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The Ohio Supreme Court's Move Toward Quality Control of Court-Appointed Counsel for Indigent Defendants Charged With Capital Offense Crimes

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The Ohio Supreme Court has moved to improve the quality of legal representation for indigent defendants facing the death penalty. Common Pleas Superintendent Rule 65 (hereinafter C.P.Sup.R. 65) is a three-part rule used to determine and regulate the minimum standard qualifications required for an attorney to be eligible for court-appointment as legal counsel for indigent defendants charged with capital offense crimes. C.P.Sup.R. 65 delineates the specific eligibility requirements for court-appointed counsel, both on the trial and the appellate level. The Rule also establishes the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (hereinafter Oversight Committee) and provides guidelines for its operation. Finally, the Rule identifies the proper procedure for appointing counsel, for notifying the Oversight Committee of the appointment and for providing support services to counsel.

The Rule itself is unique because it is the first of its kind designed specifically to enhance the quality of court-appointed counsel for indigent capital defendants. Justice Andrew Douglas' concern over ineffective assistance of counsel in capital offense cases, especially after the decision in State v. Johnson, sparked
the Ohio State Bar Association (hereinafter O.S.B.A.) Criminal Justice Committee to form the Subcommittee on the Appointment of Counsel for Indigents in Capital Cases to address the problem. The efforts of the Subcommittee, approved by the O.S.B.A., and later by the Ohio Supreme Court, became C.P.Sup.R. 65.

This comment outlines the law in Ohio concerning court-appointed representation of indigent defendants in capital offense cases. A brief look at Ohio’s “pre-C.P.Sup.R. 65” period provides the proper backdrop in which to examine C.P.Sup.R. 65’s relation to the Ohio Public Defender’s Regulations and the impact this rule may have throughout the State.

INDIGENT DEFENDANTS IN CAPITAL CASES: THEIR RIGHTS AND THE LAW IN OHIO

Concepts of “fundamental fairness” require that an indigent defendant be provided with effective counsel. Unless waived, the appointment of counsel is mandatory in trials where the indigent defendant is charged with a capital offense. The sixth and fourteenth amendments of the United States Constitution provide protection from any encroachment of these rights. These rights are similarly protected in article I, section 10 of the Ohio Constitution, which guarantees due process rights to all persons in Ohio.


Letter from Professor Margery Koosed, supra note 2.


The National Legal Aid and Defender Association has prepared Standards for the Appointment and Performance of Counsel in Death Penalty Cases (Dec. 1, 1987) for adoption in all states with the death penalty. This Comment is limited to C.P.Sup.R. 65’s origin and its likely impact in Ohio.

See 17 O. Jur. 3d Const. Law § 649 (1987); The standard of “fundamental fairness” appeared in Powell v. Alabama, 287 U.S. 45 (1932), where that fourteenth amendment analysis at the time prevailed, later being reprocessed as part of the “selective incorporation” of the sixth amendment through the fourteenth amendment. LaFave, Israel, Criminal Procedure § 11.1 (1985).

In Ohio, the determination of indigency is made pursuant to Ohio Rev. Code Ann. §§ 120.05 and 120.15 (Anderson 1984) and Ohio Admin. Code § 120-1-13 (1987); See Ohio Crim. R. 44 (Appointment of Counsel); See also Annotation, Determination of Indigency of Accused Entitling Him to Appointment of Counsel, 51 A.L.R.3d 1108 (1973).


The technical assistance needed in capital cases requires the presence of attorneys “to assume rights are fully protected and the trial is fair.” See 29 O. Jur. 3d Crim. Law § 1444 (1987). Although mandatory offering of counsel is required to be available, a defendant is not required to take advantage of these rights provided the trial court makes sufficient inquiry to ascertain that the defendant fully understands and intelligently relinquishes the right. State v. Gibson, 45 Ohio St. 3d 366, 345 N.E.2d 399 (1976).

Ohio Const. art. 1, § 10.

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a statutory right to appointed counsel since 1816. Appointed counsel cannot refuse to represent an indigent defendant without facing possible contempt charges.

