

BEST PRACTICE GUIDELINES IN POTENTIALLY CAPITAL CASES AT THE TRIAL LEVEL IN A TIME OF SEVERE BUDGETARY CONSTRAINTS

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INTRODUCTION: The primary purpose of these Guidelines is to identify ways in which counsel can try to limit the cost of their representation in potentially capital cases at the trial level without compromising the defendant's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, §§ 19 and 23, of the Constitution of North Carolina. While compliance with these guidelines is strongly encouraged, we recognize that exceptions might be warranted to address unique circumstances in a particular case.

GENERAL PRINCIPLES: In this time of reduced funding, all members of the defense team need to ensure that available resources are used to guarantee that the work that is absolutely necessary in representing a client is accomplished. The defense team cannot assume that there will always be additional resources available. These Guidelines are intended to assist defense team members in achieving the goal of providing effective representation with the resources that are available. These Guidelines do not address every conceivable situation that will arise, and experienced defense team members will need to find additional means of providing quality representation in a cost-effective manner. Nonetheless, there are some general principles that should be followed:

(1) **Prioritize.** It has always been difficult to do everything that might conceivably benefit a client. Counsel must prioritize what needs to be done to ensure that the most important work is done before resources in a case become scarce. It is counsels' responsibility to prioritize not only their own work, but the work that is being done by investigators, mitigation specialists, experts, paralegals, and anyone else working on the case. This is best accomplished with a specific investigative plan that is clearly communicated to those who are doing the work. Prioritizing may also mean delaying some work that would be necessary for a trial until it is clear that there will be a trial; spending hours preparing for trial in a case that is likely to plead is not an efficient use of resources.

(2) **Create and Use Meaningful Work-Product.** In the best of all possible worlds, every team member would review all of the discovery, watch every recorded interview, meet with every witness, see every piece of evidence, and attend every court hearing. This is not the best of all possible worlds. Rather than having multiple experts read discovery, counsel should review all of the discovery and create or oversee the creation of a digest, which can be done through Casemap or any homemade system. Other team members can review the digest to locate portions of the discovery that they need to review. Similarly, one person should be responsible for reviewing recorded interviews and ensuring that a workable digest is created; for important interviews this may mean having the interview transcribed. Creating a meaningful digest of discovery, transcripts, recordings, etc., takes time, but it generally pays off in time saved later in the case and it generates a useful system for retrieving needed information quickly.

(3) **Use Investigative and Expert Resources Wisely.** An investigator will generally be better at locating and interviewing witnesses than counsel. If counsel depletes the limited resources for investigation having the investigator attend court when it is not necessary, attend meetings with a prosecutor when it is not necessary, and review large volumes of discovery that are not needed to accomplish their investigative tasks, counsel will run out of money for investigation. Counsel should try to coordinate the work of investigators and mitigation specialists to cover all available witnesses in one trip, or combine witness interviews with record collection or crime scene examination. Similarly, if counsel take the time to put together material for an expert in a fashion that will assist the expert's review, and are clear with the expert on what they are expected to analyze, counsel will find that the resources for the expert's work will go farther.

(4) **Delegate When Appropriate.** There is work that can be done by a paralegal or student at a lower rate than if it is done by counsel or an investigator. For example, a large number of phone records, bank records, e-mail, etc., can be digested by a paralegal if counsel gives them the parameters of the work sought. If someone needs to copy documents, print photos, or pick up discovery, counsel should have this done by the least expensive person available for the work.

(5) **Watch Out for Even Small Costs.** IDS funds hundreds of new murder cases each year and, at any given time, has over a thousand active murder cases. Relatively small costs add up quickly. For example, law enforcement officers now take numerous digital photographs, some of which will need to be reviewed by experts, investigators, etc. Counsel should consider alternatives to printing out multiple copies, such as providing them on a CD or other media. Counsel should also spend time before trial or a hearing to determine which photographs will be used. The cost of printing color photographs may not seem to add much to an individual case but, multiplied by 1,000, it adds up.

