May 31, 2000

The Honorable Major B. Harding, Chief Justice
Florida Supreme Court
500 S. Duval Street
Tallahassee, Florida 32399

**Re: Proposed Amended Rules of Criminal Procedure 3.851, 3.852 and 3.993 (No. SC 96646)**

Dear Justice Harding:

On behalf of the American Bar Association, the Association's Death Penalty Representation Project respectfully submits comments on the Florida Supreme Court's proposed amendments to Rules of Criminal Procedure 3.851, 3.852, and 3.993.[1]

We also write to comment on the Florida Supreme Court's Select Committee on Minimum Standards for Lawyers in Capital Cases' ("Select Committee") proposed amendments to Rule 3.112.[2] We understand that the comment period for standards for capital post-conviction counsel has not yet begun. However, the need for qualified post-conviction counsel -- and the adoption of legislation and judicial rules to ensure their appointment -- is an essential precondition to any proposed changes to the rules for capital post-conviction litigation. Similarly, challenges to the restrictions on the professional responsibilities and independence

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1 *See Allen v. Butterworth*, Nos. SC00-113, SC00-154, SC00-410, 2000 WL 381484, 25 Fla. L. Weekly S277 (Fla. April 14, 2000); *Amendments to Rules of Criminal Procedure* 3.851, 3.852 and 3.993, 25 Fla. L. Weekly S285, S286 (Fla. April 14, 2000).

2 *See In re Amendment to Florida Rules of Criminal Procedure -- Rule 3112 Minimum Standards for Attorneys in Capital Cases*, No. 90, 635, proposed standards submitted on May 11, 2000, by the Court's Select Committee, chaired by The Hon. Philip J. Padavano, [hereinafter Rule 3.112].

of Registry counsel that are currently before this Court are inextricably intertwined with these issues.[3]

The ABA respectfully urges that the Court not adopt the proposed amendments to Rules 3.851, 3.852 and 3.993 at this time.

In reaching this conclusion, we are relying upon policies and procedures concerning the administration of the death penalty that were adopted by the Association during the post-*Gregg*[4] era. Our comments highlight a number of significant practical developments since ABA policies such as the Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("Guidelines") were approved. These include the profound changes in capital jurisprudence and the exacerbated shortage of qualified, adequately funded counsel for individuals facing the death penalty. The ABA's comments are also based on the ABA Death Penalty Representation Project's ("Project") experience in the recruitment of pro bono counsel and in training and assisting volunteer and appointed lawyers in capital cases.

We have attached a copy of the Project's Memorandum of January 6, 2000 ("Memorandum"), which was submitted by the Association to the legislature as a follow-up to the correspondence of ABA President William G. Paul and President-Elect Martha

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[3] The American Bar Association has a long-standing policy that supports the right to counsel in capital state post-conviction proceedings. (*See* Resolution of the ABA House of Delegates, Aug. 1982; Resolution of the ABA House of Delegates, Feb. 1990; and ABA Guidelines discussed herein.) The ABA has also expressed its position in this area through its Standards for Criminal Justice, Providing Defense Services. Standard 5-1.6 states that "[g]overnment has the responsibility to fund the full cost of quality legal representation" for all indigent persons in criminal cases. Standard 5-5.2 states that "[counsel should be provided in all proceedings arising from or connected with" a criminal case, including post-conviction relief. In several cases before the United States Supreme Court, the Association has advanced the position that governments must provide effective representation to individuals under sentence of death in pursuing state post-conviction review. *See, e.g.*, *Amicus Curiae* Brief of the American Bar Association in *Murray v. Giarratano*, No. 88-411, 492 U.S. 1 (1989); *Amicus Curiae* Brief of the American Bar Association in *Mackall v. Angelone*, No. 97-7747, *cert. denied*, 522 U.S. 1100 (1998); *Amicus Curiae* Brief of the American Bar Association in *Gibson v. Turpin*, No. 99-77, *cert. denied*, 120 S.Ct. 363 (1999). *See also Olive v. Maas*, No. SC00-317, Initial Brief of Appellant, Cross-Appellee.

[4] *Gregg v. Georgia*, 428 U.S. 153 (1976).

W. Barnett.[5] The Memorandum furnished an overview of the ABA's study of the administration of capital punishment and its policies on the issue. In the interests of brevity, references are made to the Memorandum throughout this correspondence.

## I. The Florida Supreme Court Should Decline to Implement the Proposed Rules Until Necessary Legislative and Judicial Action Occur

The Court's proposed amendments to Rules 3.851, 3.852 and 3.993 create a "modified dual-track system" for appellate and post-conviction review.[6] As drafted by the Court, this scheme is less fraught with peril to the state and federal constitutional rights of those facing execution than the Death Penalty Reform Act of 2000 (DPRA).[7] However, until the essential legislative and judicial action described below is fully implemented, these proposed rules should not be adopted.

