



# *National Center for State Courts*

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## **MEMORANDUM**

Ref. No: IS01-0407

Date: July 17, 2001

By: Madelynn Herman

Re: Standards of Qualification for Attorneys to Handle Capital Cases on Behalf of Indigent Defendants

This memorandum updates the September 1, 1995, memorandum IS95-1061 "Standards of Qualification for Attorneys to Handle Capital Cases on Behalf of Indigent Defendants," by Catherine Gill. The information was compiled from a Lexis statutes and rules search, a Court2Court listserv survey, as well as information gathered from various indigent defense organizations. State links to on-line statutes, court rules, or public defender agencies have been provided where available. A list of resources to relevant on-line publications is also provided.

The death penalty is legal in 38 states. The following states have adopted standards for the appointment of counsel to handle capital cases on behalf of indigent defendants. All citations refer specifically to the appointment of counsel in capital cases unless otherwise noted.

**Alabama:** §13A-5-54 (2000) of the Code of Alabama states that any person indicted for a capital felony who is unable to afford a lawyer must be provided with a court appointed attorney who has no less than five years' prior experience in the active practice of criminal law.

Links: Code of Alabama 1975;

<http://www.legislature.state.al.us/CodeofAlabama/1975/coatoc.htm>.

**Arizona:** §13-4041B of the Arizona Revised Statutes (2000) states that counsel shall meet the following qualifications:

Membership in good standing of the state bar of Arizona for at least five years immediately preceding the appointment; practice in the area of state criminal appeals or post conviction proceedings for at least three years immediately preceding the appointment; and no previous representation of the capital defendant in the case either in the trial court or in the direct appeal,

unless the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation.

**Arkansas:** The Arkansas Public Defender Commission has set minimum standards for attorney qualifications to handle capital cases that include:

In cases where the death penalty is sought, including a re-sentencing trial, two qualified attorneys shall be assigned to represent the defendant. Further, the appointment of the two attorneys should be made as soon as possible from the time charges are brought. Lead trial counsel assignments: are members of the bar admitted to practice in the jurisdiction; are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defense; and have prior experience as lead counsel in no fewer than five jury trials of serious and complex cases where tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. The attorney should have been counsel in at least two cases in which the charge was murder or capital murder; or alternatively, at least one was a murder or capital murder trial and an additional two others were felony jury trials; and are familiar with the practice and procedure of the criminal courts of the jurisdiction; and are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and have attended and successfully completed within one year from the time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually; and have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

Trial co-counsel assignments: are members of the bar admitted to practice in the jurisdiction; and who qualify as lead counsel under paragraph A of this standard or meet the following requirements: are experienced and active trial practitioners with at least two years litigation experience in the field of criminal defense; and have prior experience as lead counsel or co-counsel in no fewer than three jury trials, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least once was a murder trial and one was a felony jury trial; and are familiar with the practice and procedure of the criminal courts of the jurisdiction; and have attended and successfully completed within one year from the time of the promulgation of these minimum standards six hours of continuing legal education in the defense of capital cases. Further, in order to retain certification to try capital murder cases, the attorney must maintain six hours of continuing legal education in the defense of capital cases annually; have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

Rule 37.5(b) of the Arkansas Rules of Criminal Procedure (2000) applies only to state post-conviction cases and outlines the qualifications of an appointed attorney in death penalty cases for appeals and post-conviction.

Links: Arkansas Public Defender Commission; <http://oit.state.ar.us/Summaries/07-04.html>.

**California:** Rule 76.6 of the California Rules of Court (2001) sets forth in greater detail the standards previously embodied in Section 20 (c) of the Standards of Judicial Administration. Qualifications for appointed appellate counsel include:

Active practice of law in California for at least four years; either Counsel of record for a defendant in seven completed felony appeals, including one murder; or Counsel of record for a defendant in five completed felony appeals and supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service of supervised counsel in a death penalty appeal shall apply toward the minimum qualification described in this subdivision only if lead or associate counsel in that appeal attests that the supervised attorney has performed a significant portion of work on the case and recommends the attorney for appointment; familiarity with the practices and procedures of Supreme Court, including those specifically related to death penalty appeals; within three years before appointment, completed at least nine hours of Supreme Court-approved appellate criminal defense training, continuing education, or court of study, at least six hours of which involve death penalty appeals. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement; and proficiency in issue identification, research, analysis, writing, and advocacy, taking into consideration: two writing samples, ordinarily appellate briefs, written by the attorney and involving analysis of complex legal issues; if the attorney has been appointed previously in a death penalty appeal or death penalty related habeas corpus proceeding in the Supreme Court, the evaluation of the assisting counsel or entity in that proceeding; recommendations from two attorneys familiar with the attorney's qualifications and performance; and if the attorney is on panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

Links: Rule 76.6 Qualification of counsel in death penalty appeals and habeas corpus proceedings; <http://www.courtinfo.ca.gov/rules/2001/titleone/tit1-2-79.htm> and California Office of the State Public Defender; <http://www.ospd.ca.gov/>.