(6) **Do Not Reinvent the Wheel.** If counsel runs into a new issue, chances are it has been dealt with by some other lawyer. Before spending hours researching and strategizing, counsel should seek guidance from other lawyers, consult the resources on the IDS website, or post a query on one of the listservs. If counsel runs into forensic issues, counsel should seek guidance from IDS' Forensic Resource Counsel before beginning a search for an expert or other resources.

I. INITIAL CLIENT VISIT

Counsel should try to see the defendant within forty-eight hours of being appointed to the case to advise the defendant of his or her rights, to warn the defendant about talking to other persons regarding his or her case, and to explain what is likely to happen in the near future.

Counsel should obtain contact information for family members and any other significant persons who are involved in the defendant's life.

Counsel should determine if the defendant is suffering from any mental, emotional, or

physical condition that would require the immediate assistance of a mental health expert to memorialize the defendant's condition, or the collection of blood, hair, or saliva for future testing.

Counsel should determine if there is potential evidence at the crime scene that needs to be collected or memorialized in any manner, *e.g.*, photographs, before the crime scene is released by law enforcement authorities or contaminated by other persons.

Counsel should determine if there are any witnesses to the alleged offense that need to be located and interviewed as soon as possible.

II. BOND REVIEW MOTIONS

Counsel should determine if there is any possibility that the defendant could post bail and, if so, consider filing a bond review motion. Even if the motion is not granted, it will demonstrate to the defendant that counsel is fighting for him or her.

III. EXPERTS

For IDS to be able to maintain its ability to ensure that appropriate requests for experts are funded, counsel need to comply with existing IDS policies and applicable case law. IDS Rule 2D.1 states: "Defense counsel will be required to make at least as specific an application to retain experts as would be required by a fair but exacting trial judge applying G.S. 7A-450(a) and *Ake v. Oklahoma* and its progeny." To have a request for expert funding reviewed, counsel must submit the request on the "Ex Parte Request for Expert Funding" form (IDS-28), which is available on the IDS website.¹ If funds for an expert are authorized, counsel must inform the expert that he or she will only be paid for the amount of work that was initially authorized based on the specific showing of need contained in the request; therefore, the expert must stop working on the case after the initial authorization has been exhausted unless additional funds are authorized. In addition, the expert should be informed of the exact nature of the work that was detailed in the expert request and authorized. Counsel should advise experts to keep close track of their hours and to notify counsel when they are close to exhausting the initial funds authorized. Counsel should also inform experts that they should not assume that additional funds will be authorized in every case.

If an expert requires additional funds after the initial authorization, counsel must submit the "Ex Parte Request for Expert Funding" form and set forth with particularity the need for additional funds. It will not be sufficient to state, "The expert has exhausted the funds approved in his or her initial authorization and needs additional funds" or "See prior request." If an expert request contains such language, it will be denied. In order to have a request for additional funds considered, it must set forth the work that the expert has performed and the work that remains to be done.

¹ See www.ncids.org. The "Ex Parte Request for Expert Funding" form must be filled out by counsel. Forms submitted by the expert will be denied.

Counsel should wait before submitting requests for experts other than an investigator or a mitigation specialist, including mental health experts, until he or she has obtained the defendant's educational, employment, and medical records, as well as any other relevant records that would allow counsel to determine the exact type of experts that are needed.² Absent exceptional circumstances, IDS will not authorize funds for more than one expert in a particular field.

Although counsel should postpone requesting funds for a mitigation specialist until the case is declared capital at the Rule 24 hearing, or it is apparent that the State intends to seek the death penalty, a request for a mitigation specialist will be considered at an earlier date if the client has a significant history of mental illness, or a current mental or emotional condition, that might affect the State's decision whether to proceed capitally.

