

Capital Counsel Qualifications Standards Review Committee Report

The Honorable Jane Marum Roush, Chair

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Capital Counsel Qualifications Standards Study Committee

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Executive Summary

Section 19.2-163.8 of the Code of Virginia requires that the Supreme Court of Virginia and the Indigent Defense Commission (VIDC), in conjunction with the Virginia State Bar (VSB), adopt and maintain standards for attorneys who are qualified to represent defendants charged with capital murder. In a letter dated January 12, 2012, the Virginia Criminal Justice Conference (VCJC) proposed that the Supreme Court, VIDC, and VSB establish a joint study committee to conduct a comprehensive review of the existing standards of qualification for attorneys appointed to represent indigent defendants charged with capital murder or sentenced to death.

Having concluded its work, the joint study committee recommends that the standards for qualification for counsel to indigent capital defendants be shifted from the existing criteria based on prior experience in capital cases to criteria focused on relevant knowledge and skill. This change in focus is needed because of the declining number of capital prosecutions in Virginia. Simply put, there are dwindling numbers of otherwise able attorneys who meet the existing experience-based criteria.

In requesting the review, the VCJC cited a number of concerns with the existing standards including:

1. It has been more than a decade since the existing standards were adopted and a comprehensive review is long past due to ensure the continued existence of a pool of well-qualified attorneys certified to accept appointment in capital murder cases.
2. The existing standards are primarily experience-based and should be expanded to include an evaluation of counsel's "demonstrated proficiency and commitment to quality representation" as well as his/her ability to provide quality representation.

3. Although Virginia requires completion of a comprehensive initial training program for attorneys seeking qualification to accept appointment in non-capital cases, the current standards have no similar requirement for attorneys seeking qualification to accept appointment in capital murder cases.
4. The IDC regional capital defender offices were established subsequent to the creation of the existing standards. Given the importance of the capital defender offices in providing representation in capital cases, the capital defender offices could appropriately take some part in the appointment process, particularly in the appointment of co-counsel.

Pursuant to the proposal by the VCJC, and in order to fulfill the mandates of Section 19.2-163.8 of the Code of Virginia, the Supreme Court, IDC, and the VSB established a joint study committee to undertake a comprehensive review of the existing standards. The 15 person committee, chaired by the Honorable Jane Marum Roush, Circuit Court Judge for Fairfax County, established sub-committees to conduct in-depth analysis of four identified areas of concern. The sub-committees completed their work and reported to the full committee which has adopted specific recommendations for the qualification, training and appointment of defense counsel in capital murder cases.

The four areas studied by the committee and its recommendations are:

Capital Qualifications and Removal- The committee has recommended initial qualification standards and training designed to ensure that capital trial counsel possess the necessary skills, knowledge and substantive training. There is a provision for the waiver of the initial certification training requirements for experienced capital counsel who can demonstrate they possess the requisite skill and knowledge. Continuing legal education

requirements are recommended for continued inclusion on the qualified list. All attorneys would be required to reapply every four years. Prior to appointing trial or direct appeal counsel, the judge of the circuit court would be required to obtain and consider the recommendation of the capital defender from the capital defense unit responsible for the jurisdiction where the appointment is to be made.

Appointment Process- The process for appointment of defense counsel in capital cases is governed by section 19.2-163.7 of the Code of Virginia. The committee has proposed the addition of language to the statute which would clarify the legislative intent that responsibility for appointment of capital counsel rests exclusively with the circuit court even in cases that are initiated in a district court.

Initial Certification Training For Capital Counsel- The committee recommends that attorneys seeking inclusion on the list of attorneys qualified to accept appointment as trial counsel in capital murder cases must meet specific requirements including the successful completion of specified initial certification training. There is a waiver process for counsel who can demonstrate that they possess the requisite knowledge and experience. Continuing legal education requirements are recommended for continued inclusion on the list of qualified attorneys.

Post-Conviction Counsel- The committee recommends that attorneys seeking inclusion on the list of attorneys qualified to accept appointment as appellate counsel on direct appeal, or as habeas counsel for a defendant convicted of a capital offense and sentenced to death, must meet specific requirements including the successful completion of specified initial certification training. Continuing legal education requirements are recommended for continued inclusion on the lists of qualified post-conviction attorneys.