**Colorado:** Colorado Revised Statutes 16-12-205 (IV) (2000) Post Conviction Review states that in appointing new post conviction counsel to represent an indigent defendant, the trial court shall appoint one or more attorneys who, alone or in combination, meet all of the following qualifications:

Each appointed attorney shall be licensed to practice law in Colorado or be admitted to practice in Colorado solely for the purpose of representing the defendant; at least one of the appointed attorneys shall have a minimum of five years' experience in criminal law litigation, including work on trials and post conviction proceedings; at least one of the appointed attorneys shall have a minimum of three years' experience in trying felony cases, including having tried at least five felony cases to verdict in the preceding five years or having tried a minimum total of twenty-five felony cases; and at least one of the appointed attorneys shall have a minimum of three years' experience in handling appeals of felony cases having served as counsel in at least five appeals in felony cases.

Trial court may also consider the following factors:

Whether the attorney under consideration has previously appeared as counsel in a class 1 felony case in which the death penalty was sought; whether the attorney under consideration has tried at least one first degree murder case to verdict; whether, within the preceding five years, the attorney has taught or attended a continuing legal education course that dealt in substantial part with the trial, appeal, and post conviction review of class 1 felony cases in which the death penalty is sought; the workload of the attorney and how that workload would affect the attorney's representation of the defendant; the diligence and ability of the attorney under consideration; and any other factor that may be relevant to a determination of whether the attorney will fairly, efficiently, and effectively represent the defendant for purposes of post conviction review.

Links: State of Colorado, Office of the State Public Defender;  
[http://www.state.co.us/gov\\_dir/pdef\\_dir/pd.htm](http://www.state.co.us/gov_dir/pdef_dir/pd.htm).

**Connecticut:** Standards for serving as counsel in death penalty cases are minimum qualifications adopted by the Connecticut Public Defender Services Commission. Even though there are no specific statutory requirements or authority for such standards, they were promulgated based upon the fact that assigned counsel come under the jurisdiction of the Chief Public Defender and the Commission. The duties/responsibilities of both are set forth in Section 53a-289 through 53a-291 of the Connecticut General Statutes:

Attorneys who are appointed as *lead counsel* in capital cases should be attorneys who satisfy the following criteria: are experienced and active trial practitioners with at least seven years litigation experience in the field of criminal defense; and have prior experience as lead or sole counsel in no fewer than nine criminal jury trials of serious and complex cases which were tried to verdict or hung jury. If the attorney has experience as lead or co-counsel in a capital case that was tried through the sentencing phase then seven, not nine, prior jury trials are required. Of the nine jury trials which were tried to completion, the attorney should have been lead or sole counsel in at least three cases in which the charge was murder or felony murder; or alternatively, of the nine jury trials, at least one was a murder or felony murder trial and an additional five were felony jury trials of C degree felonies or greater; for attorneys with prior capital felony trial experience one additional felony trial of the seven felony trials was for murder or felony murder; or six were felony jury and court trials of C degree felonies or greater; and are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and have completed a certified training program in the litigation of capital felony defense; or agree to read and study capital felony defense trial training and mitigation preparation and presentation materials compiled by and provided by the Capital Defense and Trial Services Unit of the Office of the Chief Public Defender, have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

Attorneys who are appointed as *co-counsel* in capital cases should be attorneys who qualify as lead counsel or meet the following criteria: are experienced and active trial practitioners with at least four years litigation experience in the field of criminal defense; and have prior experience as lead counsel or co-counsel in no fewer than four criminal jury trials of class C or greater felony cases which were tried to verdict or hung jury, and at least one trial in which the charge was murder or felony murder; or have participated as lead or co-counsel in one prior capital felony jury trial tried to completion through the sentencing phase; and have completed a certified training program in the litigation of capital felony defense; or agree to read and study capital felony defense trial training and mitigation preparation and presentation materials compiled by and provided by the Capital Defense and Trial

Services Unit of the Office of the Chief Public Defender. Have demonstrated the necessary proficiency and commitment, which exemplify the quality of representation appropriate to capital cases.

Links: State of Connecticut, Division of Public Defender Services; <http://www.ocpd.state.ct.us/>.

**Delaware:** Civil service rules require experience; practice is to appoint attorneys experienced in capital cases.

Links: State of Delaware, Office of the Public Defender;  
<http://www.state.de.us/pubdefen/index.htm>.

