ABA Guideline 10.7(B)(2): The New Achilles' Heel for Trial Courts and Counsel Handling Death Penalty Cases?

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Guideline 10.7 (B)(2) of the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases *(2003) requires death penalty defense counsel to obtain a complete record of the case. This article explores common problems encountered when lawyers attempt to meet the mandate of Guideline 10.7(B)(2) from the perspective of court administrators, court reporters, and capital-defense attorneys. The author offers solutions for problems with capital-case record procurement and archiving, including define the record, index court proceedings and identify missing transcripts, obtain transcripts from historic key-punched or handwritten stenographer notes, and improve record requests and communication between court staff and defense counsel. The article includes constructive ideas for formal collaboration between courts and criminal-law practitioners with regard to the archiving of capital-case records.*

Trial court administrators may have noticed that their record-management practices in death penalty cases are coming under increased scrutiny. A little noted provision of the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) is responsible. ABA Guideline 10.7 states in relevant part:

> Investigation. *** B. *** (2). Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate. *Commentary*. *** Subsection B(2) is *** new and describes counsel's ongoing obligation to ensure that the official record of proceedings is complete.

Guideline 10.7(B)(2) imposes a plain duty on each and every defense attorney representing a death penalty client to personally make sure that the official record of the proceeding is complete. It is important to note that in no other type of criminal case is this mandate explicitly imposed on defense counsel. Court-appointed capital defenders are now required to understand sufficient detail about a court's case-file management system so that the attorney may perform a timely audit of the court's performance of its archival duties in each capital case. Before the passage of this guideline, busy capital defenders could put a low priority on double-checking the trial court's efforts to receive, index, archive, and otherwise maintain custody of the complete official record of a death penalty trial. A good-faith reliance on court staff was enough. ABA Guideline 10.7(B)(2) has changed all that.

Policy Considerations Behind ABA Guideline 10.7(B)(2)

There is little, if any, argument against the assertion that in a death penalty case, a government-sanctioned execution should go forward only if an appellate court has reviewed the complete record of the case and found no reversible error. Indeed, in many states having the death penalty, an automatic and direct appellate review of the entire trial and sentencing phase is required, and the condemned prisoner cannot waive this procedural safeguard. The purpose of such a policy is to ensure that any execution to be carried out by the government on the community's behalf will receive substantive scrutiny by an appellate court for errors of law before it is enforced. At least on a theoretical level, the death penalty is not to be parlayed by clients into a version of lawyer-assisted suicide.

Why the Guideline? Before the mandate of Guideline 10.7(B)(2), it was likely that problems with a state trial court's handling and archiving of a death penalty case file would go unnoticed or, if noticed, would not be the basis for litigation or otherwise addressed and fully resolved. Attorneys willing to take capital cases on state appeal or post-conviction were (and are), like trial court staff, typically overworked and underfunded. Before passage of Guideline 10.7(B)(2), these busy attorneys were encouraged to make two crucial presumptions. The first was that any prior defense counsel was competent and, thus, had obtained a complete copy of the official record, which would be securely archived within the attorney-client file. The second was that the trial court's file of the death penalty case had been flawlessly maintained and would remain available as a public record into perpetuity.

In cases where both of these presumptions turned out to be false, the current defense attorney would be at a severe disadvantage from not having the full record to review and could be severely hampered in assisting the condemned client. Any court reviewing the death sentence would also be at a disadvantage from not having the full record to review and not receiving the benefit of fully informed advocacy. Unless the defendant could raise a successful post-conviction claim over the issue (a daunting task), there would be little likelihood of a court granting relief to him over an incomplete record. And although the existence of Guideline 10.7(B)(2) cannot guarantee to a defendant that his attorneys will always obtain and preserve a complete record of the case, just as the existence of record-retention rules cannot guarantee to the public that the court's record will always be preserved, the guideline promulgates a very important standard of practice for death penalty defense attorneys.

And while it may appear obvious that an attorney needs access to the complete official record of the case being litigated to provide effective assistance of counsel to the client, and not only in death penalty cases, it is still extremely common for court-appointed attorneys never to have obtained and indexed the whole record of a case. In large part this is because many jurisdictions have tolerated—if not required or encouraged—court-appointed attorneys to carry huge caseloads on a low flat-fee-per-case contract with inadequate funding for administrative support. The day-to-day

practice of law for these attorneys is focused on triaging emergencies, waiting in the courthouse hallway for their cases to be called, and engaging in last-minute plea negotiations. Because the attorney's income in such circumstances is maximized by spending the least amount of time possible on each case, these attorneys have a strong financial motivation to avoid the time-consuming task of carefully reviewing and indexing the file, whether before advising their clients or after their cases are adjudicated and the files are ready to go into storage or be transferred to successor counsel. Salaried public defenders with high caseloads are similarly unlikely to find support or time for detailed record procurement and review, especially in complex cases.