Report on Capital Counsel Qualification Standards Review Committee

§ I - Capital Qualifications and Removal

Currently, the initial requirements for appointment as lead and co-counsel in capital trials is as follows:

Capital Trial Lead Counsel:

1. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice;
2. Have at least five years of criminal litigation practice (defense or prosecution) within the past seven years;
3. Have experience as defense counsel in at least five jury trials, tried to verdict, involving violent crimes with maximum penalties of at least 20 years or more;
4. Served as lead counsel in the defense of at least one capital case within the past five years;

OR

5. Served as co-counsel in the defense of at least two capital cases within the past seven years;

AND

6. Have had, within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours of specialized training required by §19.2-163.8(A)(vii) of the Code of Virginia of 1950, as amended.

Capital Trial Co-Counsel:

1. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice;
2. Have at least five years of criminal litigation practice (defense or prosecution) within the past seven years;
3. have served as lead or primary defense counsel in at least five jury trials, tried to verdict, involving violent crimes with a maximum penalty of twenty years or more;

4. Have had, within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours of specialized training required by §19.2-163.8(A)(vii) of the Code of Virginia of 1950, as amended.

Recommendations:

The joint study committee makes the following recommendations with respect to the qualification, appointment and removal of counsel for indigents persons charged with capital offenses:

**INITIAL QUALIFICATION REQUIREMENTS FOR APPOINTMENT AS LEAD OR CO-COUNSEL FOR PERSON CHARGED WITH CAPITAL OFFENSES;
REMOVAL FROM CAPITAL APPOINTMENT LIST**

1. Every attorney appointed as lead counsel or co-counsel for a defendant charged with a capital offense or under sentence of death shall possess the following qualifications:
 - a. A license to practice law in Virginia, or eligibility for admission pro hac vice;
 - b. The legal knowledge and skill necessary for representation as either lead or co-counsel in a capital case, and a demonstrated capacity to apply that knowledge and skill with appropriate thoroughness and preparation, and
 - c. Have satisfied the training requirements set forth in (4) below.
2. In appointing trial and direct appeal counsel under this section, the judge of the circuit court shall obtain and consider the recommendation of the capital defender from the capital defense unit responsible for the jurisdiction where the appointment is to be made. If the judge of the circuit court determines that the capital defender responsible for the jurisdiction where the appointment is to be made may have a conflict, the judge of the circuit court shall consider the recommendation of the capital defender from a different capital defense unit, designated by the Virginia Indigent

Defense Commission, that is not responsible for the jurisdiction where the appointment is to be made.¹

3. To be eligible for appointment as lead counsel in a capital case, an attorney shall have demonstrated that he or she possesses the following skills, and can be expected to apply them with appropriate thoroughness and preparation:
 - a. Substantial knowledge and understanding of the state and federal law, both procedural and substantive, governing capital cases;
 - b. Skill in the management and conduct of complex negotiations and litigation;
 - c. Skill in legal research, analysis, and the drafting of litigation documents;
 - d. Skill in oral advocacy;
 - e. Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
 - f. Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
 - g. Skill in the investigation, preparation, and presentation of mitigating evidence;
 - h. Substantial knowledge and understanding of the issues, both procedural and substantive, in the representation of capital defendants who are foreign nationals; and
 - i. Skill in the elements of trial advocacy, such as motions practice, jury selection, cross-examination of witnesses, and opening and closing statements.
4. To be eligible for appointment as lead or co-counsel in a capital case, an attorney shall also have satisfied the certification requirements set out in Section III of these standards, or be qualified by demonstrated experience,

¹ This section incorporates the recommendations of the Appointment Process Committee.

knowledge and skill for a waiver of such certification, and shall also satisfy all applicable continuing training requirements under Section III.

5. An attorney wishing to be considered for appointment as defense counsel in capital cases shall so indicate by completing a form prescribed by the Executive Director of the Indigent Defense Commission. The form application will:
 - a. Specify whether the attorney wishes to be considered for appointment as lead or co-counsel,
 - b. Describe with particularity the basis of the attorney's belief that he or she is qualified for such appointment, including
 - i. A listing of each capital and non-capital murder case in which the attorney served as counsel over the previous ten years, naming the client, jurisdiction, judge, prosecuting attorney, and co-counsel if any;
 - ii. A listing of all relevant training experiences during the previous five years; and
 - iii. Any other experience or employment bearing on the attorney's qualifications;
 - c. Designate the jurisdictions or region(s) in which the attorney desires to be considered for appointment; and
 - d. Indicate which qualification or qualifications set forth in this rule, if any, should be waived, and the reasons why such waiver is appropriate.

After reviewing the application and conducting such investigation of the attorney's qualifications as may be appropriate, the Executive Director of the Indigent Defense Commission or his or her designee will approve or disapprove the application. The Director may appoint an advisory panel or panels to assist in reviewing such applications. An attorney whose application is approved will be included in the capital appointment list required by Va. Code Sec. 19.2-163.8(B) for a period of four years, after which time the attorney's name will be removed from the list. An attorney will not be placed back on the appointment list unless a

new application is submitted and approved. The expiration of an attorney's membership on the capital appointments list will not affect the validity of that attorney's prior appointment in any pending case.