Although fundamental errors are always reversible, in Ohio, a presumption exists that court-appointed counsel is competent and not inexperienced. The burden of showing a violation of due process rests on the shoulders of the defendant. The inherent problem this presents is whether an indigent defendant will be able to recognize if a due process violation has occurred because of the ineffective assistance of his or her counsel. Ironically, the persons in the best position to recognize such a violation, are the appointed counsel themselves. Indigent and unable to procure counsel independent of the county or the state, the defendant literally has nowhere else to turn. For this reason, the initial appointment of competent counsel for an indigent defendant, especially in capital cases, is vital to prevent ineffective representation and a possible violation of the defendant's due process rights.

Ohio courts, recognizing the inherent problems with ineffective lawyers, have stated that a court should appoint experienced, competent lawyers. In Ohio, appointment of counsel is not meant to be an empty formality. The court must inform a defendant of his or her court-appointed counsel. Once appointed, counsel has wide latitude to choose among trial tactics, such as deciding not to call witnesses at the trial. Trial tactics are not reversible. Some courts have held that a counsel's representation is reversible only if the representation was so ineffective that it was as if there had been no legal representation at all. Prior to C.P.Sup.R. 65, no statute or court rule concerning qualified court-appointed counsel was in effect. Standards of review in Ohio remained vague interpretations of case law.


23"We hold it to be the obligation of experienced criminal practitioners to accept appointment to represent indigent defendants in appeals." State v. Toney, 23 Ohio App. 2d 203, 206, 262 N.E.2d 419, 422 (1970).

24See Annotation, Attorney’s Refusal to Accept Appointment to Defendant Indigents, or to Proceed in Such Defense, 36 A.L.R.3d 1221 (1971).


28Williams, 19 Ohio App. 2d 234, 250 N.E.2d 907.

29Toney, 23 Ohio App. 2d 203, 262 N.E.2d 419.


31In re Motz, 100 Ohio App. 296 (1955).


STATE v. JOHNSON
SPRINGBOARD TO C.P.SUP.R.65

In 1986, the Ohio Supreme Court decided State v. Johnson, holding that defense counsel’s failure to object when a non-statutory aggravating factor in the penalty phase of a capital case was submitted to the jury, constituted ineffective assistance of counsel. The Court further held that the trial court’s refusal to grant a continuance, where new evidence arose on the first day of trial, deprived the defendant of a fair trial.

Johnson was the launching pad for C.P.Sup.R. 65. In Johnson, the defendant was indicted for the aggravated murder of a desk clerk at the Reno Hotel in Cleveland, Ohio. Before the jury selection, defense counsel asked the court for a continuance, informing it that new evidence had been discovered: there were persons inside the hotel at the time of the murder and defense counsel had not had an opportunity “to ascertain their identities or otherwise investigate them.” Defense counsel requested one week to examine the evidence. The trial judge refused to grant the continuance “in view of defense counsel’s expertise and experience in criminal cases” and because the prosecution’s evidence was only circumstantial. The trial judge found no compelling reason for granting the continuance.

After the trial, the jury returned a guilty verdict on all charges and specific aggravating factors. Defense counsel then asked for only a ten minute break to explain the penalty phase of the proceeding to the defendant in order “to consider what action [defense counsel] would like for him to take.” After the break, the hearing was scheduled for the next morning.

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35 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986).
36 Id.
37 Id.
38 Id.
39 Defendant “was indicated for aggravated murder with two specifications: (1) that appellant was committing or attempting or fleeing immediately after committing or attempting to commit aggravated robbery, and (2) that appellant had a firearm on or about his person or under his control.” Id. at 87, 494 N.E.2d at 1062.
40 Id.
41 The record indicated that defense counsel may have had five months to investigate the new evidence. Id. at 105, 494 N.E.2d at 1075 (Douglas, J., dissenting).
42 Id. at 87, 494 N.E.2d at 1062.
43 Id. at 88, 494 N.E.2d at 1062.
44 Id. at 87, 494 N.E.2d at 1062.
45 Defense Counsel also made an alternative motion to be excused from the case. Counsel asserted that they could not provide appellant with effective assistance of counsel. The court also overruled this motion. Id. at 88, 494 N.E.2d at 1062.
46 Id.
47 Id.
48 Id.
At the penalty hearing, the defense produced only the unsworn testimony of the defendant, while the prosecution produced four exhibits and examined two witnesses. The jury recommended the death penalty and the trial court adopted the jury’s recommendations. The appellate court affirmed the sentence and conviction.

