

EFFECTIVE USE OF MENTAL HEALTH EXPERTS IN POTENTIALLY CAPITAL CASES

IDS Policy:

Counsel undertaking to represent a defendant in a potentially capital case have a duty to investigate independently and fully the underlying facts and circumstances of the crime charged, as well as all aspects of the defendant's character, background, or record that might call for a sentence less than death. *See Eddings v. Oklahoma*, 455 U.S. 104 (1992); *Lockett v. Ohio*, 438 U.S. 586 (1978). Counsel generally will not be in a position to select mental health experts until after a mitigation specialist and investigator have explored the facts of the case and the background of the defendant. Once an investigation is well underway, counsel will be in the best position to identify appropriate mental health professionals with expertise in the particular field or fields that will support counsel's overall theory and strategy for both phases of a potentially capital case.

Commentary:

As the Introduction to the Commentary for the 2003 *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* points out, the Eighth Amendment right to offer mitigating evidence is dependent upon a full investigation of the unique characteristics of the particular defendant. Thus, the presentation of mitigating evidence will only be persuasive if it is: "(a) consistent with that made by the defense and the guilt phase and (b) links the evidence offered in mitigation to the specific circumstances of the client." 31 HOFSTRA L. REV. 913, 927 (2003).

Guideline 10.4 of the ABA Guidelines thus requires that the defense team include at least one mitigation specialist and one fact investigator so that a complete investigation of both the facts of the case and the background of the defendant may be thoroughly explored. The importance of the mitigation specialist is emphasized in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). Once these two investigations have been well undertaken, counsel will then be in the best position to identify and explore the use of other experts who may be required and who may be helpful to a consistent theory for the trial of both phases of the case and a persuasive presentation of evidence.

While counsel should have at least one member of the team qualified by training and experience to screen the client for the presence of mental or psychological disorders and impairments, the background and training of a competent mitigation specialist fulfills this role. Therefore, *after* the mitigation specialist has explored the client's background and *after* the team has met to develop a tentative theory for the trial of both phases of the case is the time at which other experts in the field of mental health are most appropriately chosen. In other words, at that point, the team will be able to identify and choose mental health experts with an expertise in the particular field or fields that counsel chooses to use as a part of his or her overall trial strategy.

There are many mental health fields, and each case and client must be evaluated on an individual basis. For example, counsel may have a claim of mental retardation based upon school and employment records and family history developed by the mitigation specialist, and the wise choice for an expert would be a psychologist with expertise in mental retardation and/or developmental disabilities. In another case, the mitigation investigation may reveal a history of addiction with the client, along with a family history of addiction; in such a case, the wise choice for an expert would be a mental health professional with an expertise in addiction. In a final example, the mitigation specialist's work may reveal that the client has a history of diagnoses of mental illness and perhaps a genetic predisposition for mental illness; in such a case, the wise choice for an expert would be a forensic psychiatrist.

In the vast majority of cases, therefore, it is important to conduct a comprehensive investigation of the potential facts of both phases of the case *before* mental health experts are identified to evaluate the client. Of course, there are exceptions to every rule; for example, if counsel determines early on that the client appears deeply mentally disturbed or floridly psychotic, questions may immediately arise concerning competency or insanity. In such a case, counsel may legitimately require the services of a mental health professional to assist with and provide guidance on those issues quickly.

Another reason to wait until after investigation to identify potential mental health professionals is that then and only then will counsel be able to identify the appropriate referral question(s) for the expert. It is rarely fruitful to engage a mental health professional to examine the client to “see what’s wrong with him.” The more specific the referral question(s), the more useful the information gathered by the expert will be. The specificity of the referral question(s) is based upon information learned in the background mitigation and fact investigation. Examples of specific referral questions include:

- “Is the client competent to assist in his defense?”
- “Does the client have mental retardation?”
- “Was the client’s capacity to commit first-degree murder diminished by alcohol addiction, drug addiction, or mental illness?”
- “Was the client suffering from a mental or emotional disturbance at the time of the crime?”
- “Does the client have a neurological impairment that affected him or her at the time of the crime?”
- “Was the client insane at the time of the crime?”

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Authority:

G.S. 7A-498.3(c); 7A-498.5(c)(6), (c)(7), and (f); IDS Rules, Part 2D.