In *Allen*, this Court observed that "the DPRA represents only the latest in a long history of efforts by all three branches of Florida government to improve the efficiency of Florida's death penalty process."[8] In detailing the events of the past decade, this Court acknowledged the drastic shortage of qualified counsel that resulted from the "collapse of the VLRC [Volunteer Lawyers Resource Center],"[9] Florida's federally funded resource center, and outlined the actions of the state legislature and the Court to address the loss of vital legal services provided by the VLRC.[10]

The Court's proposed amended procedural rules recognize that the constitutionality and feasibility of any "dual-track system" is contingent on timely access to public records, the provision of qualified post-conviction counsel, adequate funding for such counsel and judicial flexibility in the administration of deadlines.[11] The first three of these conditions require a legislative response:

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[5] Letter of January 3, 2000, to the Hon. Jeb Bush, et al.

[6] *Allen v. Butterworth*, at *13.

[7] *See* Letter of January 3, 2000, *supra* note 5 and January 6, 2000 Memorandum.

[8] *Allen v. Butterworth*, at *5.

[9] *Id.*

[10] *Id*. at *5-6.

[11] *Id.* at *11, 13-14 & n. 7.

1. Amendment of Chapter 119 to allow post-conviction litigants timely access to criminal investigation files;

2. Appropriation of sufficient funds to the Capital Collateral Regional Counsels ("CCRCs") for lawyer and investigator positions, overhead and litigation expenses necessary to handle cases in the post-conviction "pipeline" and the additional caseload created by the "modified dual-track" procedure;

3. Amendment of Florida's statutory provisions for Registry attorneys and of the contractual provisions for these attorneys to a) eliminate unreasonable and unrealistic limitations on the number of compensable hours for post-conviction representation and on the scope of necessary advocacy; and b) provide for the payment of necessary ancillary costs of litigation.

When the legislature did not make the necessary changes to Chapter 119 by the end of the session, the Court issued an order amending its earlier proposed rules to allow post-conviction counsel one year from the decision on direct appeal to file a motion for post-conviction relief.[12] In our view, the extended deadline does not solve the problems that exist in light of the continuing inadequacies in the provision of post-conviction representation. Thus, present conditions do not warrant implementation of the dual-track procedure, and until the necessary legislation is in place, that state of affairs will continue.

We are pleased that the Court in *Allen* reaffirmed its position that "[a] reliable system of justice depends on adequate funding at all levels" and emphasized the requirement that the State of Florida provide "adequate funding for competent counsel during trial, appellate, and postconviction proceedings . . . including access to thorough investigators and expert witnesses," recognizing this encompasses "public defenders, conflict counsel, and CCR and registry counsel."[13] The Court's recognition that implementation of the proposed amended procedural rules is contingent upon adequate funding by the legislature is also consistent with the ABA view that, in capital cases, the "[l]ack of compensation not only contributes to the unavailability of lawyers, but also to the poor quality of performance that is actually rendered."[14]

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[12] *See* Case No. SC96646, Order of May 17, 2000.

[13] *Allen v. Butterworth*, at *14.

[14] *See* American Bar Association Task Force on Death Penalty Habeas Corpus, *Toward a More Just and Effective System of Review in State Death Penalty Cases,* 40

The provision of qualified post-conviction representation also requires action by this Court. It cannot be achieved until the Court adopts standards that, at minimum, apply to all appointed post-conviction lawyers.

Notwithstanding the pre-conditions set forth by the Court in *Allen*, the State of Florida does not provide qualified and adequately funded counsel for the hundreds of men and women on death row. In our January 6 Memorandum, we cited examples of seriously inadequate representation by Florida post-conviction counsel that are the product of a system that is already overextended and underfunded.[15]

This Court's opinion in *Allen v. Butterworth*, the Court's proposed amendments to Rules of Criminal Procedure 3.851, 3.852 and 3.993, as well as the proposed amendments to the capital counsel standards, demonstrate a diligent effort by this Court to address several of the systemic failures that prompted the Association's 1997 resolution calling for a halt to executions.[16] However, some of the deficiencies that deny fundamental fairness and impartiality to those facing the death penalty have not yet been addressed by this Court.[17] The persistence of these problems in Florida's capital punishment system remains a grave concern.

It is our understanding that close to one hundred additional Florida capital appeals are pending and may shortly be in a post-conviction posture.[18] Although the

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AM. U. L. REV. 1, 78 (1990) [hereinafter Task Force Report]; Recommendations adopted by the ABA House of Delegates, Feb. 13, 1990.

[15] Memorandum, at 7-10.

[16] Resolution of the ABA House of Delegates, Feb. 1997.

[17] These other ABA policies include removing restrictions on the state and federal courts' responsibility to exercise independent judgment on the merits of constitutional claims in habeas corpus proceedings (adopted Aug. 1982, Feb. 1990); striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug. 1988, Aug. 1991); and preventing execution of mentally retarded persons (adopted Feb. 1989) and persons who were under the age of 18 at the time of their offenses (adopted Aug. 1983).