§ II - Capital Counsel Appointment

The appointment of counsel in capital cases is governed by Va. Code § 163.7.

Recommendations:

I. The Committee recommends that the judge consider the recommendations of the Regional Capital Defender in the jurisdiction where the appointment takes place. In the federal system, the courts obtain the recommendation of the federal defender, if one exists in their district. (18 U.S.C. § 3005). This committee recommendation is intended to bring Virginia more in line with the federal requirements of appointment of capital counsel. The Committee, therefore, proposes that section 2 of the initial qualifications requirements state:

In appointing trial and direct appeal counsel under this section, the judge of the circuit court shall obtain and consider the recommendation of the capital defender from the capital defense unit responsible for the jurisdiction where the appointment is to be made. If the judge of the circuit court determines that the capital defender responsible for the jurisdiction where the appointment is to be made may have a conflict, the judge of the circuit court shall consider the recommendation of the capital defender from a different capital defense unit, designated by the Virginia Indigent Defense Commission, that is not responsible for the jurisdiction where the appointment is to be made.²

II. In order to clarify the clear legislative intent that authority for the appointment of trial counsel in capital cases rests solely with the circuit court, the joint study committee recommends the following statutory amendment:

² See §I recommendations

HOUSE BILL NO. _____

Offered January __, 2014
Prefiled December __, 2013

A BILL to amend and reenact §§ [19.2-163.7](#) of the Code of Virginia, relating to counsel in capital cases.

Patron-- _____

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ [19.2-163.7](#) of the Code of Virginia is amended and reenacted as follows:

§ 19.2-163.7. Counsel in capital cases

In any case in which an indigent defendant is charged with a capital offense, the judge of the circuit court, upon request for the appointment of counsel, shall appoint at least two attorneys from the list or lists established by the Supreme Court and the Indigent Defense Commission or as provided in subsection C of § 19.2-163.8 to represent the defendant at trial and, if the defendant is sentenced to death, on appeal. *In cases where the capital offense is charged by warrant in district court, the district court judge, upon hearing the defendant's request for the appointment of counsel, shall promptly refer the case to the judge of circuit court for appointment of counsel.* In all cases where counsel is appointed under this section after July 1, 2004, one of the attorneys appointed shall be from a capital defense unit maintained by the Indigent Defense Commission. This section shall be construed in conformity with the provisions of § 19.2-163.4. If prior to indictment the attorney for the Commonwealth declares in writing that the Commonwealth will not seek the death penalty, the capital defense unit attorney may upon motion before the circuit court seek to withdraw as counsel. The circuit court judge having heard the motion to withdraw shall permit the capital defense unit attorney to withdraw and shall appoint another attorney pursuant to the provisions of § 19.2-159. If the sentence of death is affirmed on appeal, the court shall, within 30 days after the decision of the Supreme Court of Virginia, appoint counsel from the same list, or such other list as the Supreme Court and the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding. The Attorney General shall have no standing to object to the appointment of counsel for the petitioner.

§ III – Training Requirements

Currently, the training requirement for lead and co-counsel is, within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours of specialized training required by Va. Code § 19.20163.8(A).

Recommendations:

The joint study committee recommends the following initial and continuing training requirements for capital counsel qualification:

Initial Training:

- I. An initial multi-day certification training (to be developed), which should include, but not be limited to presentations on:
 - A. Relevant state and federal law, including the representation of foreign nationals;
 - B. Pleading and Motions practice;
 - C. Pre-trial investigation, preparation, and theory development regarding guilt/innocence and penalty;
 - D. Jury selection;
 - E. Trial preparation and presentation, including the use of experts;
 - F. Investigation, preparation, and presentation of mitigating evidence;
 - G. Investigation, preparation, and presentation of mental health evidence including intellectual disability;
 - H. Ethical considerations particular to capital defense representation;
 - I. Preservation of the record for post-conviction review and capital appellate practice;
 - J. Relationship building with the client and the client's family;
 - K. Presentation and rebuttal of scientific evidence, OR
- II. Completion of comparable capital defense training approved by the VIDC.