One consequence is that when these defenders become capital defenders and then attempt to obtain the complete record, they typically have little to no experience of how to go about it, and the task does not get finished. In one complex case that is now in its twenty-first year of prosecution at the state trial level, the defense team has spent over 200 hours attempting to obtain transcripts from the three prior trials of the case and collateral case records. This is time that could and would otherwise be spent with the client or on researching and drafting motions and briefs. And this is not an unusual situation in Oregon, and it easily demonstrates why the guideline is very much needed. The client has been defended by three prior trial-defense teams and by three prior appellate-defense teams. He has been continually prosecuted by experienced government counsel for over twenty years. Yet none of these attorneys had bothered to obtain and review the complete official record or provide it to the appellate courts. So although the guideline may seem to be unnecessarily pronouncing an already accepted norm, its appearance is borne of a critical need brought about by the realities of indigent-defense caseloads, and decades of insufficient training and funding.

THE SUBSTANCE OF GUIDELINE 10.7(B)(2)

Guideline 10.7(B)(2) newly mandates that defense attorneys do everything in their power to ensure, early in a case, that the historic case record is complete and that the current record is faithfully maintained. Although the guideline cannot prevent or cure all record-related problems in capital cases, it clearly requires the defense attorney to obtain and maintain a complete record of the case for the client's benefit. The guideline does not usurp or otherwise lessen the official recordkeeping responsibilities of the court or of the executive branch. And, for new cases, adherence to the guideline should not pose a problem. However, an attorney working on an older complex case may innocently besiege a busy, understaffed trial court administrator's office with questions and demands that are enormously time-consuming to investigate and answer.

Because the ability to obtain any missing portion of the record often turns on how much time has passed between the event itself, such as the court hearing, a transcript of which is missing or incomplete, and the discovery of the missing record, perhaps as much as twenty years after the event when the case is on federal habeas, time is of the essence. If the error is discovered in the early stages of an appeal, it is more

likely that the missing portion can be located and provided, or perhaps satisfactorily re-created.

Of major import here, the guideline when passed was not merely prospective. The guideline applies to *all* death penalty cases, whether newly charged, on remand for a new trial or penalty phase, or in the late stages of appeal. For death penalty attorneys around the nation, personally inventorying the court case file has jumped to the top of the priority list. In cases that are decades old and which have been to trial more than once—Oregon has nine such "continuing prosecutions"—the official court files are voluminous and additionally reflect two decades' worth of changes in court recording, reporting and file archiving. ABA Guideline 10.7(B)(2) has, thus, arguably become the new Achilles' heel of trial court administrators charged with archiving death penalty case files.

Attorneys' Views. death penalty attorneys zealously attempt to abide by all of the ABA Guidelines, including Guideline 10.7(B)(2). Government attorneys and court staff should have no quarrel with this, especially in states such as Oregon where the Guidelines have been formally incorporated into the performance standards and employment contracts for court-appointed capital-defense counsel. In all jurisdictions, a capital defender's adherence to the Guidelines is ultimately mandated by the United States Supreme Court, because the Court has repeatedly measured the performance of capital-defense counsel in terms of standards set forth in the Guidelines.

As with any other litigation-related endeavor, a defense lawyer's success under Guideline 10.7(B)(2) will depend on the lawyer's innate abilities and learned skills, the amount of time and money that can be devoted to the task, and how much encouragement and cooperation she can get from the court administrative staff. It is often a delicate situation, to say the least. If the lawyer has allowed reasonable time for getting records, knows what to look for, and has already developed a good working relationship with court staff, success is likely. If, however, the lawyer is new to the task, lacks basic social skills (as many attorneys do), and has an unmasked sense of entitlement when working with court staff, an icy, seemingly insurmountable roadblock will be encountered early. But because the lawyer arguably cannot begin filing motions or briefs in the case until after reviewing the complete record of the case to date, and because any missing portions of the record may mean the difference between the client's life and death, the substance of the request is reasonable. There may even need to be an evidentiary hearing on the matter, and court staff may be subpoenaed to testify about the situation.

Court Staff's Views. Typically, the trial court administrator or county clerk is the official custodian of court files. In most jurisdictions, official record custodians enjoy a presumption of law that they have performed their official duties properly. Despite this presumption, records do get misplaced or lost. When it starts to become obvious that the record in a death penalty case that went to trial years ago has never been completely transcribed, or that exhibits are missing or lost, tensions can quickly rise.