[18] *See Comments of the Collateral Regional Counsel for the Northern and Southern Regions* on file with the Court [hereinafter Comments of the CCRC]*; Comments of the Florida Association of Criminal Defense Lawyers* on file with the Court, at 1-2 [hereinafter Comments of the FACDL]; *Comments of the Florida Public*

CCRCs will be the original appointed counsel for these new cases, we have been informed that they do not have the funding or staff positions to accept these assignments.[19] The burden of this enormous volume of cases therefore will be expected to fall upon the Registry lawyers, many of whom lack the resources, skill, experience, and qualifications to provide effective representation.[20] These lawyers, including those who are able and willing to provide competent legal services, operate under a statutorily-mandated contract that imposes conditions limiting compensable hours and costs and restricts the scope of their advocacy.

The statutory "fee and payment schedule . . . is the exclusive means of compensating a court-appointed attorney who represents a capital defendant."[21] The statute also requires Registry lawyers to enter into a third-party fee contract, which includes an agreement not to exceed the statutory limits on the number of compensable hours counsel may work on a given stage of the litigation.[22] As we discuss below, both provisions interfere with counsel's professional responsibilities to the client and the client's right to effective representation.[23]

The ABA is of the view that, even if the contingencies identified by the Court are satisfied, this new post-conviction framework nonetheless may be at odds with ABA capital punishment policies and criminal justice standards designed to ensure fundamental fairness and due process. A full assessment of the potential constitutional and ethical pitfalls of a dual-track procedure cannot be provided until Florida's system for post-conviction representation is substantially improved.

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*Defender Association, Inc.* on file with the Court [hereinafter Comments of the FPDA].

[19] *See* Comments of the FPDA, *supra* note 18; Comments of the CCRC, *supra* note 18.

[20] The relevant provisions of the Registry Act are codified in sections 27.710 and 27.711 of the Florida Statutes (1999). *See* Comments of the CCRC; Comments of the FPDA; Memorandum, at 9, n.50; *see also infra* pp. 13-20, regarding standards for capital post-conviction counsel.

[21] Section 27.711(3), Fla. Stat. (1999).

[22] Sections 27.710(4) and 27.711(2) & (4), Fla. Stat. (1999).

[23] *See Olive v. Maas,* No. SC00-317, Initial Brief of Appellant, Cross-Appellee; examples cited in the January 6, 2000 Memorandum, at 8-9.

Therefore, the ABA respectfully urges this Court to postpone implementation of the proposed amendments to Rules 3.851, 3.852 and 3.993. Once the legislative action outlined above has occurred and the Court has approved adequate standards for post-conviction lawyers, it will be appropriate for the Court to consider whether the "modified dual-track" system can be instituted consistent with the Court's "primary responsibility . . . to follow the law in each case and to ensure that the death penalty is fairly administered in accordance with the rule of law and both the United States and Florida Constitutions."[24]

## II. Florida's Current Legislative Provisions for Post-Conviction Counsel Cannot Accommodate a Dual-Track System that Offers Any Reasonable Assurance of Effective Representation or Reliable Administration of the Death Penalty

In so far as collateral relief for persons sentenced to death is concerned, state proceedings now occupy center stage. Taken together, the Anti-terrorism and Effective Death Penalty Act ("AEDPA")[25] and the United States Supreme Court's exhaustion, procedural default and abuse of the writ doctrines make it critically important that all "possible claims and their factual bases [be] researched and identified" before the inmate's first state post-conviction petition is filed and that the "first petition adequately set forth all of a state prisoner's colorable grounds for relief."[26] Provisions of the AEDPA increase the risk that the client will be executed if a lawyer, because of the state's refusal to provide adequate fees or compensation for necessary support services, fails to fully investigate and present all possible meritorious claims in the first state post-conviction proceeding.

The Court, in announcing its proposed amendments to Rules 3.851, 3.852 and 3.993, clearly recognized that public records investigation is critical to the development of state post-conviction claims and the facts supporting those claims.[27] The Court explained that the goal of reducing delay requires that post-conviction counsel be able

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[24] *Allen v. Butterworth,* at *7.

[25] Pub. L. No. 104-132, 110 Stat. 1215 (amending 28 U.S.C.A. secs. 2241-2255 and adding 28 U.S.C.A. secs. 2261-2266) (West 1994 & Supp. 1996).

[26] *McFarland v. Scott,* 512 U.S. 849, 855, 860 (1994).

[27] *See e.g.*, *State v. Riechmann*, 2000 WL 205094 at *5-6 & n.1 (Fla. Feb. 24, 2000) and *Young v. State*, 739 So. 2d 553, 556-560 (Fla. 1999) for examples of post-conviction litigation in which public records act disclosures resulted in the granting of relief.

to review public records and resolve all disputes involving the production of such records before filing the initial post-conviction motion.[28] It acknowledged that this objective could not be achieved if the Legislature failed to amend the statutory exemptions that "allow active criminal investigative information" and work product to be withheld until the conclusion of the direct appeal.[29]

The Court, in the face of the Florida Legislature's failure to amend the public records exemptions, acted conscientiously by extending the post-conviction filing deadline to one year.[30] However, the ABA does not believe that this latest amendment of the proposed rules is sufficient to warrant implementation of the dual-track system. As noted above, the CCRCs cannot handle the cases already in the post-conviction pipeline at their present staffing and funding levels. We address the urgent need for counsel standards for post-conviction lawyers, including Registry attorneys, in Section III, below.