**Florida:** Rule 3.112 of the Florida Rules of Criminal Procedure (2000) outline the minimum standards for attorneys in capital cases:

*Lead trial counsel* assignments should be given to attorneys who: are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; are experienced and active trial practitioners with at least five years of litigation experience in the field of criminal law; have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead defense counsel or co-counsel in at least two cases tried to completion in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder; or alternatively, of the nine jury trials, at least one was a murder trial and an additional five were felony jury trials; and are familiar with the practice and procedure of the criminal courts of the jurisdiction; and are familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence, and have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

Trial *co-counsel* assignments should be given to attorneys who: are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; who qualify as lead counsel under paragraph (c) of these standards or meet the following requirements: are experienced and active trial practitioners with at least three years of litigation experience in the field of criminal law; and have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial; and are familiar with the practice and procedure of the criminal courts of the jurisdiction and have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition, no attorney may be qualified on any of the capital lists unless he or she has attended within the last year a continuing legal education program of at least ten hours' duration devoted specifically to the defense of capital cases. Continuing legal education programs meeting the requirements of this rule shall be offered by the Florida Bar or another recognized provider and should be approved for continuing legal education credit by the Florida Bar. The failure to comply with this requirement shall be cause for removal from the list until the requirement is fulfilled.

Links: Florida Public Defender Office; <http://publicdefender.cjis20.org/>.

**Georgia:** The “Unified Appeal” process became effective in January of 2000 by the Supreme Court of Georgia. Standards for attorneys appointed to handle death penalty cases were incorporated in the new UA procedures. Any attorney appointed to serve as either lead or co-counsel is required to meet the following minimum qualifications:

Two attorneys shall be appointed to handle matters in death penalty cases. *Lead Counsel* must be a member in good standing of the State Bar or admitted to practice pro hac vice, and must have at least five years criminal litigation experience as a defense attorney or a prosecuting attorney; and must have been lead counsel on at least one death-penalty murder trial to verdict or three capital (non-death penalty) trials to verdict, one of which must have been a murder case, or been co-counsel on two death penalty cases; and must be familiar with the unified appeal procedures; and must be familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death-penalty defense or, upon appointment agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs. This requirement may be met by viewing video-tape instruction and written materials and certifying to the trial court that the materials have been reviewed; and must have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

*Co-counsel* must be a member in good standing of the State Bar with combined three years criminal trial experience either as a criminal defense attorney or prosecuting attorney; and must have been lead or co-counsel in at least one (non-death penalty) murder trial to verdict, or in at least two felony jury trials; and must have attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death-penalty defense or, upon appointment, agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case 10 hours of such training or educational programs. This requirement may be met by viewing videotape instruction and written materials and certifying to the trial court that the materials have been reviewed.

Links: Qualifications for Appointed Counsel in Death Penalty cases in Georgia; <http://www.gacdl.org/uasect2.htm#A> and Georgia Indigent Defense Council; <http://www.gidc.com/>.

**Idaho:** Idaho Criminal Rule 44.3 (2000), Standards for the Qualification of Appointed Counsel in Capital Cases, states:

In a case in which the death penalty may be imposed: at the initial appearance in the magistrate division, two qualified trial attorneys shall be appointed to represent an indigent defendant, unless the administrative district judge or his/her designee makes specific findings that two attorneys are not necessary. In the district court upon an indictment, two qualified trial attorneys shall be appointed to represent an indigent defendant, unless the administrative district judge or the assigned district judge makes specific findings that two attorneys are not necessary. In the event

that more than one attorney is appointed, one appointed attorney shall be designated “lead counsel” and the second as “co-counsel.”

*Lead trial counsel* assignments shall be made to attorneys who: are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice pro hac vice; and are experienced and active trial practitioners with at least five years litigation experience in criminal defense or prosecution; and have served as lead counsel in no fewer than four felony jury trials of cases which were tried to completion; and have served either as lead or co-counsel in one case in which the death penalty might have been imposed and which was tried through to completion or served as lead counsel in the sentencing phase of a death penalty case; are familiar with the rules, practice and procedure of the district courts of the state of Idaho; and are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and have attended and successfully completed at least twelve hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two years; and have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

*Co-counsel* assignments shall be assigned to attorneys who: are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice pro hac vice; qualify as lead counsel under paragraph 3(a) of this Order or meet the following requirements: are experienced and active trial practitioners with at least three years litigation experience in criminal defense or prosecution; and have served as lead counsel in no fewer than three felony jury trials of cases which were tried to completion; and are familiar with the rules, practice and procedure of the district courts of the state of Idaho; and have attended and successfully completed at least six (6) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two years; and have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition, appointed counsel workload is considered. The appointing authority shall not make an appointment without assessing the impact of the appointment on the attorney’s workload.

Links: Idaho Standards of Qualification of Appointed Counsel in Capital Cases, [http://www.sapd.state.id.us/Principal%20Pages%20for%20SAPD%20Web/icr\\_44\\_3.htm](http://www.sapd.state.id.us/Principal%20Pages%20for%20SAPD%20Web/icr_44_3.htm); Capital Litigation Unit, State of Idaho, <http://www.sapd.state.id.us/principal%20pages%20for%20sapd%20web/Capital%20Litigation%20Unit.htm>.