In the majority opinion, Justice Clifford Brown stated that Johnson was "denied his constitutional right to effective assistance of counsel." The majority found that defense counsel had failed to investigate the defendant’s background for mitigation evidence and therefore failed to present any such evidence at the penalty phase of the trial. The Court stated that these failures in themselves do not “constitute proof of ineffective assistance of counsel or deprivation of the accused’s right to a fair trial,” and recognized that there might exist tactical, well-planned reasons for not providing mitigation evidence “completely consonant with [counsel's] duties to represent the accused effectively.” However, the Court listed eight mitigating circumstances that defense counsel did not use at all, "illustrat[ing] the utter lack of informed, calculated decision-making” on the part of the defense counsel.

Defense counsel also failed to object to the prosecution’s submission to the jury, during both the guilt and the penalty stages of the evidence of possession of a firearm as an aggravating factor. The Court found that the prosecutorial evidence admitted violated statutory law and that it was a reversible error. The majority also admonished the trial court for its failure to grant a continuance stating that refusal to allow investigation of vital facts “substantially prejudiced [Defendant’s] ability to present a complete defense, and deprived him of the effective assistance of counsel.” The Court thereby found blame in the effective assistance of counsel in both the court and the counsel themselves.

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49 Id.
50 Id.
51 Id.
52 Id. at 88, 494 N.E.2d at 1063.
53 Id.
54 Id. at 91, 494 N.E.2d at 1065.
55 Id.
56 Id. (footnote 5). These included Defendant’s marriage and family, his battle with and eventual triumph over drug abuse and the fact that he turned himself in voluntarily to the police upon hearing of the warrant for his arrest.
57 Id. at 92, 494 N.E.2d at 1065.
58 Id.
60 However, the court went through lengths to determine this analysis of statutory violation. Id. at 92-93, 494 N.E.2d at 1065-66. Would counsel at the trial stage be prepared to know arguments to keep the evidence from being admitted?
61 Id. at 94-95, 494 N.E.2d at 1067-68.
62 Id. at 95, 494 N.E.2d at 1068.
Justice Wright, concurring in part and dissenting in part, placed more blame on the trial court: "I think the trial court’s failure to provide counsel reasonable time and opportunity to prepare and present evidence in mitigation of the imposition of the death penalty was a clear denial of due process . . . A duty rests on the court to see the accused’s rights are upheld." 63

Justice Douglas dissented, 64 finding that "there is simply no sound legal basis upon which to overrule both the trial and appellate courts’ decision." 65 In a lengthy restatement of the facts, Justice Douglas emphasized that defense counsel had handled the case for five months, 66 stressing that: (1) defendant was granted change of counsel and given a new attorney of record "specifically chosen" by defendant; 67 (2) the "new evidence" was available to defense counsel since discovery; 68 and, (3) the continuance was the third one which had been requested. 69 Justice Douglas found that the submission of the non-statutory aggravating circumstances admitted into trial without objection did not deny defendant a fair trial and defense counsel’s assistance did not violate due process. 70 Justice Douglas therefore saw no reason to set aside the conviction or the death sentence. 71

Justice Douglas did see a need to curb the incidence of ineffective assistance of court-appointed counsel for indigent defendants in capital cases. On June 18, 1986, the day that the Johnson opinion was released for publication, Justice Douglas wrote the O.S.B.A. and the Ohio Public Defender’s Office expressing concern over this problem. 72 Disagreeing with the majority’s finding of effective assistance of counsel in the Johnson case, 73 Justice Douglas suggested "that it is time for us to set some standards for training counsel and handling [death