The only reference to attorney compensation in the Select Committee's proposed standards is in the context of trial counsel, simply stating that both lead counsel and co-counsel "shall be reasonably compensated for the trial and sentencing phase."[31] Most disturbingly, the proposed standards do not address the unreasonable and unrealistic limitation on compensation for capital post-conviction counsel mandated by the Registry statute. The statute sets forth maximum caps on the number of compensable hours that may be devoted to statutorily-defined stages of the post-conviction litigation, as well as caps on the amount of fees and costs available.[32] This pay-as-you-plead scheme remains the "exclusive means" of compensation for appointed post-conviction counsel.[33] Section (4) of the statute sets forth a schedule of predetermined allowable hours payable at $100.00 per hour.

Notwithstanding these statutory fee limitations, this Court has previously held that the state cannot require absolute caps on the amounts of fees that counsel can be

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[28] *Amendments to Rules of Criminal Procedure 3.851, 3.852 and 3.993*, 25 Fla. L. Weekly at S285, S286-87.

[29] *Id.*

[30] *See* Case No. SC96646, Order of May 17, 2000.

[31] *See* Rule 3.112(e).

[32] *See* Sec. 27.711(4)-(6), Fla. Stat. (1999).

[33] Sec. 27.711(3).

compensated for in capital cases.[34] Furthermore, members of this Court also recognize that "[t]he legitimate purpose of postconviction capital proceedings requires adequate funding" of counsel.[35] The inflexible Registry compensation scheme runs afoul of long-standing ABA policies. It is critically important that resources are available **when** needed, as well as in sufficient amounts. As the ABA has recommended, such "[f]lat payment rates or arbitrary ceilings should be discouraged since they impact adversely upon vigorous defense."[36]

The Registry statute's limitation on hours for each stage of the post-conviction proceedings, when added together, totals 840 hours for the entire proceeding. This is less than one-quarter of the average amount of attorney hours required to handle a Florida capital post-conviction case. The Spangenberg Group's recent study of time and expenses required in Florida capital post-conviction cases concluded that experienced and qualified lawyers at one of the state's three CCRC offices estimated that, on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the United States Supreme Court following direct appeal to the denial of certiorari through the state's post-conviction proceedings.[37] In short, the Registry statute and mandated contract have created a system in which indigent death-sentenced prisoners who are assigned Registry counsel may receive effective representation only if those lawyers work hundreds of hours without pay. As noted in our January 6 Memorandum, reports from the Florida Commission on Capital Cases indicate that private Florida lawyers who are appointed without co-counsel

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[34] *See Makemson v. Martin County*, 491 So.2d 1109, 1112 (Fla. 1986), *cert. denied*, 107 S. Ct. 908 (1987) (finding statutory fee maximums unconstitutional in cases involving unusual or extraordinary circumstances); *White v. Board of County Comm'rs,* 537 So.2d 1376, 1380 (Fla. 1989) ("We find that virtually every capital case fits within this standard [extraordinary circumstances and unusual representation] and justifies the court's exercise of its inherent power to award attorney's fees in excess of the current statutory fee cap").

[35] *Hoffman v. Haddock*, 695 So.2d 682, 685 (Fla. 1997) (Wells, J., concurring).

[36] Comment to Guideline 10.1, at 81.

[37] Affidavit of Robert L. Spangenberg, *Amended Time and Expense Analysis of Post-Conviction Capital Cases in Florida*, at 16 (April 1998) (filed in *Arbelaez v. Butterworth*, 738 So.2d 326 (Fla.1999)), *cited in* January 6 Memorandum, at 8 & n.47.

(contrary to ABA Guidelines), are working far fewer hours than is considered necessary by professional standards.[38]

Registry counsel are limited to payment of $2,500.00, upon appointment and filing a notice of appearance.[39] They are prohibited from receiving any further compensation until **after** filing the "complete original motion for post-conviction relief under the Florida Rules of Criminal Procedure."[40] The dual-track procedure would require that Registry lawyers begin work on the post-conviction motion as soon as the direct appeal is initiated and, if they perform competently, they will invest hundreds of hours without payment during what will likely be at least two years during which the direct appeal is pending.[41] Beginning work before the conclusion of the direct appeal will add time and proceedings to those taken into account in the Spangenberg study.