**Illinois:** Illinois Supreme Court Rule 714. Capital Litigation Trial Bar (adopted March 1, 2001). The Supreme Court is responsible for certifying duly licensed attorneys to serve as members of the Capital Litigation Trial Bar. *Lead trial counsel* for capital cases must meet the following minimum requirements:

Be a member in good standing of the Illinois Bar or be admitted to the practice *pro hac vice*; be an experienced and active trial practitioner with at least five years of criminal litigation experience; have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois; have prior experience as lead or co-counsel in no fewer than eight felony jury trials which were tried to completion, at least two of which were murder prosecutions; and either (i) have completed at least 12 hours of training in the preparation

and trial of capital cases in a course approved by the Illinois Supreme Court, within two years prior to making application for admission; or (ii) have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence.

Co-Counsel qualifications include:

Be a member in good standing of the Illinois Bar or be admitted to the practice *pro hac vice*; be an experienced and active trial practitioner with at least three years of criminal litigation experience; have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois; have prior experience as lead or co-counsel in no fewer than five felony jury trials which were tried to completion; and either (i) have completed at least 12 hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court, within two years prior to making application for admission; or (ii) have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence.

The Attorney General or duly elected or appointed State's Attorney of each county of this state shall not be disqualified from prosecuting a capital case because he or she is not a member of the Capital Litigation Trial Bar. A waiver can be granted if an attorney cannot meet one or more of the requirements set forth above, the Supreme Court may waive such requirement upon demonstration by the attorney that he or she, by reason of extensive criminal or civil litigation, appellate or post-conviction experience or other exceptional qualifications, is capable of providing effective representation as lead or co-counsel in capital cases.

Links: Capital Case Standards, effective March 1, 2001, [http://www.state.il.us/court/supremecourt/Rules/Art\\_VII/ArtVII.htm#Rule%20714](http://www.state.il.us/court/supremecourt/Rules/Art_VII/ArtVII.htm#Rule%20714), and the Illinois Office of the State Appellate Defender, <http://www.state.il.us/defender/default.html>.

**Indiana:** Indiana Criminal Procedure Rule 24 (2001) states that the presiding judge in a capital case must appoint two qualified attorneys to represent an indigent defendant. *Lead counsel* qualifications include:

One of the attorneys appointed by the court shall be designated as lead counsel. To be eligible to serve as lead counsel, an attorney shall: be an experienced and active trial practitioner with at least five years of criminal litigation experience; have prior experience as lead or co-counsel in no fewer than five felony jury trials which were tried to completion; have prior experience as lead or co-counsel in at least one case in which the death penalty was sought; and have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

*Co-Counsel* qualifications. The remaining attorney shall be designated as co-counsel. To be eligible to serve as co-counsel, an attorney shall:

Be an experienced and active trial practitioner with a least three years of criminal litigation experience; have prior experience as lead or co-counsel in no fewer than three felony jury trials

which were tried to completion; and have completed within two years prior to the appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.

In addition, appointed counsel for indigent defendants in capital cases must comply with an overall caseload limit.

In the appointment of counsel, the nature and volume of the workload of appointed counsel must be considered to assure that counsel can direct sufficient attention to the defense of a capital case. Attorneys accepting appointments pursuant to this rule shall provide each client with quality representation in accordance with constitutional and professional standards. Appointed counsel shall not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations; a judge shall not make an appointment of counsel in a capital case without assessing the impact of the appointment on the attorney's workload; salaried or contractual public defenders maybe appointed as trial counsel in a capital case, if: the public defender's caseload will not exceed twenty (20) open felony cases while the capital case is pending in the trial court; no new cases will be assigned to the public defender within thirty (30) days of the trial setting in the capital case; none of the public defender's cases will be set for trial within fifteen (15) days of the trial setting in the capital case; and compensation is provided as specified in paragraph (c) ...

Links: Indiana Public Defender Council, <http://www.in.gov/pdc/>.

**Kansas:** According to the Kansas State Board of Indigents' Defense Services, Kansas follows the ABA Guidelines for the appointment of counsel in death penalty cases. Kansas Statutes Annotated, Chapter 22-4505 (2000) states that counsel appointed to represent a defendant that has been convicted of capital murder and is under a sentence of death, determined to be indigent, and accepting of the offer of representation, the court shall appoint one or more counsel to represent the defendant. Counsel appointed to represent the defendant shall not have represented the defendant at trial unless the defendant and counsel expressly request continued representation.

Links: Kansas State Board of Indigents' Defense Services, <http://www.sbids.org/>, and The Death Penalty Defense Unit, [http://www.sbids.org/death\\_penalty\\_defense.htm](http://www.sbids.org/death_penalty_defense.htm).

