

SUPPLEMENTARY GUIDELINES AND STANDARDS FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN TEXAS DEATH PENALTY CASES

INTRODUCTION

On April 21, 2006, the State Bar of Texas Board of Directors adopted the Guidelines and Standards for Texas Capital Counsel. Drafted by the State Bar of Texas Standing Committee on Legal Services to the Poor in Criminal Matters, the Guidelines and Standards assign to counsel (at Guideline 11.1(A) & (B)) the responsibility for conducting a thorough investigation relating to both guilt and penalty, regardless of any statement by the client opposing such investigation (Guideline 11.1(A)(3)). To meet this responsibility, counsel must assemble a capital defense team consisting of no fewer than two qualified attorneys, an investigator, and a mitigation specialist—with at least one member of that team qualified by training and experience to screen for the presence of mental or psychological disorders or impairments (Guideline 10.1(B)).

Inherent in the approach to competent capital defense dictated by the Guidelines and Standards is the recognition that the mitigation function is multifaceted and multidisciplinary, even though ultimate responsibility for the investigation of such issues rests irrevocably with counsel. Because the mitigation function is of utmost importance in the defense of capital cases, and because counsel must rely on the assistance of experts, investigators, and mitigation specialists in developing mitigating evidence, the Standing Committee on Legal Services to the Poor in Criminal Matters determined that these Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases would provide useful guidance to judges and defense counsel on selecting, funding, and working with mitigation specialists in death penalty cases.

On April 10, 2015, following a review process that incorporated the feedback of practitioners and several bar committees, the board of directors adopted these Supplementary Guidelines and Standards. The committee appreciates the work of the bar and the board, and it is confident that these Supplementary Guidelines and Standards will elevate the quality of representation of indigent people, and all people, in capital cases in Texas.

The full set of guidelines is available online at <http://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/TexasCapitalGuidelines.pdf>.

—Standing Committee on Legal Services
to the Poor in Criminal Matters

GUIDELINE 1.1—OBJECTIVE AND SCOPE OF GUIDELINES

- A. The objective of these Guidelines is to summarize prevailing professional norms for mitigation investigation, development, and presentation by capital defense teams in order to ensure high-quality representation for all persons facing the possible imposition or execution of a death sentence in any jurisdiction. All capital defense teams must be comprised of individuals who, through their experience, training, and function, strive to fulfill the constitutional mandate that the sentencer consider all evidence in support of a sentence other than death. Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g., employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.
- B. These Guidelines apply from the moment that counsel is appointed and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, appeal, post-conviction review, competency-to-be-executed proceedings, clemency proceedings, and any connected litigation.

GUIDELINE 3.1—THE CAPITAL DEFENSE TEAM: THE ROLE OF MITIGATION SPECIALISTS

- A. In performing the mitigation investigation, counsel has the duty to obtain services of persons independent of the government and the right to select one or more such persons whose qualifications fit the individual needs of the client and the case. Applications to the court for the funding of mitigation services should be conducted *ex parte*, *in camera*, and under seal.

- B. Counsel has a duty to hire, assign, or have appointed competent team members; to investigate the background, training, and skills of team members to determine that they are competent; and to supervise and direct the work of all team members. Counsel must conduct such investigation of the background, training, and skills of the team members as will determine that they are competent and must ensure on an ongoing basis that their work is of high professional quality.
- C. All members of the defense team are agents of defense counsel. They are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client. The privileges and protections applicable to the work of all defense team members derive from their role as agents of defense counsel. The confidentiality of communication with persons providing services pursuant to court appointment should be protected to the same extent as if such persons were privately retained. Like counsel, non-attorney members of the defense team have a duty to maintain complete and accurate files, including records that may assist successor counsel in documenting attempts to comply with these Guidelines.
- D. It is counsel's duty to provide each member of the defense team with the necessary legal knowledge for each individual case, including features unique to the jurisdiction or procedural posture. Counsel must provide mitigation specialists with knowledge of the law affecting their work, including an understanding of the capital charges and available defenses; applicable capital statutes and major state and federal constitutional principles; applicable discovery rules at the various stages of capital litigation; applicable evidentiary rules, procedural bars, and "door-opening" doctrines; and rules affecting confidentiality, disclosure, privileges, and protections.

GUIDELINE 4.1—QUALIFICATIONS OF THE DEFENSE TEAM

- A. Capital defense team members should demonstrate a commitment to providing high-quality services in the defense of capital cases; should satisfy the training requirements set forth in these Supplementary Guidelines; and should be skilled in the investigation, preparation, and presentation of evidence within their areas of expertise.
- B. The defense team must include individuals possessing the training and ability to obtain, understand, and analyze all documentary and anecdotal information relevant to the client's life history. Life history includes, but is not limited to: medical history; com-

plete prenatal, pediatric, and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders, and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural, and community influences; socioeconomic, historical, and political factors.

- C. Mitigation specialists must be able to identify, locate, and interview relevant persons in a culturally competent manner that produces confidential, relevant, and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family, and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures. They must have the ability to advise counsel on appropriate mental health and other expert assistance.
- D. Team members must have the training and ability to use the information obtained in the mitigation investigation to illustrate and illuminate the factors that shaped and influenced the client's behavior and functioning. The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies; chronologies; social histories; and studies of the cultural, socioeconomic, environmental, political, historical, racial, and religious influences on the client in order to aid counsel in developing an affirmative case for sparing the defendant's life.
- E. At least one member of the team must have specialized training in identifying, documenting, and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, and neurological deficits; long-term consequences of deprivation, neglect, and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental, and ethnic influences on behavior; effects of substance abuse; and the presence, severity, and consequences of exposure to trauma. Team members acquire knowledge, experience, and skills in these areas through

education, professional training, and properly supervised experience.