Under the Court's amended rule, after the mandate issues, counsel will then have a year in which to file the post-conviction motion.[42] "Consequently, postconviction [Registry] counsel will be working on the case for three or more years before obtaining additional compensation under section 27.711(4)."[43]

Compensation for court-appointed post-conviction attorneys to investigate, research, prepare and file a post-conviction motion is limited to 200 hours at $100.00 per hour.[44] The ABA can envision no circumstances under which counsel could file an adequate post-conviction motion in 200 hours or less. Moreover, the proposed dual-track rule increases post-conviction counsel's workload during the pre-filing period, e.g.,

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[38] *Olive v. Maas,* Case No. 99-1027, Fla. Second Cir. Ct., Exhibit to the Affidavit of Roger R. Maas, executed Oct. 22, 1999, *cited in* Memorandum, at 9 & n.50.

[39] Section 27.711(4)(a), Fla. Stat. (1999).

[40] Section 27.711(4)(b), Fla. Stat. (1999).

[41] *See* Comments of the FACDL, *supra* note 18, at 4 ("the direct appeal process takes *at least* a couple of years before a mandate is issued by this Court") (emphasis in original).

[42] Proposed Fla. R. Crim. Pro. 3.851(d)(1)(A); Case No. SC96646, Order of May 17, 2000.

[43] *See* Comments of the FACDL*, supra* note 18, at 5.

[44] Sec. 27.711(4)(b).

status conferences will be held at least once every three months, including the litigation of "[p]ending motions . . . and disputes involving public records."[45]

ABA Guideline 10.1 requires that counsel be compensated for actual time and services performed at a "reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation." This mandate applies to all stages of the capital proceedings. The same Guideline requires "[p]eriodic billing and payment during the course of counsel's representation."

The denial of compensation during the lengthy period that precedes the filing of the post-conviction motion, as well as the fee caps, have several deleterious consequences. First, they make it economically disadvantageous, if not impossible, for qualified, experienced lawyers to seek capital post-conviction appointments. As the Commentary to Guideline 10.1 notes:

> Periodic billing and payment – **for example, monthly** – should be available to avoid hardship to sole practitioners, small firms and any other appointed counsel . . . [E]xtensive preparation and long hours characterize capital representation. Office overhead, the need for reimbursement for expenses incurred, and for compensation for time already worked do not stop during a capital case. Financial hardship imposed by a long delay before payment for time worked and expenses incurred may impact adversely upon counsel's ability to provide quality representation.[46]

This Court has also observed that a defendant's right to effective representation of counsel is "inextricably interlinked" with counsel's right to fair compensation.[47]

In the January 6 Memorandum, the Project objected to provisions of the DPRA that created impermissible conflicts of interest for defense counsel and interfered with the capital post-conviction lawyer's duty to act with dedication to the interests of his or her client.[48] The statutory time and fee caps imposed upon Registry lawyers also interfere with counsel's professional responsibilities under the Florida Rules of

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[45] Proposed Fla. R. Crim. Pro. 3.851(c)(2).

[46] Comment to Guideline 10.1, at 81 (emphasis added).

[47] *See Makemson*, 491 So.2d at 1112.

[48] Memorandum, at 10-14.

Professional Conduct, the ABA Model Rules of Professional Conduct and the ABA Defense Function Standards. The additional, uncompensable duties imposed under the proposed dual-track system exacerbate these problems.

Contractual conditions of employment under the Registry Act that impose absolute caps on the fees counsel may recover run contrary to the requirement that an attorney zealously represent his client and create a conflict of interest between the lawyer's own financial interest and the duty of loyalty to one's client.[49] The same objections apply to contractual restraints on counsel's advocacy and the exercise of his or her independent professional judgment,[50] e.g. prohibitions against arguing for the expansion, modification or reversal of existing law or undertaking representation – even on a pro bono basis -- in any litigation other than post-conviction proceedings that is necessary for pursuing post-conviction relief.[51] These restrictions, which are the subject of litigation before this Court in *Olive v. Maas*, No. SC00-317, pose an even greater threat to the right to effective representation under the proposed dual-track system.

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[49] *See* Rules 1.3 and 1.7 of the ABA Model Rules of Professional Conduct; R. Regulating Fla. Bar 4-1.7(b) ("lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the . . . lawyer's own interest") and 4-1.8(f) ("lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"). *See also* Memorandum, at 11-12, discussing the ABA's position that this responsibility is heightened in capital cases and applies equally to public defenders and appointed counsel; ABA Standards of Criminal Justice, Defense Function Standard 4-1.2 and commentary to Defense Function Standard 5-1.3.

[50] Memorandum, at 10-14.

[51] *See Olive v. Maas,* Case No. SC00-317, Initial Brief of Appellant and Cross-Appellee, at 5, citing provisions of the contract based upon sections 27.711(10) & (11), Fla. Stat. (Supp. 1998).