**Kentucky:** The goal of the Kentucky Department of Public Advocacy is to meet the ABA Standard for appointment and performance of counsel in death penalty cases. They have developed a policy and procedure manual that deals with the guidelines they adopted in November 1999 for the handling of capital cases, which states:

The Trial Division formally adopted the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty* cases with the direction that only that portion of the *Guidelines* that deals with performance of counsel shall be formally adopted. The portion of the *Guidelines*, which address appointment of counsel in death penalty cases, shall not be formally adopted, but are to be utilized for reference as the standard toward which to strive in representing our clients. Those *Guidelines* which refer to the appointment of defense counsel in a capital case, though not

formally adopted, should nonetheless be considered with the full weight and effect of the operational goals in order to insure the best possible representation for our clients.

**Louisiana:** Louisiana Supreme Court Rule XXXI (2000) sets the standards for indigent defendants. Section A states:

In any capital case in which a defendant is found to be indigent, the court shall appoint no less than two attorneys to represent the defendant. At least two of the appointed attorneys must be certified as qualified to serve in capital cases. One attorney shall be designated lead counsel and the other shall be designated associate counsel. The court shall only designate as lead and associate counsel those attorneys who have either been previously certified by the Louisiana Indigent Defender Board and whose certification is still in good standing or those attorneys who, after December 31, 1997, may be certified by the district court judge handling the case. The certification of attorneys by district court judges shall remain in effect until such time as the Indigent Defense Supplemental Assistance Board is able to review and evaluate the standards and capital certification procedures for continuation, discontinuation, or modification. Until such time as the Indigent Defense Supplemental Assistance Board shall address this matter, each district judge, presiding over a capital case, shall maintain and enforce the capital certification procedures previously developed by the Louisiana Indigent Defender Board.

Links: Louisiana Indigent Defense Assistance Board, <http://www.lidb.com/>.

**Maryland:** Article 27A, sections 4 and 6, of the Code of Maryland authorizes the public defender of Maryland to represent defendants in serious crimes, including capital cases. According to David Durfee, Maryland Administrative Office of the Courts:

A panel attorney may also be appointed from a list of attorneys categorized pursuant to qualification criteria set forth by the Public Defender. The criteria shall be based on the nature and complexity of the offense, the previous trial or appellate experience of the attorneys, and any other factors considered necessary to insure competent legal representation. Within the Public Defender's Office there is a Capital Defense Division that coordinates the appointment of counsel in capital cases, consults with the appointed counsel, and provides up-to-date research, pleadings, and memoranda to the appointed attorney.

Links: Maryland Office of Public Defender, <http://www.mdarchives.state.md.us/msa/mdmanual/25ind/html/61pubd.html>.

**Missouri:** When a motion is filed to set aside a sentence of death following conviction on a plea of guilty or conviction after trial, Supreme Court Rules 24.036(a) and 29.16(a) (2001), respectively, provide that the court shall appoint two counsel to represent an indigent movant. Rules 24.036(b) and 29.16(b) provide that:

All counsel appointed as provided in this Rule 24.036 shall be members of The Missouri Bar or shall be admitted to practice in the particular case as provided in Missouri Supreme Court Rule 9. At least one of the counsel shall meet the following qualifications: have attended and successfully completed within two years immediately preceding the appointment at least twelve hours of

training or educational programs on the post conviction phase of a criminal case and federal and state aspects of cases in which the death penalty is sought; and have at least three years litigation experience in the field of criminal law; and have participated as counsel or co-counsel to final judgment in at least five post conviction motions involving class A felonies in either state or federal trial courts; and have participated in either state or federal court as counsel or co-counsel to final judgment in at least: three felony jury trials; or five direct criminal appeals in felony cases.

--This rule was adopted November 19, 1996, and became effective July 1, 1997.

Links: Missouri State Public Defender Office, <http://www.publicdefender.state.mo.us/Home.htm>, and the Capital Litigation Division, <http://www.publicdefender.state.mo.us/Legal%20Division.htm>.

**Montana:** Montana Supreme Court Rule, Title 46, Chapter 21, which became effective January 1, 2000, establishes standards for competency of trial and appellate counsel appointed to represent indigent persons in capital cases.

Both appointed attorneys must be members in good standing of the State Bar of Montana or admitted to practice before the district court pro hac vice; both counsel must have completed or taught in the two-year period prior to appointment or within 90 days after the appointment, a continuing legal education course or courses, approved for credit by the appropriate authority under the rules adopted by the Montana Supreme Court, at least 12 hours of which deal with subjects related to the defense of persons accused or convicted of capital crimes; counsel, either individually or in combination, must have had significant experience within the past 5 years in the trial of criminal cases to conclusion, including a capital case or a case involving charges of or equivalent to deliberate homicide under Montana law; the nature and volume of the workload of both appointed counsel is such that they will have the ability to spend the time necessary to defend a capital case; counsel are familiar with and have a copy of the current American Bar Association standards for the defense of capital cases. By adoption of this provision, the Montana Supreme Court does not hold that adherence to the guidelines is required as a condition of providing effective assistance of counsel, or that failure to adhere to the guidelines gives rise to an inference of ineffective assistance of counsel.