Like many court-appointed capital defenders, trial court administrators never have had enough money or time to hire and train a sufficient number of staff, and they may have trouble retaining experienced staff for any length of time. Like court-appointed capital-defense counsel, trial court administrators must—out of necessity—delegate much work to assistants, many of whom lack formal training and, because of time constraints, cannot be closely supervised. Storage space for court records is woefully overcrowded and can easily become disorganized. If the court has experienced a high turnover in staff, the old-timer with the useful institutional memory may not be available to help direct a search or otherwise provide useful information. And court staff have hundreds of other tasks besides finding an old death penalty case file. Against this backdrop, picture a capital defender (or state's assistant attorney general) making an oral request to a rural trial court administrator at 4:00 p.m. for a complete certified copy of a 6,000-page trial-court file of a twice-tried, fifteen-year-old capital case now pending in federal court on a federal habeas petition, and who throws in a threat to subpoena the staff into federal court three hundred miles away if the copies are not ready by 8:00 a.m. the next morning. That would be an unrealistic records request, to say the least.

MEETING THE GUIDELINE

Lawyers face a catalog of problems when attempting to do their job and comply with the guideline. For some lawyers, this will be their initiation into the world of trial court case-file management. To be successful, a lawyer having to complete a missing record or having to attempt to re-create a record must employ considerable patience with the process and the people involved, including court staff and transcriptionists. Patience is particularly important when one is trying to piece together the complete court file of a case that may have been remanded again and again for new trials. These extraordinarily complex cases often date back to the 1980s, a time when the mandate of Guideline 10.7(B)(2) did not exist and when there was little oversight of what comprised the record on appeal. Trial and appellate counsel who are working on these "continuing prosecutions" today are the ones having the most problems in obtaining a complete record of earlier trials. Emotions run high when the government faces the loss of a death verdict over missing trial records, or when the defense counsel is asked to prove somehow what the missing records contain that would save a client's life.

Because trial court administrators and their staff are the official custodians and ultimate gatekeepers of these death penalty court files, they can expect to field an increasing amount of requests for these files. Keeping in mind the fact that court staff and attorneys share the goal of obtaining and archiving a complete case record, there are problems commonly encountered in attempting to comply with Guideline 10.7(B)(2).

Defining What Is the "Complete . . . Official Record." It is up to defense counsel, not trial-court staff, to define what is meant by a complete official record of the proceedings as those terms are used in the guideline. A reasonable definition would include, for

each named defendant, the court's case register (case-activity index or docket); the court correspondence file; any search warrants and returns; any grand-jury orders; the indictment; all pleadings; all trial exhibits; verdict forms, sentencing documents, and judgment; the jury register; the jury questionnaires; jury instructions; notice of appeal; certificate of trial court record; and transcripts of all court proceedings.

Communicating About the Record Request. Most courts require that a request for court records be submitted to the court in writing. This is the best way to document the record request for both the attorney and the court employee. Drafting a clear and accurate request requires that the attorney have both a certain knowledge base about local practices and good drafting skills. However, not all attorneys have the requisite knowledge base. It may be helpful for court administrators to remember that each court has its own in-house terminology for records and procedures and that few defense attorneys or their investigators/paralegals have received formal training in trial court file-management systems. Lawyers need to schedule sufficient time to consult with senior court staff about the substance of a records request and the expected time line for production of the requested records and to have the meeting *before* the request is submitted. Setting reasonable expectations can help defense counsel avoid misunderstanding and miscommunication to others (including trial court or appellate-court judges) about the records request.

Obtaining All Transcripts of the Proceedings. Verifying that a complete set of transcripts has actually been provided can be a time-consuming project, particularly in older cases that have been tried multiple times or have multiple codefendants. If an official court-transcript index is maintained and made available, parties will be able to avoid unnecessarily ordering and paying for duplicate transcriptions. Defense counsel will prepare their own index of court appearances and then cross-check it not only against the court's official transcript index and the court's docket for each named defendant but also against trial counsel's billing records, any official court minutes (court journal entries for court proceedings), any newspaper articles about the case, transport records for the in-custody defendants, and the client's recollection. Capital-defense counsel ought *never* rely solely on the court's case register, because the accuracy of such an index cannot be easily determined. As with all computerized databases, the veracity of the court's index is dependent on staff having had sufficient time to enter all relevant data into it accurately, and the computer system having operated on an error-free basis the entire time. In light of crowded dockets and understaffing, it is likely that data-entry errors will be found.

