

THE ILLINOIS DEATH PENALTY DEFENSE SYSTEM AND THE ABA CAPITAL DEFENSE GUIDELINES*

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The American Bar Association has published a collection of standards to be used in defending capital cases—“Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases” (2003)—and the Supreme Court of the United States has approved the use of those standards in deciding whether an attorney has been an effective advocate in defending a capital case. This article examines how one state—Illinois—has structured a capital-defense system and how that structure compares with the standards set by the ABA.

Because the public only sees the lawyer or public defender at trial and does not know how he or she “got there,” and even those who study the judicial system and are interested in capital punishment know little about whether lawyers are “qualified” and how, it is important to explore the system, at least as to how it operates in the one state. This article explores capital defense in Illinois. (For reforms in Illinois, see Hayler, 2008.)

A single state agency—the Office of the State Appellate Defender (OSAD)—is involved in most death penalty cases from the time of indictment until clemency or execution. OSAD provides legal assistance to the indigent, and this includes indigent defendants who had public defenders or private attorneys appointed to represent them. The first part of this article looks at how capital cases are defended at every stage in Illinois. The second part compares what is done in Illinois with what is required under the American Bar Association’s “Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases” (2003). The use of the ABA Guidelines as the standard by which to judge the performance of defense counsel has been approved by the United States Supreme Court (*Wiggins v. Smith*, 2003). The actual practices in Illinois usually meet or exceed the requirements of the ABA Guidelines, but in some areas the actual practice falls short of the requirements.

PROCEDURE IN ILLINOIS

OSAD is considered to be a part of the judicial branch of the state government, and the appellate defender is appointed by the Supreme Court of Illinois (State Appellate Defender Act, 2006). OSAD has three death penalty units. The Death Penalty Trial Assistance Division (DPTAD) assists appointed attorneys—those either appointed as public defenders or from the private bar—in capital cases in the trial court from the time the charges are filed, through trial, and through sentencing. That

* The opinions expressed in this article are not necessarily the views of the Illinois Office of the State Appellate Defender, but are those of the author, who takes full responsibility for them.

assistance is as much—or as little—as the appointed trial counsel wishes. Because, under the Illinois Constitution, death penalty sentences are automatically appealed to the state supreme court (Ill. Const. art. VI, § 4(b)), the supreme court unit (SCU) of OSAD handles the appeal. If the appeal is not successful, OSAD’s capital litigation division (CLD) assists the defendant in challenging his conviction, sentence, or both in state court through post-conviction proceedings, and then through habeas-corpus proceedings, in federal court. If all of these efforts fail, an attorney from any unit can draft a petition for executive clemency.

If a capital defendant is indigent, as most are, the trial court must appoint “qualified” attorneys to represent the defendant, and counsel from DPTAD may enter an appearance to assist the appointed counsel (Capital Crimes Litigation Act [2006]); Illinois Supreme Court Rule 416(d) [2006]). “Qualified” means that the lead attorney must be certified by the Illinois Supreme Court as a “lead counsel,” and the second attorney must be similarly certified as a “co-counsel” in the Capital Litigation Trial Bar (Illinois Supreme Court Rule 714 [2006]). Generally, to be a member of the Capital Litigation Trial Bar, attorneys must have considerable experience in trying murder cases and other felony cases in jury trials, have taken (and continue to take) relevant courses of continuing legal education, and be familiar with expert witnesses and forensic science one might expect to encounter during a capital-murder trial (Rule 714; see below for further discussion).

Appointed counsel is paid at an hourly rate, and counsel’s expenses, including the expense of fees for expert witnesses, are reimbursed from the Capital Litigation Trust Fund, a special fund established and funded by the legislature (Capital Crimes Litigation Act). Likewise, payment for counsel and reimbursement for expenses is available to postconviction counsel who are under contract to OSAD’s CLD. At both the pretrial/trial (DPTAD) and the postconviction (CLD) levels, OSAD has investigators and sentencing experts (in “mitigation” or “forensic social work”) available to assist appointed counsel, and counsel is also free to hire additional investigative and sentencing help (Capital Crimes Litigation Act). What the legislature has done in this regard would seem to comply with ABA’s requirement for funding and compensation in capital cases (in Guideline 9.1; see below for discussion of Guidelines).