## III. Comments on Proposed Standards for Capital Counsel

A. Overview

To the extent that the Court's Select Committee's proposed standards[52] are consistent with ABA policies, it is important to note that the ABA Guidelines represent the **minimum** standards necessary for capital counsel. As the Introduction to the Guidelines clearly states, the Guidelines "enumerate the **minimal** resources and practices necessary to provide effective assistance of counsel" in capital cases.[53]

The Court's Select Committee acknowledges that the purpose of the proposed rules is to set minimum standards for capital cases.[54] However, when comparing the Select Committee's proposed rules to the ABA Guidelines, it is critical to bear in mind that the Guidelines simply provide a starting point. The Court may wish to consider the fact that the Guidelines have not been revised to respond to the dissolution of the federally-funded VLRC, the enactment of the AEDPA, the growing demands on capital counsel and the increased complexity of capital litigation, all of which point to the need for lawyers to possess a greater level of experience, training, skill and resources than was contemplated when the Guidelines were adopted in 1989.[55]

Mindful of this Court's interest in "substantially reduc[ing] the time required for substantive adjudication of [capital post-conviction] cases,"[56] we note that the ABA Task Force urged that "if competent trial counsel were appointed initially and given the resources to represent their clients properly, and if competent counsel represented petitioners from the earliest stages of state post-conviction review, then the entire capital litigation process would be shortened, perhaps greatly so."[57]

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[52] The ABA's comments are in response to the Select Committee's "First Alternative Requested by the Court," the version that applies to all lawyers, including private counsel.

[53] Guidelines at i (emphasis added).

[54] *See* Rule 3.112(a).

[55] *See* Memorandum, at 4, 7, 9; *see, e.g.*, *Amicus Curiae* Brief of the American Bar Association in *Gibson v. Turpin*, at 10 and 18 (noting the added burdens on counsel resulting from the AEDPA) No. 99-77, *cert. denied*, 120 S.Ct. 363 (1999).

[56] *Allen v. Butterworth,* at *1.

[57] Task Force Report, *supra* note 14, at 16-17.

The ABA Guidelines do not address the question of standards for retained counsel in capital cases. The 1990 Task Force Report included a "Suggested Legislative Plan" for providing "competent and adequately compensated counsel at all stages."[58] The plan essentially tracked the Guidelines and was intended to apply only to appointed counsel in capital cases because ". . .retained counsel [is] a rare occurrence in capital cases . . . ."[59] However, a Special Committee of the Illinois Supreme Court assigned to submit proposals to improve capital trials found that "[a]pplying capital case qualifications to retained counsel is not unprecedented," noting that the Illinois State Bar Association had made this recommendation.[60] The Special Committee also looked to both state and federal precedent in adopting the position that "[w]hen the right to effective counsel and the right to counsel of choice conflict, it is the right to effective assistance of counsel that must prevail."[61]

There are several ways in which the Select Committee's proposed standards fall short of the ABA Guidelines:[62]

B. ABA Guidelines Require Two Attorneys at All Stages of the Capital Proceedings

The Guidelines make it clear that **two** qualified attorneys should[63] be assigned to represent the defendant at **all** stages of the capital proceedings, including trial, appeal, and post-conviction.[64] The Select Committee's proposed rules acknowledge that these are in fact the standards of the American Bar Association, but fail to direct the

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[58] *Id.* at 18.

[59] *Id.*

[60] Special Illinois Supreme Court Committee on Capital Cases, *Findings and Recommendations* (October 1999), at 17-18 & n. 41.

[61] *Id.* at 16 (*citing Wheat v. United States*, 486 U.S. 153, 159 (1988) and *People v. Holmes*, 141 Ill.2d 204, 218, 565 N.E.2d 950 (1990)).

[62] It is important to note that in some respects the Select Committee's proposed standards are more stringent than the Guidelines, *see, e.g.*, 3.112(f)(3) requiring two death penalty trials and 3.112(h)(2) requiring five years experience in the field of criminal law.

[63] The term "should" is used throughout the Guidelines "as a mandatory term and refers to activities which are minimum requirements." Guidelines at ii.

[64] Guideline 2.1.

appointment of two attorneys at all stages and leave the appointment of trial co-counsel to the discretion of the trial court.[65]

The ABA is cognizant of this Court's opinion in *In re Amendment to Florida Rules of Criminal Procedure – Rule 3.112 Minimum Standards for Attorneys in Capital Cases.*[66] Nonetheless, the ABA's policy requiring the appointment of two qualified counsel at every stage of the capital proceedings is unequivocal -- and rightly so. The Commentary to Guideline 1.1 outlines the extensive responsibilities of the lawyer at trial, on appeal and in post-conviction proceedings, emphasizing the fact that "counsel must be aware of specialized and frequently changing legal principles and rules, and be able to develop strategies applying them in the pressure-filled environment of high-stakes, complex litigation."[67] The Commentary to Guideline 2.1 observes that "[i]n the context of capital litigation, this mandate [of qualified counsel] is difficult to fulfill where the heavy responsibilities of representation are placed in the hands of a single attorney."[68]

The 1990 Task Force's "Suggested Legislative Plan" also contemplated "the appointment of two attorneys – lead counsel and co-counsel – at each level of capital litigation."[69]

The Task Force concluded:

> Just as one would not expect an attorney to carry on other types of complex and time-consuming litigation without assistance, one should not expect less of a death penalty lawyer. This is especially so when one considers the heavy responsibility of counsel in capital cases: frequently, and literally, they must make life or death decisions. Another important benefit to be derived from the appointment of two attorneys, with co-counsel generally having less experience than lead counsel, is that over

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[65] *See* Proposed Rule 3.112 (e); Court's Comments to Proposed Rule 3.112 at 9.