Before submitting an Ex Parte Request for Expert Assistance, counsel should ascertain the expert's hourly rate and an estimate of the amount of funds the expert would need to complete the task. In addition, counsel should determine that the expert can provide the necessary assistance within the required time frame. Experts will only be paid for work in their area of expertise. For instance, investigators will not be paid for drafting cross-examination questions.

Before submitting a request for an expert outside of North Carolina or a contiguous state, counsel must determine if there is an expert in North Carolina who would be qualified to assist counsel in providing effective representation to the defendant. If counsel need assistance in attempting to locate an expert in North Carolina, counsel should IDS' Forensic Resource Counsel or go to IDS' "Forensic Resources" website.³ Funds for experts outside of North Carolina will only be authorized under exceptional circumstances.

IV. INVESTIGATORS AND FACT INVESTIGATION

Counsel should consider requesting funds for an investigator soon after being appointed to represent the defendant, so that the investigator can interview potential witnesses while the circumstances surrounding the alleged offense are fresh in the witnesses' minds and, if necessary, photograph the alleged crime scene and obtain any physical evidence that might deteriorate if not seized immediately.

After the initial interview with the defendant, counsel should prepare a list of tasks, including

² If upon counsel's initial meeting with the defendant it appears that he or she is under the influence of a mental or emotional condition that might have affected the defendant's behavior at the time of the alleged offense, or affected his or her ability to make a knowing and voluntary waiver of his or her rights, counsel should submit a request for a mental health expert as soon as possible.

³ See www.ncids.com/forensic/index/shtml.

interviewing witnesses, that he or she wants the investigator to perform. Counsel should also prioritize the various tasks for the investigator. In addition, counsel should establish a deadline for completing the tasks to ensure that the work is done in a timely fashion. Furthermore, counsel must closely supervise the work of investigators to ensure that they are working effectively and efficiently. Investigators will only be paid for investigative tasks.

Counsel should never give the investigator a copy of discovery and expect him or her to investigate the case without any guidance. In addition, counsel should never give the investigator parts of discovery to read unless it is specifically related to one of the witnesses he or she will be interviewing. IDS will only pay for time spent by an investigator reviewing discovery when the discovery has been provided to the investigator by counsel after counsel has reviewed the discovery and determined that the discovery is directly relevant to the investigator's work. IDS will not pay investigators for reviewing discovery that the investigator has obtained directly from the DA and that has not been reviewed by counsel. *See Infra* § VI Discovery.

Absent extraordinary circumstances, counsel should not accompany their investigator when the investigator is only attempting to locate witnesses or to interview collateral witnesses.

Unless counsel has a compelling reason not to, he or she should instruct the investigator to prepare written reports on the investigation he or she has done, as well as the witness interviews he or she has conducted. Having written reports will allow counsel (and, if necessary, IDS) to evaluate the effectiveness and efficiency of the investigator's work. In addition, if for some reason counsel has to replace the investigator, there will be a written record of what has been done in the case.

V. MITIGATION SPECIALISTS AND MITIGATION INVESTIGATION

As noted above, counsel should postpone requesting funds for a mitigation specialist until the case has been declared capital at the Rule 24 hearing or it is apparent that the State intends to seek the death penalty. A request for a mitigation specialist will be considered at an earlier date, however, if the client has a significant history of mental illness, or a current mental or emotional condition, that might affect the State's decision whether to proceed capitally. In choosing a mitigation specialist, counsel should seek one who is either close to the county where the defendant is being prosecuted or near the area where the defendant was raised.

After the State declares its intent to seek the death penalty, and funds for a mitigation specialist have been authorized, counsel should prepare a list of tasks, including interviewing potential mitigation witnesses, that he or she wants the mitigation specialist to perform. Counsel should also prioritize the various tasks for the mitigation specialist. In addition, counsel should establish a deadline for completing the tasks to ensure that the work is done in a timely fashion. Furthermore, counsel must closely supervise the work of the mitigation specialist to ensure that he or she is working effectively and efficiently. IDS will not pay for mitigation specialists to review discovery, unless it is necessary for the mitigation case. Additionally, mitigation specialists will only be paid for mitigation work and not for other tasks beyond their area of expertise.