Link: Proposed Order under title 46, chapter 21, <http://www.lawlibrary.state.mt.us/dscgi/ds.py/Search>.

**Nebraska:** The Nebraska Commission on Public Advocacy has its own standards for attorneys handling capital cases.

Links: Nebraska Commission on Public Advocacy, <http://www.nol.org/home/ncpa/home.htm>.

**Nevada:** Nevada Supreme Court Rule 250 (V) 2 (2000) states that:

An attorney appointed to lead counsel to represent an indigent person in a capital case at trial at a minimum must have: acted as lead defense counsel in five felony trials, including one murder

trial, tried to completion (i.e., to a verdict or a hung jury); acted as defense co-counsel in one death penalty trial tried to completion; and been licensed to practice law for at least three years.

Links: Nevada State Public Defender, <http://www.state.nv.us/hr/pubdefender/>.

**New Hampshire:** No specific policies for attorneys handling capital cases.

Links: New Hampshire Public Defender, <http://www.mv.com/ipusers/larc/NHPD.htm>.

**New Jersey:** No specific standards or policies for attorneys handling capital cases; practice is to require experience.

Links: New Jersey Office of the Public Defender, <http://www.state.nj.us/defender/index.html>.

**New Mexico:** Practice is to use the ABA/NLADA standards for special unit and contract services.

Links: Public Defender Department, State of New Mexico, <http://web.state.nm.us/LOBBY/PUBDD.HTM>.

**New York:** Section 35-b of the Judiciary Law sets forth the procedures for obtaining legal representation in capital cases. If a trial judge determines a defendant is unable to afford counsel, two qualified attorneys can be appointed to represent the defendant. These attorneys, called 35-b attorneys after the Judiciary Law, must meet standards set by the New York Court of Appeals. 1995 Session Laws Section 35(b) pertains to the appointment of counsel for indigent defendants in capital cases.

To be eligible to be appointed as *lead counsel* in a capital case, an attorney must demonstrate that he or she:

Has at least six years of criminal litigation experience or at least four years of concentrated criminal litigation experience; is familiar with current criminal practice and procedure in New York; has conducted ten felony jury trials to verdict or to hung jury; at least six of which were conducted as defense counsel, and has tried two homicide cases to verdict or to hung jury; at the trial level represented to disposition defendants in four homicide cases; or represented a capital defendant or death row inmate in any phase of capital litigation; and has substantial familiarity with, and extensive experience in the use of, expert witnesses and scientific and medical evidence including, but not limited to, mental health and pathology evidence.

To be eligible to be appointed as *associate counsel* in a capital case, an attorney must demonstrate that he or she:

Has at least three years of criminal litigation experience or at least two years of concentrated criminal litigation experience; is familiar with current criminal practice and procedure in New

York; has either conducted four felony jury trials to verdict or hung jury; or spent two years in practice at a capital resource center or its equivalent; and has familiarity with, and some experience in the use of, expert witnesses and scientific and medical evidence including, but not limited to, mental health and pathology evidence.

Links: “Minimum Standards for Lead Counsel and Associate Counsel in Capital Cases,” <http://www.nycdo.org/35b/35b-std.html>, and the New York Capital Defender Office, <http://www.nycdo.org/>.

**North Carolina:** North Carolina Bar Rules Subchapter 1D, Section 0404 (2001) states that no attorney shall be appointed to represent an indigent defendant in a capital case at the trial level who does not have a minimum of five years’ experience in the general practice of law and who has not been found by the court or the public defender to be proficient in the field of criminal trial practice. No attorney shall be appointed to represent an indigent defendant in a capital case at the appellate level unless he or she has a minimum of five years’ experience in the general practice of and who has not been found by the trial judge or public defender to have a demonstrated proficiency in the field of appellate practice.

**Ohio:** Rule 20 of the Rules of Superintendence for the Courts of Ohio (2000) pertains to the appointment of counsel for indigent defendants in capital cases; it sets out extensive standards for such appointment:

At least two attorneys shall be appointed by the court to represent an indigent defendant charged with an offense for which the death penalty may be imposed. At least one of the appointed counsel must maintain a law office in Ohio and have experience in Ohio criminal trial practice. The counsel appointed shall be designated “lead counsel” and “co-counsel.” *Lead counsel* shall satisfy all of the following: be admitted to the practice of law in Ohio or admitted to practice pro hac vice; have at least five years of civil or criminal litigation or appellate experience; have specialized training as approved by the committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two-year period prior to making application; have at least one of the following qualifications: experience as “lead counsel” in the jury trial of at least one capital case or experience as “co-counsel” in the trial of at least two capital cases; have at least one of the following qualifications: experience as “lead counsel” in the jury trial of at least one murder or aggravated murder case; experience as “lead counsel” in ten or more criminal or civil jury trials, at least three of which were felony jury trials; experience as “lead counsel” in either: three murder or aggravated murder jury trials, one murder or aggravated murder jury trial and three felony jury trials, or three aggravated or first- or second-degree felony jury trials in a court of common pleas in the three years prior to making application.

