

## **Update of Performance Guidelines for Non-Capital Case Representation**

Prepared for State Bar of Texas Affordable Legal Services Committee  
August 30, 2021

### Introduction

The Standing Committee on Legal Services to the Poor in Criminal Matters started to draft an update to the current Performance Guidelines for Non-Capital Cases in the fall of 2019. Attached is the historical background to these Guidelines.

### Purpose of Revision

The original Guidelines became effective in 2011. Since then, the Guidelines has been used across the State/ Since 2011, there have been some changes in the law which precipitated a need to modify the Guidelines to reflect current law and encompass areas not fully covered.

### Proposed Changes

Attached are the Guidelines with the changes highlighted in yellow. The changes reflect current law and expand upon areas from the original Guidelines, and include:

1. Immigration consequences post-*Padilla v. Kentucky*.
2. Issues regarding competency and insanity
3. Court costs, fines, and restitution
4. Mandatory registrations such as DNA and sex offender registration.
5. Collateral consequences of a conviction as to certain government benefits
6. The law on enhancements
7. Preservation of error
8. Knowledge of programs client might be eligible
9. Parole issues
10. Bail pending appeal
11. Tex. R. App. P. 48.4 requirements regarding appellate opinions being sent to clients
12. Advising client post-appeal regarding habeas rights

## **Overview of Performance Guidelines for Non-Capital Case Representation**

Prepared for State Bar of Texas Board of Directors Meeting  
January 28, 2011

### **History of the Guidelines**

The Standing Committee on Legal Services to the Poor in Criminal Matters started to draft Performance Guidelines for Non-Capital Case Representation (the Guidelines) soon after the Board of Directors adopted the Committee-drafted Guidelines and Standards for Texas Capital Counsel on April 21, 2006.

The Committee approved the final amendments to the Guidelines in the fall of 2010, and forwarded the Guidelines to the Board of Directors' Affordable Legal Services Subcommittee. The Affordable Legal Services Subcommittee reviewed the Guidelines on December 3, 2010, and recommended approval of the Guidelines by the Board of Directors.

### **Development of the Guidelines and Stakeholder Review**

The Committee began the drafting process by reviewing comparable performance guidelines developed by national organizations and other states. Guidelines published by the American Bar Association and the National Legal Aid and Defender Association were analyzed, as were state-level guidelines adopted in Georgia, Louisiana, Massachusetts, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, and Virginia.

The Committee identified model language from these national and state guidelines, edited generic language to reflect specific elements of Texas procedure, and made additions to include issues not adequately addressed in other guidelines (e.g., the representation of defendants with mental health issues, post-trial representation). The Committee completed its initial drafting process and approved draft Guidelines on February 26, 2010.

The Committee then circulated the draft Guidelines to criminal justice stakeholders for comment. The Committee also distributed a document responding to frequently asked questions about the Guidelines. The draft Guidelines and the FAQs were sent to:

- The Court of Criminal Appeals (via Sian Schilhab, CCA General Counsel)
- The Texas Criminal Defense Lawyers Association (forwarded to all members by Joseph Martinez, TCDLA Executive Director)
- 30 local criminal bar associations (via a leadership contact list provided by TCDLA)
- The Texas District and County Attorneys Association (posted on the TDCAA website by Shannon Edmonds, TDCAA Staff Attorney and Government Relations)
- The Task Force on Indigent Defense (via Wesley Shackelford, Task Force Special Counsel)

- The Texas Fair Defense Project’s indigent defense stakeholder email distribution list (approximately 425 judges and county officials with indigent defense responsibilities)
- Clinical faculty at all Texas law schools with criminal law clinics (UT, U of H, St. Mary’s, South Texas College of Law, Texas Tech, TSU)

Comments initially were requested by April 20, 2010. TCDLA’s then-President Stan Schneider requested an extension to allow time for additional TCDLA membership discussion of the draft guidelines. Committee chair Jeff Blackburn initially authorized an extension of the comments deadline until May 14, 2010, and later extended the deadline again to August 13, 2010.

The Committee received comments from a number of judges and individual defense attorneys, as well as consolidated comments from a committee appointed by the TCDLA Board of Directors. The Committee identified 147 suggested amendments in the submitted comments, and reviewed those amendments at meetings held on May 27, 2010, August 20, 2010, and September 7, 2010. TCDLA sent representatives to the August and September meetings, and those representatives participated in the Committee’s discussion of the proposed amendments.

A final draft of the Guidelines was forwarded to the Affordable Legal Services Subcommittee after all of the proposed amendments were considered by the Committee.

#### Purpose of the Guidelines

The Guidelines are intended to:

- encourage defense attorneys to perform to a high standard of representation and to promote professionalism in the representation of indigent defendants
- alert defense counsel to courses of action that may be necessary, advisable, and appropriate, and thereby to assist attorneys in deciding upon the particular actions that must be taken in each case to ensure the client receives the best representation possible
- provide a measure by which the performance of individual attorneys may be evaluated
- assist in the training and supervision of defense attorneys

#### Potential Applications of the Guidelines

The Guidelines have a number of potential uses for defense attorneys and for counties and local judges.

Defense attorneys may use the Guidelines for the following purposes:

- As a checklist that is useful for attorneys at every level of experience
- As a tool to assist in the training of new criminal defense attorneys
- As a tool for self-evaluation, both as an individual attorney and, where applicable, as a public defender’s office or other community of defenders
- In a public defender’s office, as an objective tool for the internal evaluation of attorneys.
- As a tool for advocating for additional resources for criminal defendants and/or defender offices (e.g., greater access to investigative services)

The Guidelines also may play an important role in local indigent defense systems. The Guidelines, with their focus on an attorney's current performance, are designed to supplement the attorney qualification requirements—which generally emphasize only past experience—currently used to screen attorneys for indigent defense appointments in many Texas counties. The Guidelines also can be used to provide greater consistency and accountability in the delivery of indigent defense representation.

The Guidelines provide an objective tool that local judges may choose to rely on when they evaluate attorneys who meet experience-based standards and consider whether to admit such attorneys to the wheel. Local judges also may require defense attorneys to review and be familiar with the Guidelines as a condition of receiving indigent defense appointments. The Bar's Guidelines and Standards for Texas Capital Counsel already are used for similar purposes.