[66] 1999 WL 983852 at *2 (Fla. 1999), 24 Fla. L. Weekly S513 (1999).

[67] Commentary to Guideline 1.1, at 31.

[68] Commentary to Guideline 2.1, at 41.

[69] Task Force Report, *supra* note 14, at 18.

time it will enlarge the pool of those lawyers who are qualified to serve as lead counsel.[70]

The ABA concurs with the comments of the FACDL, which raise the denial of equal access to counsel created by section 27.710(6) of the Registry Act, prohibiting courts from appointing more than one attorney to any post-conviction case. As the FACDL points out, "CCRC attorneys who receive regular compensation and have no overhead will not face the disadvantages and disincentives which the Registry system will force on private counsel."[71]

In 1987, former Chief Judge of the Eleventh Circuit, John C. Godbold, said that capital habeas litigation "is the most complex area of the law I deal with."[72] He added that "the average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy."[73] In 1989, the ABA concluded that "[r]epresenting a death-sentenced client in postconviction proceedings is as demanding as – or, if that is possible, even more demanding than – the tasks faced by other capital counsel."[74]

The January 6 Memorandum summarized the national crisis in capital post-conviction representation precipitated by the elimination of the Post-Conviction Defender Organizations (resource centers) and the passage of the AEDPA.[75] The fact remains, however, that each and every Registry lawyer appointed to represent a death

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[70] *Id*.

[71] Comments of the FACDL, *supra* note 18, at 7-8.

[72] Task Force Report, *supra* note 14, at 62-63 & n.135.

[73] *Id.* at n.179

[74] Commentary to ABA Guideline 2.1, at 43, regarding the requirement that two "qualified" defense counsel be appointed at all stages of a capital case. In addition, the Task Force Report is replete with evidence taken from judges, defense counsel and prosecutors consistent with the view that "'there is nothing more difficult, more time consuming, more expensive, and more emotionally exhausting than handling a death penalty case after conviction'"(testimony of court-appointed attorney quoted in Wilson & Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, Judicature, Apr.-May 1989, at 331), *cited in* Task Force Report*, supra* note 14, at n.179.

[75] Memorandum, at 4-5, 7, 9-10.

sentenced prisoner does so without the necessary assistance of co-counsel and without the guidance formerly provided by experienced VLRC counsel. And, he or she does so when capital post-conviction litigation in state court has never been more critical and demanding. We reiterate that many of the Supreme Court's decisions of the preceding decade and several key provisions of the AEDPA have heightened the obligations of counsel in state post-conviction proceedings.[76]

As noted in the January 6 Memorandum, since the closure of the resource centers and the passage of the AEDPA, the Project has been deluged with requests for pro bono counsel for death row inmates.[77] While a small number of private firms represent Florida death-sentenced prisoners as volunteer counsel, with very few exceptions these firms have not been recruited in the last several years. Given the enormous shortage of qualified lawyers in most states in the South, the Project has been unable to enlist pro bono counsel for Florida cases and is unlikely to do so in the future.

In sum, the ABA Guidelines are clear with regard to the requirement that there be two qualified lawyers at each stage of the capital proceedings. As discussed above, developments since 1989 reinforce the critical need to implement this policy.

C. Qualifications for Appellate and Post-Conviction Counsel

The Select Committee's proposed standards for appellate counsel are nearly identical to the ABA Guidelines except that the proposed requisite prior experience for the appointment of appellate counsel omits the requirement that the prior experience have occurred within the past three years.[78]

While the proposed standards closely track the ABA Guidelines for eligibility for post-conviction counsel, the ABA recommends that in addition to the experience level specifically detailed under the qualifications for post-conviction counsel, at least one of the two post-conviction counsel also possess appellate experience at the level required for appellate co-counsel,[79] which includes the following minimum factors:

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[76] For a general discussion of the AEDPA, see a three-part article, Larry W. Yackle, *Developments in Habeas Corpus,* THE CHAMPION, Sept-Oct. 1997 at 14; November 1997 at 16; December 1997 at 16.

[77] Memorandum, at 9-10.

[78] *See* Guideline 5.1(II)(A)(iii).

[79] *See* Guideline 5.1(II)(B).

(i) counsel has demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and
(ii) counsel is familiar with the practice and procedure of the appellate courts of the jurisdiction; and
(iii) counsel has attended and successfully completed within two years of appointment a training or educational program on criminal appellate advocacy.

