge of events surrounding the offense; potential alibi witnesses; witnesses familiar with aspects of the capital client's life history that might affect the likelihood that the client committed the offense or the degree of culpability for the offense.
- h. Habeas corpus counsel must attempt to obtain evidence and information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports, together with the raw data forming the basis of any reports or conclusions, and any other physical evidence. Counsel should pursue such evidence and information through public information act requests to the appropriate government agencies, or through informal and formal discovery.
- i. Habeas corpus counsel has a duty to conduct additional investigation to determine whether racial discrimination tainted the imposition of the death penalty or the composition of the jury. Counsel should investigate whether minorities or women were underrepresented on the jury lists from which grand and petit juries were drawn.
- j. Habeas corpus counsel should maintain copies of media reports about the case to determine the effects of pretrial publicity, as well as to review the public statements of potential witnesses and other trial participants.
5. The Mitigation Investigation
- a. Habeas corpus counsel must conduct a mitigation investigation regardless of the expressed desires of the capital client. Counsel may not conclude that a mitigation investigation would be futile, because counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation.
- b. Habeas corpus counsel should not rely on his or her own observations of the capital client's mental status as sufficient to detect the array of conditions (e.g., post traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance. For that reason, at least one member of the defense team should be qualified to screen for mental or psychological disorders or defects and recommend further investigation of the client if necessary.
- c. Habeas corpus counsel should retain an independent mitigation specialist as a member of the defense team as soon as possible after appointment. The mitigation specialist should have the ability to: (i.) compile a comprehensive and well-documented psychosocial history of the client based on an exhaustive investigation, interviews, and collection of documents; (ii.) analyze the significance of the information in terms of impact on development, including effect on personality and behavior; (iii.) find mitigating themes in the client's life history; (iv.) identify the need for assistance from mental health experts; (v.) assist in locating appropriate experts;



- (vi.) provide social history information to experts to enable them to conduct competent and reliable evaluations; and (vii.) work with the defense team and experts to develop a comprehensive and cohesive case in mitigation that could have been presented at trial.
- d. Habeas corpus counsel's mitigation investigation should include a review of the capital client's (i.) medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, prenatal and birth trauma, malnutrition, developmental delays, and neurological damage); (ii.) family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities); (iii.) educational history (including achievement, performance, behavior, and activities) and special educational needs (including cognitive limitations and learning disabilities); (iv.) military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services); (v.) employment and training history (including skills and performance, and barriers to employability); and (vi.) prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services).
- e. Note: Counsel should be advised that, in obtaining a prisoner's records from the Texas Department of Corrections, Institutional Division, some records can be found at the main Classification Division of the TDC in Huntsville, but also, other records are separately maintained at the Polunsky Unit, the Death Row facility, therefore any investigation or subpoena of records needs to be directed at both locations.
- f. Habeas corpus counsel should locate and interview the capital client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others.
- g. Habeas corpus counsel should obtain releases for securing confidential records relating to all potentially relevant information about the capital client, his or her siblings and parents, and other family members, including but not limited to school records, social service and welfare records, juvenile dependency or family court records, medical records, military records, employment records,

criminal and correctional records, family birth, marriage, and death records, alcohol and drug abuse assessment or treatment records, and U.S. Bureau of Citizenship and Immigration Services records.

- h. Habeas corpus counsel must also investigate prior convictions and unadjudicated offenses that the prosecution presented as aggravating circumstances, or that otherwise came into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a prior conviction or unadjudicated offense.
6. Making a Record
- a. Habeas corpus counsel must demand on behalf of the capital client all resources necessary to provide high quality legal representation, to conduct a thorough investigation of both the conviction and sentence, to procure documentary evidence, and to retain experts. Because counsel should not have to disclose privileged communications or strategy to the prosecution in order to secure these resources, counsel must insist upon making such requests *ex parte* and *in camera*. If resources are denied, counsel should make an adequate record to preserve the issue for further review.
- b. Habeas corpus counsel must ensure that there is a complete record for every issue raised, including objections, motions, statements of grounds, oral and written arguments of both sides, discussions among counsel and the court, evidence proffered and received, rulings of the court, reasons given by the court for its rulings, and any agreements reached between the parties. If a court refuses to allow a proceeding to be recorded, counsel should state the objection to the court's refusal and, at the first available opportunity, make a record of what transpired in the unrecorded proceeding.
- c. Habeas corpus counsel must file a written request for an evidentiary hearing on all disputed factual issues and provide the trial court with an in-depth explanation of why a hearing is necessary.