Although there is collegiality between the OSAD lawyers at each stage of proceedings because they are part of the same agency, there is some reluctance and guardedness between appointed trial attorneys in death penalty cases and the OSAD lawyers (DPTAD in the trial court, SCU on direct appeal to the Illinois Supreme Court, and CLD in postconviction proceedings). This is a result of the traditional wariness, if not antipathy, between trial and appellate attorneys. Trial attorneys are criticized on appeal for issues they may not have recognized during the sometimes tumultuous proceedings in the trial court, and they have some tendency to view appellate lawyers as more academician than warrior, as more monk sitting in a monastery, writing commentaries on battles. On the part of appellate lawyers, there

may be some disdain for how the law is practiced outside the law library and the genteel atmosphere of the appellate courtroom.

ABA GUIDELINES REQUIREMENTS AND ILLINOIS PRACTICE

The American Bar Association's "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases," adopted by the ABA in 2003, first call for the adoption and implementation by each state having capital punishment of a plan (the "Legal Representation Plan") to provide high-quality legal representation in death penalty cases in accordance with the ABA Guidelines (ABA Guidelines, 2.1). Every part of the plan is to be structured to ensure that defense attorneys in capital cases are free from political influence.

The Commentary to Guideline 2.1 states that the best way to structure a defender organization in death penalty cases is to make the organization one that is "statewide" because local political pressure is a critical concern in capital cases. Such pressures come from the threats of the denial of future appointments, reductions in fees, and denial of promotions within a local defender office. Although Illinois has a "system," it is a piecemeal system, and certainly not a cohesive "plan."

An essential part of a "plan" is the creation of a "Responsible Agency," which under Guideline 3.1, has much of the overall responsibility of ensuring high-quality representation. The Responsible Agency is to be in either a statewide "defender organization" which, in part, provides representation in capital cases, or an "Independent Authority" run by defense attorneys but which does not actually provide representation. Whichever of these two forms it takes, the Responsible Agency has eight duties. In Illinois, some of these duties are performed by OSAD, a statewide office; some are performed by the Illinois Supreme Court or its regulatory body, the Attorney Registration and Disciplinary Commission (ARDC); and some are performed by local judges. Local judges often have their own reasons for the choices they make. OSAD has a larger view of the system than local judges, but, except for selecting and maintaining postconviction attorneys under contract, OSAD has less input into the Guideline duties than any other group. The ARDC and the Illinois Supreme Court have the most power to ensure high-quality representation in capital cases, but after an attorney is allowed to become a member of the Capital Litigation Trial Bar, the Illinois Supreme Court and the ARDC are rarely involved in oversight of the attorney's performance. Thus, the Guideline duties are divided between different entities, rather than placed in a single "defender organization," which guarantees a disjointed rather than a unified plan to provide high-quality capital representation.

Guideline Duties. Each of the eight Guideline duties of the Responsible Agency follows, with a discussion of Illinois procedures.

1. *Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases.* In Illinois, capital attorneys are self-recruiting, both at the trial court and at the appellate levels. Only a small percentage of attorneys wish to work on death penalty cases. The attorneys who wish to be appointed as capital-trial

lawyers must apply to the Illinois Supreme Court for membership in the Capital Litigation Trial Bar, and that court certifies them. OSAD has no role in this process at the trial level. OSAD does recruit attorneys who will do postconviction and habeas-corpus work. The ABA Guidelines do not distinguish between pretrial and posttrial qualification standards for attorneys, but there is no formal method for “certifying” postconviction attorneys.

For private attorneys and public defenders to be certified as lead or co-counsel for capital work in pretrial and trial work, they must first obtain an application form from the Administrative Office of the Illinois Courts, an office within the Illinois Supreme Court. The application asks detailed questions about the applicant’s employment history as an attorney; the applicant’s history of attending continuing-legal-education courses and seminars; the case names, jurisdictions, presiding judges, and other participating attorneys in felony jury trials handled by the applicant; and any history of disciplinary complaints or actions against the applicant. Once the Administrative Office of the Illinois Courts receives the completed form, an attorney/investigator is assigned to gather information about the applicant.

One of the first things done by the attorney/investigator is to contact the ARDC to learn whether the applicant is, indeed, licensed to practice law in Illinois and has been so for at least the preceding five years, and whether the applicant has any history of discipline or has any pending disciplinary matters. The attorney/investigator then mails a form to every judge and attorney listed by the applicant as having participated in the applicant’s felony jury trials, seeking opinions as to whether the applicant is qualified under Supreme Court Rule 714 to be a member of the Capital Litigation Trial Bar. Once this information is received, the attorney/investigator decides whether to recommend the applicant for admission to the Trial Bar. The recommendation, along with the other gathered documentation, is sent to a panel of lawyers and judges appointed locally to review the applications and to do further investigation. The applicant’s documentation is sent to the local area where the applicant has done the majority of his or her felony jury trials.