Counsel should never give the mitigation specialist a copy of discovery and expect him or her to prepare the mitigation case without any guidance. In addition, counsel should never give the mitigation specialist parts of discovery to read unless it is specifically related to the mitigation investigation. *See Infra* § VI Discovery.

VI. DISCOVERY

Counsel should bate stamp discovery as soon as it is provided by the State to ensure that counsel can show what documents and other materials have been provided by the State, as well as the date on which they were provided.

Counsel should review the discovery before determining which portions, if any, should be provided to experts on the defense team, including investigators and mitigation specialists. If there are parts of discovery that counsel believe should be provided to one of one or more experts, they should determine whether it is cheaper to have the material copied or scanned to a disc.

Counsel should not give investigators, mitigation specialists or other experts significant portions of discovery to review or digest. Counsel should only provide experts with those statements, forensic reports, or other documents that are essential for the expert to assist counsel in preparing the case. IDS will not compensate experts for reviewing or digesting significant portions of discovery, and experts who submit invoices seeking compensation for reviewing or digesting discovery will not be paid for performing those tasks.

Counsel should determine the relevance and probative value of any information contained on a CD or other electronic device before deciding whether it is essential that the information on the CD be transcribed. If the information on the CD or other electronic device needs to be transcribed, counsel should attempt to use a legal assistant or paralegal who will be paid \$15.00 per hour for performing this task, or a transcriptionist who will be paid \$25.00 per hour.

VII. AUTOPSY REPORTS AND CRIME SCENE PHOTOGRAPHS

Because it often takes the State several months to provide the defendant with discovery, counsel should seek to obtain the autopsy report on the victim(s) as soon as possible after being appointed to the case. In addition, counsel should attempt to obtain copies of the photographs taken during the autopsy. Counsel does not need to wait for these items to be provided in discovery because they can be obtained directly from the medical examiner's office. Both the autopsy report and the photographs can be valuable tools in showing the defendant and his or her family the full extent of the injuries inflicted on the victim, the seriousness of the case and, depending on the facts of case, the advisability of accepting a plea offer tendered by the State.

To help reduce the costs of having copies of photographs developed, counsel should consider having the photographs scanned to a CD, which could be copied if necessary.

VIII. MOTIONS

Other than motions to preserve evidence or to request voluntary discovery from the State pursuant to N.C. Gen. Stat. § 15A-902, counsel should delay drafting and filing pre-trial motions until the case is either declared capital at the Rule 24 hearing or, in a non-capital case, it appears that the case will not be resolved pursuant to a plea bargain. In order to avoid missing the deadlines set forth in N.C. Gen. Stat. § 15A-952, counsel should seek an Order from the court that allows counsel at least sixty days after discovery is complete to file pre-trial motions. However, counsel must follow deadlines unless and until a Court has ordered an extension.

IX. LEGAL VISITS

Counsel should schedule regular legal visits with the defendant, *e.g.*, at least once every sixty days, to ensure that he or she develops a relationship of trust with the defendant and that the defendant does not feel that his or her case is being neglected.

Absent extraordinary circumstances, the entire defense team should not meet with the defendant or the defendant's family unless absolutely necessary. For instance, a group meeting may be necessary to discuss with a defendant, or his or her family, the benefits of a plea or to prepare for trial.

During a legal visit, especially in the early stages of the case, counsel should avoid giving their opinion on the strengths or weaknesses of the State's case, in order to avoid giving the defendant an unrealistic, inaccurate, or misleading assessment of his or her case. In some cases, counsel have had great difficulty persuading a client to accept the State's plea offer after they had initially advised the defendant that his or her case was not really a capital or first-degree murder case.

With the exception of counsel, members of the defense team should not give the defendant legal advice or offer their opinion regarding the case unless specifically requested to do so by counsel.