*Co-counsel* shall satisfy all of the following requirements: be admitted to the practice of laws in Ohio or admitted to practice pro hac vice; have at least three years of civil or criminal litigation or appellate experience; have specialized training, as approved by the committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two years prior to making application; have at least one of the following qualifications: experience as “co-counsel” in one murder or aggravated murder trial; experience as “lead counsel” in one first-degree felony jury trial; experience as “lead” or co-counsel” in at least two felony jury or civil jury trials in a court of common pleas in the three years prior to making application.

At the appellate level, Rule 21 of the Rules of Superintendence for the Courts of Ohio applies.

Links: Office of the Ohio Public Defender, <http://www.ohioweb.state.oh.us/opd/index.htm>.

**Oklahoma:** The Oklahoma Indigent Defense System Board sets Standards of qualification. A special trial unit has been set up to handle capital cases.

Links: Oklahoma Indigent Defense System Board; <http://www.oklaosf.state.ok.us/~oids/>.

**Oregon:** Oregon has adopted standards patterned after the National Legal Aid and Defender Association's Standards for the Appointment and Performance of Counsel in Death Penalty Cases and the ABA's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Standard 3.1 (E) of Oregon's Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense, lists the requirements for the appointing trial counsel in capital cases, and Standard 3.1 (I) lists requirements for counsel at the appellate level in capital cases.

Links: State of Oregon Public Defender's Office, <http://www.opd.state.or.us/>

**South Carolina:** According to South Carolina Rules, Administration, Guidelines (1999) for Certification of Attorneys to Handle Death Penalty Cases Order, Pursuant to Section 45 (D) of Act No. 164 of 1993, which amended South Carolina Code Annotated, Title 16-3-26, the following guidelines are established for the certification of attorneys to handle death penalty cases:

There shall be two classes of attorneys certified to handle death penalty cases, lead counsel and second counsel. *Lead counsel* shall have at least five years experience as a licensed attorney and at least three years experience in the actual trial of felony cases. Second counsel shall have at least three years experience as a licensed attorney. *Second counsel* will not be required to be further certified to be eligible for appointment.

**Tennessee:** Tennessee Supreme Court Rule 13-3 (2001) outlines the minimum qualifications for counsel in capital cases:

The court shall appoint at least two attorneys to represent a defendant at trial in a capital case. At least one of the attorneys appointed must maintain a law office in the state of Tennessee and have significant experience in Tennessee criminal trial practice. The counsel appointed shall be designated "lead counsel" and "co-counsel." Lead counsel must be a member in good standing of the Tennessee bar or be admitted to the practice pro hac vice; have for at least three years regularly represented defendants in criminal jury trials; have had a minimum of twelve hours of specialized training in the defense of defendants charged with a capital offense; and have at least one of the following: experience as lead counsel in the jury trial of at least one capital case; experience as co-counsel in the trial of at least two capital cases; experience as co-counsel in the

trial of a capital case and experience as lead or sole counsel in the jury trial of at least one murder case; or experience as lead counsel or sole counsel in at least three murder jury trials; or one jury trial and three felony trials.

Co-counsel must: be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice; have had a minimum of 12 hours of specialized training in the defense of defendants charged with a capital offense; and have at least one of the following qualifications: qualify as lead counsel, experience as sole counsel, lead counsel, or co-counsel in a murder jury trial.

**Texas:** Texas Code of Criminal Procedure, Article 26.052 (2000) Appointment of counsel in death penalty cases states:

If a county is served by a public defender's office, trial counsel and counsel for direct appeal or to apply for a writ of certiorari may be appointed as provided by the guidelines established by the public defender's office. In all other cases in which the death penalty is sought, counsel shall be appointed as provided by this article. A local selection committee is created in each administrative judicial region created under Section 74.042, Government Code. The administrative judge of the judicial region shall appoint the members of the committee. A committee shall have not less than four members, including: the administrative judge of the judicial region; at least one district judge; a representative from the local bar association; and at least one practitioner who is board certified by the State Bar of Texas in criminal law. The committee shall adopt standards for the qualification of attorneys for appointment to death penalty cases.

On May 29, 2001, the Texas Fair Defense Act (Senate Bill 7 by Ellis) passed. This act establishes a new process for granting legal representation to indigent defendants in criminal cases. It sets statewide minimum standards for attorneys in death penalty cases and creates an Indigent Defense Task Force with nearly \$20 million to help counties provide services. This bill outlines Section 9, Article 26.052, Code of Criminal Procedure, is 24-22, amended to read as follows:

The committee shall adopt standards for the qualification of attorneys to be appointed to represent indigent defendants in capital cases in which the death penalty is sought. The standards must require that an attorney appointed to a death penalty case: be a member of the State Bar of Texas; exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases; have at least five years of experience in criminal litigation; have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as second or first degree felonies or capital felonies; have trial experience in: the use of and challenges to mental health or forensic expert witnesses; and investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.