- III. Qualified and experienced capital attorneys may qualify for a waiver of the initial certification training through the completion of a comprehensive application that demonstrates the attorney's:
- A. Substantial knowledge and understanding of the requirements of capital representation as reflected in the areas listed in Subsection I above;
 - B. Experience in providing high quality legal representation to persons charged with capital murder;
 - C. Skill in the management and conduct of complex negotiations and capital litigation;
 - D. Skill in legal research and drafting of litigation documents;
 - E. Skill in oral advocacy;
 - F. Skill in the use of expert witnesses and familiarity with forensic science;
 - G. Skill in the investigation, preparation, and presentation of mental health evidence;
 - H. Skill in the investigation, preparation, and presentation of capital mitigating evidence; and
 - I. Skill in the elements of capital trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

Continuing Training:

Every two years, the attorney must complete at least twelve hours of specialized training in capital litigation. Those twelve hours must include the following; two hours of training on the investigation, preparation, and presentation of mitigating evidence; two hours on the investigation, preparation and presentation of evidence bearing upon the mental status of the defendant; two hours on the presentation and rebuttal of scientific evidence, including DNA testing and evidence of DNA profile comparison; and two hours of capital appellate practice.

§ IV - Post-Conviction Counsel

"Post Conviction" is defined as direct appeal and habeas proceedings. Clemency proceedings are excluded as there is no statutory provision for clemency counsel.

Currently, the initial requirements for appointment as appellate and habeas counsel in capital trials is as follows:

Capital Appellate Counsel:

1. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice;
2. Have, within the past five years, briefed and argued the merits, after writs have been granted, in:
 - a. At least three felony cases in an appellate court;
 - OR
 - b. The appeal of a case in which the death penalty was imposed by the trial court;
3. Be thoroughly familiar with the rules and procedures of appellate practice.

Capital Habeas Corpus Counsel:

Habeas Corpus counsel must satisfy one of the following requirements:

1. Possess experience as counsel of record in Virginia or federal post conviction proceedings involving attacks on the validity of one or more felony convictions, as well as a working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences, including the training required by §19.2.163.8(A)(vii) of the Code of Virginia of 1950, as amended;

2. Have served as counsel in at least one capital habeas corpus proceeding in Virginia and/or federal courts during the past three years;
OR
3. Have at least seven years civil trial and appellate litigation experience in the Courts of Record of the Commonwealth and/or federal courts.

Recommendations:

The study committee makes the following recommendations with respect to qualifications for appointment as counsel on direct appeals of capital convictions and as counsel on habeas proceedings for persons sentenced to death:

**INITIAL QUALIFICATIONS FOR APPOINTMENT AS
COUNSEL ON DIRECT APPEAL OF
CAPITAL CONVICTIONS**

1. Every attorney appointed to serve as counsel on direct appeal for a defendant convicted of a capital offense and sentenced to death shall possess the following qualifications:
 - a. Be licensed to practice law in Virginia or be eligible for admission pro hac vice; and
 - b. Be thoroughly familiar with the rules and procedures of appellate practice; and
 - c. Have experience as counsel in direct appeals of felony convictions;
and
 - d. Have demonstrated a commitment to providing zealous advocacy and high quality legal representation; and
 - e. Have satisfied the training requirements set forth in paragraph 2.
2. Counsel appointed on direct appeal on capital cases shall have completed the initial certification requirements for appointment as trial counsel in a capital case.

There will be a continuing recertification requirement of two hours of particularized capital appellate training every two years. That training must be done through programming approved by the VIDC.

**INITIAL QUALIFICATIONS FOR APPOINTMENT AS COUNSEL
ON HABEAS PROCEEDINGS FOR PERSONS
SENTENCED TO DEATH**

1. Every attorney appointed to serve as counsel on habeas proceedings for a person convicted of a capital offense and sentenced to death shall possess the following qualifications:

- a. Be licensed to practice law in Virginia or be eligible for admission pro hac vice; and
- b. Be thoroughly familiar with the rules and procedures related to habeas proceedings; and
- c. Have demonstrated a commitment to providing zealous advocacy and high quality legal representation; and
- d. Have satisfied the training requirements set forth in paragraph 2.

2. Counsel appointed to serve as counsel in habeas proceedings shall have:

- a. Completed the initial certification requirements for appointment as trial counsel in capital case; and
- b. Complete 6 additional hours of particularized training in capital habeas procedure and practice as approved by the VIDC.

There will be a continuing recertification training requirement of six hours of particularized capital habeas training every two years. That training must be done through programming approved by the VIDC.

Conclusion

After a comprehensive review of the existing standards, the Committee has recommended changes for the qualification, training and appointment of defense counsel in capital murder cases. The goal of these recommendations is to insure that all capital defendants in Virginia are provided high quality legal representation. Therefore, this Committee seeks adoption of these recommendations by the Virginia Supreme Court and the Indigent Defense Commission.