X. COURT APPEARANCES

Investigators and mitigation specialists should only attend court when their presence is necessary. IDS will pay for an investigator's or mitigation specialist's time in court when their presence is necessary and funding for that purpose has been preapproved, such as during evidentiary portions of hearings, trial, or sentencing because they are expected to testify, because they interviewed witnesses who are testifying and need to be available to consult with counsel, or because they are directly involved in ensuring that a defense witness is available in court. Although it may be useful to have an investigator, mitigation specialist, or Fair Trial Initiative (FTI) Fellow in court to take notes, give feedback, keep track of exhibits, or access discovery, IDS cannot afford to pay for

investigators, mitigation specialists, or FTI Fellows to perform these tasks. Investigators and mitigation specialists should rarely need to be present for a probable cause hearing, status conference or administrative hearing, non-evidentiary hearings on pre-trial motions, or the entry of a plea and sentencing when they are not offering evidence. IDS will not pay for time spent by investigators, mitigation specialists, or FTI Fellows to attend jury selection, opening statements, closing arguments, or deliberations.

In exceptional cases, IDS may authorize funding for a paralegal, student, or FTI Fellow to assist in court. Counsel will need to follow the authorization process before utilizing these expert services, and will need to detail the nature of the court proceeding and the specific work to be done.

XI. OUT-OF-STATE TRAVEL

To the extent possible, counsel should delay submitting a request for authorization of out-of-state travel until the State has been authorized to seek the death penalty at the Rule 24 hearing or it is apparent that the State intends to seek the death penalty. Absent exceptional circumstances, funds will only be authorized for one member of the defense team to travel outside of North Carolina. For non-capital cases, requests for out-of-state travel will only be approved if counsel makes a strong showing that the case will be going to trial, the witness is necessary for trial, and there is a particularized need for the travel.

XII. CONSULTS

In order to make consults as productive as possible, counsel should submit the Consult Information Sheet (CIS) at least one week prior to the consult. The CIS is posted on the IDS website, along with the IDS policy regarding mandatory consultations.⁴

Absent extraordinary circumstances, the entire defense team should not attend consults in the early stages of the case. Once a case is set for trial, however, it may be appropriate for every member of the defense team to attend the consult.

XIII. SURVEYS AND FOCUS GROUPS

Absent extraordinary circumstances, IDS will not authorize funds for private vendors to conduct county-wide surveys to ascertain the extent to which pre-trial publicity has affected the opinions of potential members of the jury pool about the defendant's guilt or innocence, or the appropriate punishment if the defendant were to be found guilty of first-degree murder. Similarly, IDS will not pay for focus groups on a case. If counsel want to conduct a survey or have a focus group, he or she will have to recruit college or law students to do the work.

⁴ See www.ncids.org.

XIV. POLYGRAPH EXAMINATIONS

Absent extraordinary circumstances, funds for polygraph examinations will only be authorized if a defendant has been extended a plea offer but refuses to accept the offer based on a claim of innocence.

XV. TRIAL PREPARATION

To the extent possible, counsel should delay preparing their opening statement, cross-examinations of the State's witnesses, direct examinations of defense witnesses, and closing argument until the case is either declared capital at the Rule 24 hearing or, in a non-capital case, it appears that the case will not be resolved pursuant to a plea bargain.

For capital cases, IDS will authorize up to \$500.00 for a member of the defense team to perform background checks on jurors. Generally, no funds will be authorized for background checks in a non-capital case.

To help reduce costs in potentially capital cases, counsel are encouraged to utilize students, paralegals, legal assistants, and FTI Fellows, who are compensated at substantially lower rates than attorneys. As with other experts, however, counsel must closely supervise the work of these individuals to ensure that they are working effectively and efficiently.⁵

⁵ Consistent with the IDS policy for investigators and mental health specialists, students, paralegals, legal assistants, and FTI Fellows will not be compensated for assisting with jury selection or for performing tasks one of the attorneys should perform.