Further, both the Select Committee's proposed standards and the ABA Guidelines require that the post-conviction lawyer have been counsel in at least three post-conviction cases in state or federal court. Given the increased complexity and demands of death penalty post-conviction litigation, the Court may wish to consider the comments of the Florida Public Defender Association recommending that counsel have experience in at least one capital state post-conviction case and one capital federal habeas case.[80]

D. Legal Representation Plan

Inherent in and critical to the ABA Guidelines is the existence of some type of independent appointing authority responsible for undertaking all duties related to the appointment of capital counsel.[81] The membership of the appointing authority, whether it be in the context of a defender office, assigned counsel program, or committee, should not include prosecutors or judges, because professional independence for appointed counsel cannot be ensured unless responsibility for the decisions concerning appointment are vested in a panel whose members are themselves free from conflicts of interest or partisanship and can act objectively according to their best professional judgment. The Select Committee's proposed standards fail to provide for an independent appointing authority. For example, while the proposed standards address the issue of limitations on attorney caseloads, it is the trial court, before whom the lawyers must appear, that makes such an assessment.[82]

In *Arbelaez v. Butterworth*, Justice Anstead cited Section 27.711(12), Fla. Stat. (1999), with approval, noting that the legislature, when it first created the Registry, "specifically mandated that courts 'shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of

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[80] *See* Comments of the FPDA, *supra* note 18.

[81] *See* Guideline 3.1.

[82] *See* Proposed Rule 3.112(k).

assigned counsel.'"[83] The six missed post-conviction motion deadlines discussed in our January 6 Memorandum strongly suggest that this decentralized system is not working.[84]

In considering counsel's availability, the proposed standards provide that the trial court shall consider counsel's caseload and "any other circumstances bearing on the attorney's readiness to provide effective assistance of counsel to the defendant in a timely fashion."[85] It appears, however, that the only basis for a court's **refusal** to appoint a particular lawyer is "an unrealistically high caseload."[86] These provisions are inconsistent. In contrast, the ABA Guidelines provide that an attorney or defender office should not receive additional appointments where "there is compelling evidence that an attorney has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case."[87] In other words, the attorney's deficient performance may be related to factors other than or in addition to excessive caseloads. Because the incompetent representation of capital defendants can have irrevocable life-or-death consequences, the appointing authority should not wait for counsel to "consistently ignore basic responsibilities" or otherwise display a pattern of incompetence before denying additional appointments to that attorney.[88] Guideline 7.1 also requires that the appointing authority establish a procedure that provides written notice to counsel whose removal is being sought and an opportunity for counsel to respond in writing, and contains specific rules for readmitting an attorney to the appointment roster after removal.

E. CLE Requirements

The Guidelines and Select Committee's proposed qualifications for trial, appellate and post-conviction counsel require that counsel attend a CLE program during the past year. The Select Committee's proposed CLE requirements require a program "devoted specifically to the defense of capital cases." The Guidelines, however, specifically tailor the subject matter of the CLE to the procedural posture of

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[83] 738 So.2d 326, 328 (Fla. 1999) (Anstead, J., concurring),

[84] Memorandum, at 8.

[85] *See* Proposed Rule 3.112(k).

[86] *Id.*

[87] Guideline 7.1.

[88] Commentary to Guideline 7.1, at 71 n.3.

the case. For example, for trial the program must focus on trial of cases in which the death penalty is sought, for appeal it must focus on appellate advocacy in capital cases, and for post-conviction it must focus on that phase of a capital case.[89]

In addition to completing the training requirements specified for each phase of the capital case, the ABA Guidelines mandate that attorneys continue, on a periodic basis, to attend and successfully complete training or educational programs focusing on advocacy in capital cases.[90] Sufficient government funding should be available to enable comprehensive and frequent training programs for counsel already on, and those seeking to be added to, the appointment roster.[91] The ABA further recommends that in addition to training within the local jurisdiction, counsel attend regional and national training programs and assumes that in order to maintain eligibility for appointment in capital cases, counsel will augment general criminal defense skills by attending seminars on other aspects of criminal law and procedure.[92]

## IV. Conclusion

The American Bar Association appreciates the opportunity to offer its comments on the proposed procedural rules and standards affecting capital post-conviction review. The ABA is aware that the Court has a vital interest in implementing rules in this critical area of litigation as expeditiously as possible. It is persuaded, however, that postponement of the adoption of the Proposed Amended Rules of Criminal Procedure 3.851, 3.852 and 3.993 is necessary to ensure effective representation and fundamental fairness in the administration of Florida's capital punishment system.

Sincerely,

LAWRENCE J. FOX, Chair ELISABETH SEMEL, Director

JUDY A. GALLANT, Staff Attorney

Enc./ES:ls

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[89] Guideline 5.1 (I. A.vi; B.ii.d; II.A.v; B.iv; III.v).

[90] Guideline 9.1.

[91] *Id.*

[92] *See* Commentary to Guideline 9.1 at 77.