The local panels are a part of the Capital Litigation Trial Bar Screening Committee established within each of Illinois’s five appellate judicial districts; each district has a number of panels. The panel members personally contact the judges and lawyers listed by the applicant, and then the panel votes whether to accept or reject the recommendation by the attorney/investigator. If the majority of the panel votes to admit the applicant, then the applicant is admitted. Likewise, a negative vote against the applicant will prevent admission to the Capital Litigation Trial Bar.

The commentary to Guideline 3.1 shows that the qualifications the Responsible Agency should use to allow attorneys to handle capital cases are those set forth in Guideline 5.1, which contains the qualifications that counsel must satisfy, and Guideline 8.1, which specifies training requirements. Performance standards are addressed in Guideline 10.1, which specifies that all standards established by the Responsible Agency must include, at the least, the standards set out in the Guidelines.

The attorney qualifications established in Guideline 5.1 are more detailed than the qualifications for lead counsel listed in Illinois Supreme Court Rule 714, but some of the Guideline qualifications can be inferred in the Rule 714 qualifications. For instance, Rule 714 requires lead counsel to be an experienced and active trial practitioner with at least five years of criminal-litigation experience, including eight felony jury trials, two of which must have been murder cases, and Guideline 5.1 requires that counsel demonstrate a zeal for advocacy and skill in the management and conduct of complex litigation. Although Supreme Court Rule 714 requires prior and continuing legal training and education for members of the Capital Litigation Trial Bar, the rule does not specify the areas of study and training as Guideline 8.1 does. The application form to become a member of the Capital Litigation Trial Bar asks only three questions as to continuing legal education: 1) what courses approved by the Illinois Supreme Court under Rule 714 has the applicant attended within the previous two years; 2) what courses addressing the subject of DNA has the applicant attended in the previous five years; and 3) what courses addressing the preparation and trial of felony cases has the applicant attended during the previous five years.

2. *Draft and periodically publish rosters of certified attorneys.* The Illinois Supreme Court does this regularly and makes the list available on its Web site: www.state.il.us/state/SupremeCourt.

3. *Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases.* The Illinois Supreme Court drafts and publishes the certification standards for membership in the Capital Litigation Trial Bar. However, no one drafts or publishes the procedures by which local judges assign attorneys to particular cases in the trial court. Nor does OSAD have either a formal method to decide which attorneys are qualified to handle postconviction cases or to assign attorneys to particular cases. Within the capital litigation division, choices result from decision making as a group process. The CLD attorneys, investigators, and mitigation specialists meet and discuss the attorneys and the cases. If a contract attorney seems too overworked or to be experiencing any other kind of problem, CLD increases the assistance and oversight it provides to that attorney.

4. *Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has hired private attorneys.* Except for the rare case where a capital defendant has hired counsel, local judges appoint the attorneys at the trial level. If the county has a sufficiently large public defender's office, the judge might simply appoint the public defender and allow the public defender to assign the case to qualified counsel inside his or her office. In a county where the public defenders are not members of the Capital Litigation Trial Bar, the judge might appoint a qualified attorney from the private bar in that county or from a nearby county. If those attorneys wish to have assistance from DPTAD attorneys, investigators, and mitigation specialists, DPTAD personnel are selected by the deputy defender in charge of DPTAD, who usually bases the decision upon geographical considerations.

OSAD assigns attorneys from its SCU to work on direct appeals and assigns attorneys from its CLD to work on capital cases in the postconviction and habeas-corpus stages.

5. *Monitor the performance of all attorneys providing representation in capital proceedings.* Except for some unofficial oversight by OSAD attorneys in DPTAD, no one monitors the performance of trial attorneys during the trial work. The direct-appeal lawyers in the SCU review the performance of the trial lawyers, and under OSAD procedures, the work of the SCU attorneys is reviewed twice each year by the deputy defender in charge of the SCU. The postconviction lawyers in the CLD review the work of the trial lawyers and the direct-appeal lawyers, and the work of the CLD lawyers is reviewed biannually by the deputy defender in charge of the CLD. Guideline 6.1 requires the Responsible Agency to monitor the caseloads of capital attorneys in such a way as to ensure that high-quality representation is being provided in every case. Illinois has no mechanism to comply with the Guideline 6.1 requirement.