Given that defense counsel are now obligated to review the entire official record, and are motivated to find and correct any errors in it, court staff should not be surprised if defense lawyers detect errors in existing transcripts or discover that entire proceedings have yet to be transcribed. One of the most frustrating situations for capital-defense attorneys is discovering that a decades-old trial-court proceeding has never been fully or correctly transcribed. For defense lawyers, the mandate of ABA Guideline 10.7(B)(2) is clear: the record of the case must be completely transcribed.

Accessing Old-Style Court Reporter "Steno Notes." Most court reporters today use laptop equipment with digital storage. Earlier, court reporters produced old-style key-punched stenographic notes and occasionally even handwritten shorthand notes. Locating the notes may take much time: depending on the customs of the jurisdiction, the original notes may be stored at the courthouse or they may be stored with the court reporter. With regards to key-punched notes, great care must be taken when handling these funny, odd-shaped bundles of narrow, folded paper strips. Experienced counsel and court staff know that to maintain the legal integrity of these notes, the entire strip must remain intact. In most instances, one cannot successfully photocopy these strips. Old shorthand notebooks and key-punched notes are not always clearly identified or carefully archived, and it may take several attempts by court staff or others to locate the right notes for the untranscribed proceeding.

Best practices in death penalty cases require that the notes remain at the courthouse in the custody of the trial court administrator because the notes are irreplaceable and any risk of loss or damage to them should be avoided at all costs. Under such circumstances, the court reporter must travel to the courthouse to transcribe them. Counsel should not be surprised if advance notice and special arrangements—and perhaps even a court order—may be required to enable a court reporter to bring older-style equipment into the courthouse under new security rules. Neither counsel nor the court should be surprised if the court reporter having to make the trip requests proof of pre-authorization for payment of reasonable travel time and expenses in addition to a per-page rate for transcription.

Court Reporters and Transcriptionists Are Not Fungible. Best practices for transcription of old-style steno or shorthand notes require that the notes be transcribed by the same court reporter who took the notes originally. This is because each court reporter, like each shorthand reporter, typically develops individualized shortcuts in reporting that are reflected in the steno notes, and only that reporter fully and readily understands those notes.

While court staff can be helpful in locating current court reporters, they are not required to keep or provide information to the public about court reporters who have retired, been fired, or moved away. Thus, attorneys will need to employ their own investigators to locate ex-court reporters. At the same time, court staff will often actively assist in counsel's efforts to obtain a missing trial transcript, particularly if a judge signs an order directing that the transcript be completed.

In instances where a court reporter has died or is otherwise unable to assist in transcribing his original steno notes, efforts nonetheless must be made to have the notes transcribed. Professional peers of the deceased court reporter may be able to transcribe the notes by referencing that reporter's other steno notes against the transcripts produced from them. Extra time and funding needs to be provided for this type of second-best transcription, as the decoding of stenographer notes by reverse-engineering is quite tedious and time-consuming for the court reporter assigned to the task. In worst-case scenarios, it will not be possible to obtain a transcript that provides

defense counsel and the courts with the requisite reliability needed for appellate review of a death sentence. If this is the case, defense counsel will nevertheless need to document clearly that they tried to obtain the transcript, and they must be prepared to show the court what efforts were made.

Obtaining Transcripts from Tape-Recorded Court Proceedings. Young lawyers and court staff may be unaware that tape-recorded court proceedings can be notoriously hard to transcribe. This is especially so where the quality of the court's recording equipment was poor, so that the original recording itself is of substandard audio quality. Although "enhanced" copies of court cassette tapes can be made at commercial rates, and are usually of sufficient quality to allow for transcription, one must allow for extra time and additional costs. A related problem is that many historic court tapes were recorded at special speeds and cannot be played back on standard cassette players. It may take extra time to find a transcriptionist who has a flexible-speed cassette player. Although these machines are still being made, they are moderately expensive to purchase, and many court reporters now only use laptop technology.

New Transcripts Must Be Reviewed for Accuracy. Before the transcripts are settled, death penalty attorneys should insist on attempting to have the attorneys who participated in the older (historic) proceedings review any new transcripts. This time-consuming step is especially crucial when only a court reporter was present at the court proceeding, as there will be no recording available to which current counsel can listen and against which the new transcript can be checked.

Appellate Record Issues. Although many state appellate courts are not "courts of record" in the traditional sense, death penalty attorneys ought to make every effort to obtain the complete appellate-record file in addition to the trial-court file. The appellate-court file should normally include an appellate case register (activity index), court correspondence file, a brief file, calendaring notices, and a recording of the oral argument. The oral argument recordings are typically the most vulnerable to being destroyed soon after the case is decided. Attorneys must exhaust other possible sources for copies or transcripts of these recordings, including the client and his family, opposing counsel, and local academics who write or teach about the death penalty.