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## 7. Presenting Legal Claims

- a. Habeas corpus counsel must evaluate each potential claim in light of the near certainty that any claim not presented in the first state application for writ of habeas corpus will be waived or otherwise defeated by defenses such as procedural default or failure to exhaust. For this reason, counsel must be especially sensitive to the need to preserve all potential issues for later review by including them in the first state application for writ of habeas corpus.
- b. Habeas corpus counsel should consider every legal claim potentially available, and thoroughly investigate the basis for each potential claim before deciding not to include it in the first state application for writ of habeas corpus.
- c. Habeas corpus counsel has a duty to preserve issues calling for a change in existing precedent. Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices and long-standing precedent.
- d. Habeas counsel should attach all available proof to the application (affidavits, documentary evidence, etc.) even though doing so is not technically required by state law. Failing to attach proof in state court will likely waive the client's ability to present it in federal court. When proof is unavailable, habeas counsel should plead all factual allegations with the greatest possible specificity.
- e. Habeas corpus counsel should consider the possible advantages to the capital client of asserting legal claims whose basis has only recently become known or available to counsel. Counsel should supplement claims previously made with additional factual or legal information that comes to counsel's attention, even if it occurs after the first state application for writ of habeas corpus has been filed.

## 8. Negotiating a Settlement

- a. Habeas corpus counsel has an obligation to take all steps that may be appropriate in the exercise of professional judgment to achieve an agreed upon disposition of the case. If a negotiated disposition would be in the best interest of the capital client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.
- b. Habeas corpus counsel should consider making overtures to members of the victim's family — possibly through an intermediary, such as a clergy member, victim liaison, or representative of an organization such as Murder Victim's Families for Reconciliation — to ascertain their current feelings about the death penalty and the possibility of settling the case.

## 9. Facilitating Federal habeas Corpus Review

- a. State habeas corpus counsel must file a motion for appointment of federal habeas counsel in federal

district court immediately after the conclusion of state habeas corpus proceedings, as required by Section 2 of Article 11.071. Any delay in filing this motion may deprive the capital client of the right to federal review.

- b. If state habeas corpus counsel does not intend to continue representing the capital client in federal habeas corpus proceedings, state habeas corpus counsel must not cease acting on the capital client's behalf until the federal district court has formally appointed new counsel. State habeas corpus counsel's duty includes monitoring the case in federal district court and, if necessary, urging the federal district court to appoint federal habeas corpus counsel as soon as possible after the termination of state habeas corpus proceedings.
- c. Even after state habeas corpus counsel has been formally replaced, he or she owes a continuing duty of complete fidelity to the capital client. State habeas corpus counsel has a responsibility to cooperate with successor counsel in evaluating state habeas corpus counsel's representation of the client.
- d. State habeas corpus counsel's continuing duty to safeguard the interests of the capital client and cooperate fully with successor counsel includes, but is not limited to, maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation; providing the client's files, as well as information regarding all aspects of the representation, to successor counsel; sharing potential further areas of legal and factual research with successor counsel; and cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

## C. Duties of Clemency Counsel

1. Clemency counsel should be familiar with the procedures for, and permissible substantive content of, a request for clemency. Clemency counsel should timely contact the Texas Board of Pardons and Paroles to determine the current and present rules and regulations for seeking clemency in death penalty cases. Counsel are advised that these rules and regulations change on a regular basis, thus this immediate contact is absolutely necessary to ensure preparation and filing of proper documents that will be considered by the Board.
2. Clemency counsel should conduct an investigation in accordance with GUIDELINE 12.2.
3. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.
4. Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if it is not, should seek appropriate redress.

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### Investigations and Forensic Accounting