Links: Legal Services to the Poor in Criminal Matters Committee;  
<http://www.uta.edu/pols/moore/indigent/indigentdefense.htm>.

**Utah:** Utah Criminal Procedure Rule 8 (2001) states that for indigent defendants in capital cases, the court shall appoint two or more attorneys to represent the defendant. The court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:

At least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total; at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or felony homicide case which was tried to a jury and which went to final verdict at least one of the appointed attorneys must have completed or taught within the past five years an approved continuing legal education course or courses at least eight hours of which deal, in substantial part, with the trial of death penalty cases; and the experience of one of the appointed attorneys must total not less than five years in the active practice of law.

In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors: whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case; the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant; the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years; the diligence, competency and ability of the attorneys being considered; and any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

**Virginia:** By § 19.2-163.8 (E) of the Virginia Code of 1950, as amended on June 17, 1999, the Public Defender Commission, in conjunction with the Virginia State Bar, set forth standards for appointed counsel determined to be qualified and possessing proficiency and commitment to quality representation in capital cases. While § 19.2-163.7 of the Virginia Code, effective July 1, 1992, does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate, and habeas proceedings. If a public defender is appointed as either “lead” or “co-counsel”, the other attorney should be appointed from the private bar.

*Lead counsel* must be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice; have at least five years of criminal litigation practice within the past seven years including acting as primary counsel (defense or prosecution) in at least five jury trials involving violent crimes with a maximum penalty of 20 years or more; have had, within the past two years, six hours of specialized training in capital litigation; have at least one of the following: experience as “lead counsel” in the defense of at least one capital case within the past five years; or experience as co-counsel in the defense of at least two capital cases within the past seven years; be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default; and have demonstrated proficiency and commitment to quality representation.

*Co-counsel* must meet the following requirements:

Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice; have at least five years of criminal litigation practice within the past seven years including

acting as primary counsel (defense or prosecution) in at least five jury trials involving violent crimes with a maximum penalty of 20 years or more; and have had, within the past two years, six hours of specialized training in capital litigation.

The Public Defender Commission shall maintain a list or lists of attorneys admitted to practice law in Virginia who are qualified to represent indigent defendants charged with capital murder or sentenced to death. In establishing such a list or lists, the Commission shall consider all relevant factors, including but not limited to, the attorney's background, experience, and training and the Commission's assessment of whether the attorney is competent to provide quality legal representation. Notwithstanding the requirements of Title 19.2-163.7, the judge of the circuit court may appoint counsel who is not included on the lists or lists, but who otherwise qualifies under the standards established and maintained by the Commission.

It should be noted that § 19.2-163.8 of the Virginia Code was amended at the 2001 session of the General Assembly. As a result of the amendments, the standards, effective January 1, 2002, will apply to all counsel (not just those appointed in indigent cases), and training in the analysis and introduction of forensic evidence, including DNA testing, will be required.

**Washington:** Superior Court Special Proceeding Rules SPRC 2 – Appointment of Counsel (2001):

At least two lawyers shall be appointed for the trial and also for the direct appeal. All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation, which is appropriate to a capital case. The trial court shall retain responsibility for appointing counsel for trial and the Supreme Court shall appoint counsel for the direct appeal. At least one counsel at trial must have five years' experience in the practice of criminal law, be familiar with and experienced in the utilization of expert witnesses and evidence, and be learned in the law of capital punishment by virtue of training or experience. At least one counsel on appeal must have three years' experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience.

Court Rule Link: SPRC 2 Appointment of counsel for trial,  
<http://www.courts.wa.gov/rules/display.cfm?group=sup&set=SPRC&ruleid=supsprc>.

**Wyoming:** No written standards. A special capital case trial unit has been established. Informal guidelines are used; practice is to use two attorneys minimum on capital case defense.

Links: Wyoming Public Defenders Office; <http://wyodefender.state.wy.us/>.

**On-line Resources:**

*Compendium of Standards For Indigent Defense Systems, Volume III: Capital Case Representation* (U.S. Department of Justice, December 2000),  
<http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv3/welcome.html>.

*Compendium of Standards For Indigent Defense Systems*, Volume IV: Standards for Appellate Representation,

<http://www.ojp.usdoj.gov/indigentdefense/compendium/standardsv4/welcome.html>.

For links to all 5 volumes of *Compendium of Standards For Indigent Defense Systems* (U.S. Department of Justice, December 2000), see

<http://www.ojp.usdoj.gov/indigentdefense/compendium/>.

“Standards for the Appointment and Performance of Counsel in Death Penalty Cases,” *National Legal Aid Defenders Association*, adopted 1987, amended 1988,

<http://www.nlada.org/standards/death.htm>.

*ABA Criminal Justice Policy--Death Penalty Cases*; <http://www.abanet.org/crimjust/rtsb4.html>.