63 Id. at 98-99, 494 N.E.2d at 1070-71 (Wright, J., concurring in part and dissenting in part).
64 Id. at 100, 494 N.E.2d at 1072 (Douglas, J., dissenting).
65 Id. at 103, 494 N.E.2d at 1075 (Douglas, J., dissenting).
66 Id. at 105, 494 N.E.2d at 1075 (Douglas, J., dissenting).
67 Id.
68 Id.
69 Id. at 109, 494 N.E.2d at 1078 (Douglas, J., dissenting).
70 One basis for Justice Douglas’s decision is his interpretation of Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, a two-part test is established for determining whether there has been effective assistance of counsel: Was the counsel’s assistance reasonable considering all circumstances and is there a reasonable probability the result of the proceeding would have been different? Id. at 694. Justice Douglas found that defendant’s claim did not meet the second part of the test. Johnson, 24 Ohio St. 3d 87, 106, 494 N.E.2d 1061, 1076 (1986) (Douglas, J., dissenting).
71 Johnson, 24 Ohio St. 3d at 100, 494 N.E.2d at 1072 (Douglas, J., dissenting).
72 Letter from Justice Douglas, supra note 11.
73 Johnson, 24 Ohio St. 3d at 100, 494 N.E.2d at 1072 (Douglas, J., dissenting).
penalty cases] and provide a procedure for that training and for the selecting of lawyers’ involved in that type of case. Justice Douglas’ suggestion of standardizing the competency levels required of court-appointed counsel was the beginning of C.P.Sup.R. 65. The President-elect of the O.S.B.A. contacted the Criminal Justice Committee about this issue. The Criminal Justice Committee then appointed a Subcommittee comprised of attorneys in Ohio with special knowledge involving capital punishment cases. This Subcommittee focused solely on capital cases where the court appointed attorneys for indigent defendants.

While this process was evolving, the Judicial Conference of the Eighth Judicial District adopted a proposal to amend the court rules. It mandated that court-appointed attorneys for indigent defendants charged with a capital offense in Cuyahoga County Courts who are appealing such cases into the Eighth Appellate Judicial District of Ohio, must have successfully completed at least five hours of a continuing legal education seminar dealing specifically with defending capital cases. C.P.Sup.R. 65 goes far beyond the Cuyahoga County and Eighth District Court Rules. C.P.Sup.R. 65 requires actual experience in specific types of criminal cases before the court may appoint an attorney for an indigent defendant charged with a capital crime.

After the Ohio Supreme Court enacted C.P.Sup.R. 65, Chief Justice Moyer stated, “Ohio is the first state in the nation to adopt a mandatory rule establishing standards for the appointment of counsel for indigents in death penalty cases. This demonstrates the Supreme Court’s commitment to maintaining and enhancing the skills of lawyers who represent indigent clients in capital cases.”

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74 Letter from Justice Douglas, supra note 11. The letter continues: “The reasons for such a suggestion would appear obvious, the most important being, of course, that defendants so charged should have the most able of attorneys, properly trained in this specialty, to represent them as they stand trial for their very life.” Id. at 1.

75 Report of the Subcommittee on the Appointment of Counsel, supra note 13.

76 Id. This membership includes, among others, a professor of law, general practitioners and a National Legal Aid and Defender Association liaison. Id. at i.

77 Id. at ii.

78 Cuyahoga County Rule 33 (I) § 1 (E) - (F) (1987): Local Rules of Eighth Appellate Judicial District (1987) which reads in pertinent part:

No Lawyer may be assigned to represent on appeal a defendant sentenced to death unless the lawyer has successfully completed a continuing legal education seminar respecting the defense and/or appeal of capital cases during the year prior to his appointment. The successfully completed seminar shall be sponsored by a qualified criminal defense organization or bar association and compromise a minimum of five hours of instruction on the defense and/or appeal of capital cases.


80 There are exceptions in C.P.Sup.R. 65 to the requirement of specific trial experience. C.P.Sup.R. 65 (I)(A)(4) and (I)(B)(3) (Baldwin 1987).

81 Ohio Supreme Court Press Release (Oct. 15, 1987).

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The state has a great interest in implementing C.P.Sup.R. 65.82 C.P.Sup.R. 65 is implemented through the rule-making power granted to the Supreme Court of Ohio by the State Constitution.83 The Ohio Constitution specifically provides for the Supreme Court to promulgate rules of superintendence over all of Ohio.84 Although the Preface to the Rules of Superintendence for Common Pleas Courts states that the Rules are made for the benefit of the public,85 a benefit to the courts will also arise. Hopefully, C.P.Sup.R. 65 will reduce the number of reversals and claims of ineffective assistance of counsel.

