



OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

Date: December 7, 2012

To: Public Defender Commission

From: Eric Olson and Kristina Neal

Re: Proper hourly rate for investigator in the *Spell* and *Waters* death penalty cases

General Requirements: *The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (“ABA Guidelines” or “Guidelines”)

Unless legal representation at each stage of a capital case reflects current standards of practice, there is an unacceptable “risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Accordingly, any jurisdiction wishing to impose a death sentence must at minimum provide representation that comports with the ABA Guidelines. *Commentary to ABA Guideline 1.1, “Conclusion”*

The ABA’s Guidelines have been cited widely in decisions by state and federal courts, including the Supreme Court in *Rompilla v. Beard*, a 2005 decision finding ineffective assistance of counsel in a death case.

The commentary to Guideline 4.1—The Defense Team and Supporting Services provides in part:

The assistance of an investigator *who has received specialized training is indispensable* to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings. Although some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel, the prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation. Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness. As a result, an investigator should be part of the defense team at every stage of a capital proceeding.

More specifically, Guideline 9.1 C. provides:

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 by those who assist counsel with the litigation of death penalty cases.

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3. Members of the defense team assisting private counsel *should be fully compensated* for actual time and service performed **at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services**, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

Factors specific to the Spell and Waters case:

This capital case presents extraordinary and unique challenges to the presentation of an effective defense. Sidney, Montana is located in the fairly remote Northeast corner of the State. Its airport is serviced by one airline that provides limited flights out of Billings.

Sidney's remoteness is only the beginning of the challenges presented by *Spell*. There are also the challenges presented by the oil boom in the Bakken oil field in North Dakota and Montana. This development has made working in Sidney more difficult and costly than other cases. Hotels are often fully booked well in advance (filled by individuals associated with the work in the oil fields) or have only a limited number of rooms available at the "state rate."

As a result, it is very valuable to have experienced investigators based in Billings. With Billings as a home base for both investigators, they are able to visit the clients more readily than from any other major Montana city. Both investigators, Ron Cummings and Tom Taggart, typically can make the trip to Sidney (the location of defendant Spell) or Glendive (the location of defendant Waters) in one day without the need for an overnight stay.

Sidney's remoteness makes visits by a mitigation specialist extremely difficult. Therefore, an investigator with mitigation knowledge and skills is an invaluable asset. If not for Ron, Spell's mitigation specialist would be forced to travel from California to Sidney to conduct mitigation interviews with Mr. Spell. Each trip would necessitate a long day of travel and one or two overnight stays, all at great expense to the OPD. Ron and the mitigation specialist have also been coordinating their efforts because certain witnesses involve overlapping mitigation and case investigation issues. The same applies in the Waters case, in which the mitigation specialist would be traveling from Arizona to Montana. Just as in the Spell case, Tom and Mr. Waters' mitigation expert have been coordinating interviews and working in a joint manner.

Moreover, Mr. Cummings' and Mr. Taggart's ability to visit the clients on a regular basis has allowed counsel to make less frequent visits to eastern Montana at great savings to the OPD yet provide invaluable assistance in helping the defense team develop the necessary relationship with the client. In the case of Mr. Waters, although Regional Deputy Cindy Thornton is involved in the case, she is also trying to single-handedly run one of the largest and most booming regions in our state. Tom's involvement in the case and his ability to maintain personal contact with Mr. Waters has taken huge pressure off Ms. Thornton.

Factors specific to Mr. Ron Cummings

Ron Cummings is uniquely qualified to work on capital cases. This is the third capital case he has worked for Avignone and Banick. He worked on the Montana federal capital case *United States. v. Weber* where he was involved in the mitigation and guilt phase investigation function. While working on the federal capital case, Ron received specialized capital case training by attending a program sponsored by the Administrative Office of the U.S. Courts and Federal Death Penalty Resource Counsel Project.

It should be emphasized that Ron Cummings is presently being compensated for his work in the *Spell* case at the same hourly rate he is paid by retained counsel and the federal government **not** for similar services, but the same rate he is paid for non-death penalty cases. Over the past decade Attorneys Avignone and Banick have retained Mr. Cummings in a variety of challenging cases including three capital cases.

Factors specific to Tom Taggart

Tom Taggart has approximately thirty years of investigation experience, including numerous homicide investigations. As with Mr. Cummings, Mr. Taggart has greatly reduced his private practice because of his involvement in this case. Due to the nature of this case, Mr. Taggart has been willing to make himself immediately available for travel for interviews throughout numerous states.

Mr. Cummings' and Mr. Taggart's present hourly rate of \$75.00 is commensurate with, or lower than, the prevailing rates paid by retained counsel in the jurisdiction for similar services.