- F. Mitigation specialists must possess the knowledge and skills to obtain all relevant records pertaining to the client and others. They must understand the various methods and mechanisms for requesting records and obtaining the necessary waivers and releases and the commitment to pursue all means of obtaining records.

GUIDELINE 5.1—WORKLOAD

Counsel should ensure that the workload of defense team members in death penalty cases is maintained at a level that enables counsel to provide each client with high-quality legal representation in accordance with these supplementary Guidelines and the American Bar Association Guidelines as a whole. In the case of mitigation specialists on the staff of an institutional defender office, the office should implement mechanisms to ensure that their workload is maintained at a level that enables them to provide each client with high-quality services and assistance in accordance with these Guidelines.

GUIDELINE 7.1—TRAINING

- A. All capital defense team members should attend and successfully complete, at least once every year, a specialized training program that focuses on the defense of death penalty cases offered by an organization with substantial experience and expertise in the defense of persons facing execution and committed to the national standard of practice embodied in these supplementary Guidelines and the ABA Guidelines as a whole.
- B. Funding should be provided for team members to receive effective training and continuing professional education in their respective fields of expertise.

GUIDELINE 8.1—FUNDING AND COMPENSATION

Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high-quality legal representation and reflects the specialized skills needed to assist counsel with the litigation of death penalty cases. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

GUIDELINE 9.3—OBLIGATIONS OF TEAM MEMBERS RESPECTING WORKLOAD

All members of the defense team in death penalty cases should limit their caseloads to the level needed to provide each client with high-quality legal representation in accordance with these supplementary Guidelines and the ABA Guidelines as a whole.

GUIDELINE 10.4—THE DEFENSE TEAM: THE ROLE OF COUNSEL WITH RESPECT TO MITIGATION SPECIALISTS

- A. Counsel bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case. It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client. It is therefore incumbent upon the defense to interview all relevant persons and obtain all relevant records and documents that enable the defense to develop and implement an effective defense strategy.
- B. Counsel guides the defense team and, based on consultation with team members and experts, conducts ongoing reviews of the evidence, assessments of potential witnesses, and analyses of the most effective manner in which to convey the mitigating information. Counsel decides how mitigation evidence will be presented.

GUIDELINE 10.5—THE DEFENSE CASE: REQUISITE MITIGATION FUNCTIONS OF THE DEFENSE TEAM

- A. It is the duty of the defense team to aid counsel in coordinating and integrating the case for life with the guilt or innocence phase strategy.
- B. The defense team must conduct an ongoing, exhaustive, and independent investigation of every aspect of the client's character, history, record, and any circumstances of the offense or other factors, which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric, and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders, and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural, and community influences; socioeconomic, historical, and political factors.
- C. Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information, and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that

will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.

- D. Team members must provide counsel with documentary evidence of the investigation through the use of such methods as genealogies; social history reports; chronologies; and reports on relevant subjects including, but not limited to, cultural, socioeconomic, environmental, racial, and religious issues in the client's life. The manner in which information is provided to counsel is determined on a case-by-case basis, in consultation with counsel, considering jurisdictional practices, discovery rules, and policies.
- E. It is the duty of the defense team members to aid counsel in the selection and preparation of witnesses who will testify, including but not limited to:
 - 1. Expert witnesses or witnesses with specialized training or experience in a particular subject matter. Such experts include, but are not limited to:
 - a. Medical doctors, psychologists, toxicologists, pharmacologists, social workers, and persons with specialized knowledge of medical conditions, mental illnesses and impairments, substance abuse, physical, emotional, and sexual maltreatment, and trauma and the effects of such factors on the client's development and functioning.
 - b. Anthropologists, sociologists, and persons with expertise in a particular race, culture, ethnicity, or religion.
 - c. Persons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants.
 - d. Persons with specialized knowledge of institutional life, either generally or within a specific institution.
 - 2. Lay witnesses or witnesses who are familiar with the defendant or his family, including but not limited to:
 - a. The client's family, extending at least three generations back, and those familiar with the client;
 - b. The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning; medical history;

environmental history; mental health history; educational history; employment and training history; military experience; and religious, racial, and cultural experiences and influences upon the client or the client's family;

- c. Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;
 - d. Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;
 - e. Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment, and the prevalence of violence;
 - f. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
 - g. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.
- F. It is the duty of team members to gather documentation to support the testimony of expert and lay witnesses, including, but not limited to, school, medical, employment, military, and social service records, in order to provide medical, psychological, sociological, cultural, or other insights into the client's mental and/or emotional state, intellectual capacity, and life history that may explain or diminish the client's culpability for his conduct, demonstrate the absence of aggressive patterns in the client's behavior, show the client's capacity for empathy, depict the client's remorse, illustrate the client's desire to function in the world, give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison, explain possible treatment programs, rebut or explain evidence presented by the prosecutor, or otherwise support a sentence less than death.
- G. It is the duty of the team members to aid counsel in preparing and gathering demonstrative evidence, such as photographs, videotapes, physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference. **TBJ**