C.P.Sup.R. 65 is divided into three parts. Part I of this rule deals with the qualifications needed for court-appointment of counsel; Part II establishes and empowers the Oversight Committee; and, Part III outlines the procedures for court-appointment.86

Part I, which establishes minimum qualifications needed for court-appointment, is based on the Ohio Public Defender Commission’s requirements as set forth in the Ohio Administrative Code Section 120-1-10.87 However, the Administrative Code requirements are not mandatory, and the Committee Comments to C.P.Sup.R. 65(I) indicate that “significant” numbers of court-appointed counsel may fall beneath the minimum required standard.88

Both C.P.Sup.R. 65 and Ohio Administrative Code Section 120-1-10 require that the defendant be provided with two attorneys for the trial,89 that the counsel be admitted to the Ohio bar or be admitted to practice pro hac vice90 and the lead counsel has to have at least three years of litigation experience.91

82 State v. Hill, 12 Ohio St. 2d 88, 232 N.E.2d 394 (1967); “In a criminal case, the interest of the state and its citizens is involved as well as the interest of the accused. Ascertainment of the truth is always of paramount importance.”

83 Ohio Const. art. IV § 5(A)(I) reads:

In addition to all other powers vested by this article in the Supreme court, the Supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme court.

84 Id. However, unlike rules of procedure and practice, which supercede existing or subsequent legislation under sec. 5(B), rules of superintendence will not invalidate any statute. They are derived from Sec. 5(A)(I) of art. IV of the Ohio Constitution, not 5 (B). State v. Lacy, 46 Ohio App. 2d 215, 348 N.E.2d 381 (1975).

85 Preface to the Rules of Superintendence, which reads in part:

It is to be remembered that the courts are created not for the convenience or benefit of the judges and lawyers, but to serve the litigants and the public at large.

86 C.P.Sup.R. 65 (I) (Baldwin 1987).

87 Committee Comments to C.P.Sup.R. 65.

88 Id.

89 C.P.Sup.R. 65 (I)(A)(I) (Baldwin 1987) and OHIO ADMIN. CODE § 120-1-10 (A)(I)(a).

90 C.P.Sup.R. 65 (I)(A)(2)(a) (Baldwin 1987) and (I)(A)(3)(A); and, OHIO ADMIN. CODE § 120-1-10 (A)(I)(b) and (c).

91 C.P.Sup.R. 65 (I)(A)(2)(b) (Baldwin 1987) and OHIO ADMIN. CODE § 120-1-10 (A)(I)(b).
and specific criminal court experience.\textsuperscript{92} C.P.Sup.R. 65 additionally requires that at least one attorney (at both the trial and appellate levels) maintain an office in Ohio\textsuperscript{93} and that the lead counsel "have had some specialized training in the defense of persons accused of capital crimes."\textsuperscript{94}

The requirements for co-counsel are identical in the Rule and the Administrative Code.\textsuperscript{95} Each requires criminal or civil trial experience, or at least specialized training for defending persons accused of capital crimes.\textsuperscript{96}

If an attorney does not meet the minimum requirements under C.P.Sup.R. 65, the court-appointed attorney requirements may be waived for that particular case if an Oversight Committee majority is convinced that the defendant will receive competent legal representation.\textsuperscript{97} The Administrative Code allows for the trial judge to decide whether to permit an attorney, who does not meet the Administrative Code requirements, to represent an indigent defendant.\textsuperscript{98} The Ohio Public Defender Commission has the power, under the Administrative Code, to refuse to approve reimbursement to the county for the court-appointed counsel.\textsuperscript{99} Now, under C.P.Sup.R. 65, the trial judge no longer has the authority to determine if an attorney, who does not meet the minimum requirements set forth in the Rule, may represent an indigent defendant in a capital case. Only the Oversight Committee has the authority to waive the qualification requirements.