Collateral Record Issues. A broader definition of "the official record of the proceedings" found in the guideline could include all collateral court files pertaining to the death penalty defendant. This is not unreasonable, given the fact that during the penalty phase of capital cases, evidence about the defendant, although not directly related to the capital crime, is typically introduced. Collateral court files would include any juvenile-court records, civil-case records, or other criminal-case records involving the defendant and family members. Attorneys will familiarize themselves with the different types of courts—e.g., district, circuit, municipal—within the region and carefully search for all relevant records. Capital-defense counsel new to the area or new to the job may request help from trial-court staff about these other courts and case files.

Time Is of the Essence. As death penalty defense counsel develop priorities for fulfilling their duty under ABA Guideline 10.7(B)(2), they come up against the court's

official record-retention schedule. While trial court administrators understand that court records are routinely destroyed in the regular course of court business every day in accordance with published judicial record-retention schedules, death penalty attorneys may have a hard time understanding and accepting this. And although best practices dictate that no part of a death penalty court-case file will be destroyed until after the death of the defendant and all codefendants, not all court files are carefully archived and preserved.

Thus, time is of the essence when meeting the expectations of the guideline. The longer a death penalty defense attorney waits to verify personally that the record in a death penalty case is complete, the more likely it will be that the record, or a portion of its foundation, such as old court-reporter steno notes, will have been destroyed. However, trial court administrators and counsel also are aware that record-retention schedules are simply that—schedules. Many records long-scheduled for destruction have yet to be so identified and set aside, let alone packed or shipped off for terminal indexing and destruction. Attorneys should require that the court's record-storage facility be carefully searched and extra efforts be made to verify that records cannot be found.

The Importance of Institutional Memory. Lawyers, judges, and court staff who have dedicated their careers to the administration of justice in a given geographical region have deservedly revered "institutional memory" about the practices and procedures that have been historically implemented in their jurisdictions. These people are invaluable resources for attorneys and newer court staff trying to gain an understanding of how an older trial record was archived. For instance, they will often be able to decipher cryptic court entries as to whether the hearing was tape recorded rather than court reported or digitally recorded; who the trial record custodian was then and where that person is now, both as a matter of law and of fact (in other words, the right person to ask to retrieve a file out of archives); where historical records might still be found despite their calendared destruction under current record-retention schedules; and the whereabouts of allegedly retired or expired court bailiffs and court reporters.

Establishing the Fact of a Missing Record. It may be hard to prove a negative, but it is not impossible. In circumstances in which it has become clear that the official record, or portion of it, should exist but is missing, the burden falls on the attorneys to document that fact. There are a variety of ways to prove the point, including securing an affidavit, calling a court clerk to the stand, and moving to compel the production of the record. Trial court administrators should anticipate such efforts and attempt to work out in advance the most efficient and effective method of documenting the necessary facts.

For instance, unless a known court staff member personally destroyed the record, there will likely be no one who can testify regarding how or when the record was lost. What is relevant in these circumstances is how thorough a search was undertaken for the record, whether there has been an official statement issued that the record is lost, and what efforts, if any, might be made to reliably re-create the record.

Opportunities for Collaboration in the Archiving of Death Penalty Case Files. Court staff and counsel share the goal of properly making and archiving a full record in any death penalty case. Ideally, meaningful collaboration will occur between representatives from the trial-level death penalty bar, the appellate-level death penalty bar, and court administrative staff. Efforts could be made to identify current death penalty case files annually, review current practices, and plan and implement needed improvements. The provision of written materials on court-record-management practices and samples of well-drafted record requests would be helpful to new lawyers and court employees alike. Capturing institutional memory by interviewing senior staff on historic court practices may provide priceless information to future courts and counsel beset with the need to inspect or re-create a historic death penalty court file. Designing a procedure by which all court proceedings in death penalty cases are clearly designated for prompt transcription, and the original recordings scheduled for indefinite retention, would be a major improvement. Designing a method by which all court files pertaining to death penalty defendants (including their juvenile, civil, and other criminal files) would be permanently flagged and protected from destruction would also be useful.

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ABA Guideline 10.7(B)(2) imposes an admirable mandate on death penalty defense counsel. The guideline does not have to be an Achilles' heel for court administrators or counsel. Understanding the policy behind the guideline, and sharing techniques for solving hurdles encountered under the guideline, can help ensure that the complete official record of any death penalty case will be available to reviewing courts and successor counsel. **jsj**