6. *Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines.* No one performs this duty in Illinois. If a complaint to the ARDC is lodged against an attorney, there might be an investigation and then there might be a hearing, leading to discipline, which could lead to decertification as a Capital Litigation Trial Bar attorney, but there is nothing “automatic” about the process. If the conduct of a contract attorney in a postconviction matter became an issue at a CLD staff meeting, the attorney’s contract could be terminated and the attorney prohibited from doing further postconviction work for the CLD. Guideline 7.1 requires the Responsible Agency to prohibit the appointment of further cases to an attorney who is not providing high-quality representation. Illinois has no mechanism to comply with the Guideline 7.1 requirement.

7. *Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases.* In Illinois, OSAD conducts most of the specialized training courses for defense attorneys, but some are conducted by the public defender offices in the more populous counties. There are entities that sponsor prosecutor-only courses, and bar associations that sponsor courses for both defenders and prosecutors. A not-for-profit agency, the Illinois Institute of Continuing Legal Education, sponsors many of the courses. A twice-yearly course titled “Defending Illinois Death Penalty Cases” is an example of one hosted and conducted by the Institute of Continuing Legal Education and OSAD. The Illinois Supreme Court approves specialized training courses and publishes a list of the approved courses on its Web site.

8. *Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.* If a complaint is filed with the ARDC alleging that an attorney in a capital case provided ineffective assistance of counsel, neglected a legal matter, or in some other way violated one of the other Illinois Rules of Professional Conduct,

the ARDC will review the allegation and might conduct an investigation. If there is an investigation, and if the attorney is found to have provided substandard representation, the ARDC will maintain a record of the proceeding and will take any appropriate corrective action. This procedure is the same for all attorneys licensed to practice in Illinois. Except for a situation where a complaint is filed with the ARDC, no one at the pretrial or trial level investigates allegations of poor-quality performance, no one maintains records, and no one takes corrective action. At the postconviction level, such matters are handled informally by the CLD, and with little if any documentation.

Several Guidelines (10.13, 10.14, 10.15.1, and 10.15.2) concern the duties of counsel after conviction, including the duty to assist successor counsel if there is one. In Illinois, the relevant counsel are in OSAD units—the direct appeal attorneys in SCU and the postconviction attorneys in CLD. The transition from any DPTAD trial attorneys to the direct-appeal attorneys is an easy one, as is the transition from the direct-appeal attorneys to the postconviction attorneys. Any friction, discord, or wariness that occurs is between appointed attorneys in the trial court, whether private attorneys or public defenders, and the successor attorneys in OSAD for direct appeal or postconviction proceedings.

The largest difference in Illinois between what is required by the ABA Guidelines and what is done in actual practice occurs in the pretrial and trial stages of capital litigation. Illinois has a statewide appellate and postconviction office staffed with lawyers to handle appeals and postconviction proceedings that could be the “Responsible Agency” the Guidelines require, but performs the duties of a “Responsible Agency” only at the appellate and postconviction levels. In other words, not until a defendant has been sentenced to death is there a Responsible Agency to ensure that the defendant receives high-quality representation free from local political pressure. The OSAD trial unit (DPTAD) does not have the authority of a Responsible Agency. Indeed, the responsibilities are spread over a number of agencies, or no agency at all.

Nor does Illinois have a “Legal Representation Plan” for the delivery of high-quality legal representation in capital cases from beginning to end. Illinois has no “Responsible Agency” to certify, monitor, educate, and maintain a roster of highly qualified attorneys practicing trial work in death penalty cases, free from local political pressure. Illinois makes the services of DPTAD available to appointed attorneys for no cost to the defense, but in some cases, including a handful of the fifteen current cases where a verdict of death has been delivered after the capital reforms were enacted, appointed counsel has refused this free assistance. With no Responsible Agency to monitor and remove deficient counsel except in the most egregious circumstances, local judges continue to appoint these attorneys to capital cases. Illinois does have a system of adequate funding in place for trial practitioners, and does have an adequate system in place for high-quality representation after a defendant has been

sentenced to death. Thus, Illinois meets some, but not all, of the requirements established by the American Bar Association's "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases."



The American Bar Association's "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" envisage a unified defense system that provides high-quality representation from the beginning of a death penalty case until the end. Condensed to its minimum, that system could be described as, "appoint high-quality lawyers, and pay them accordingly." Illinois does not have a unified system from start to finish, but it does have a unified system once a client has been sentenced to die. Once a client has been sentenced to die, there is a statewide system to provide high-quality representation. There is adequate funding from the beginning of a case to the end of a case. The major area where Illinois falls short of the ABA Guidelines is in having a way not only to certify but also to monitor and maintain a well-qualified trial bar. **jsj**

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