Ohio Administrative Code Section 120-1-10 recommends that at least two attorneys should represent a single defendant.\textsuperscript{100} C.P.Sup.R. 65 mandates that two attorneys be court-appointed to appeals cases.\textsuperscript{101} Both appellate attorneys must be admitted to the Ohio bar, or admitted to practice pro hac vice.\textsuperscript{102} Both attorneys must have three years litigation experience\textsuperscript{103} and have "adequate criminal appellate, post-conviction or habeas corpus experience commensurate with the appellate responsibilities of a capital case."\textsuperscript{104}

The second part of C.P.Sup.R. 65 establishes the Oversight Committee.\textsuperscript{105}

\textsuperscript{93}C.P.Sup.R. 65 (I)(A)(1) (Baldwin 1987) and \textit{Ohio Admin. Code} § 120-1-10 (B)(1).
\textsuperscript{94}C.P.Sup.R. 65 (I)(A)(2)(c) (Baldwin 1987).
\textsuperscript{97}C.P.Sup.R. 65 (I)(A)(4) (Baldwin 1987).
\textsuperscript{98}\textit{Ohio Admin. Code} § 120-1-10 (A)(1)(d).
\textsuperscript{100}\textit{Ohio Admin. Code} § 120-1-10 (A)(6)(a).
\textsuperscript{101}C.P.Sup.R. 65 (II)(B)(1) (Baldwin 1987).
\textsuperscript{102}C.P.Sup.R. 65 (I)(B)(1) (Baldwin 1987).
\textsuperscript{103}C.P.Sup.R. 65 (I)(B)(2)(b) (Baldwin 1987).
\textsuperscript{104}C.P.Sup.R. 65 (II)(B)(1) (Baldwin 1987).
\textsuperscript{105}C.P.Sup.R. 65 (II)(A) (Baldwin 1987).
The five-member Oversight Committee is selected by the Ohio Supreme Court, the O.S.B.A. and the Ohio Public Defender Commission. Each member must be an attorney who is a member of the Ohio bar. The appointed member must have performed criminal work for at least five years and have demonstrated a knowledge of the law and practice of capital cases. The appointed member cannot be a prosecuting attorney or similar employee of any court. Each position lasts for five years. The Oversight Committee itself cannot be composed of more than three members of the same political party. In order to ensure state-wide participation in the Oversight Committee, no more than two members can reside in the same county. The Oversight Committee is required to meet at least four times a year.

The Oversight Committee’s main function is to determine which attorneys are eligible to represent indigent defendants in capital cases and to provide a list of all eligible attorneys to the proper appointing courts. Each county is provided one list dividing the attorneys into categories of lead counsel, co-counsel and appeals counsel. C.P.Sup.R. 65 also calls on the Oversight Committee to develop criteria and procedures that include “some form of mandatory continuing legal education in the defense of capital cases.”

The Committee Comments to C.P.Sup.R. 65 indicate the limitations of the Oversight Committee’s authority and power: “However, the [Oversight] Committee shall not attempt to interfere with the conduct of a particular case, nor seek to remove counsel over the objection of the attorney and client . . . Removal of counsel from representation therefore should not occur unless the attorney and client agree to a substitute counsel.”

Part III of C.P.Sup.R. 65 sets procedural guidelines for appointing counsel. The Oversight Committee must be notified within two weeks after the court
appoints counsel. The court must also notify the Oversight Committee Chairman in writing of the outcome of the trial and, if the death sentence was imposed, provide information concerning the appointment of counsel for the appeal. In addition, the appointing judge is required to provide support services to the counsel as Ohio law or the United States Constitution require. Part III of C.P.Sup.R. 65 also states that appointed counsel's workload cannot be so excessive that it impairs the counsel's ability to represent the defendant.

CONCLUSION

Mandatory qualifications for court-appointed counsel can only help to ensure effective representation will be provided for indigent defendants charged with capital crimes. Compulsory continuing legal education will increase the competency of defense attorneys who deal in the difficult world of death penalty cases. The Ohio Public Defender Commission offers Criminal Law Seminars at no cost to attorneys who provide free representation in one criminal case per year. Ohio appears to be taking the lead in ensuring quality representation to indigent defendants.

C.P.Sup.R. 65, however, should not be mistaken as the standard of representation to which court-appointed counsel is expected to maintain. Merely meeting the qualification standards in C.P.Sup.R. 65 is not enough. It is only the starting point from which indigent defendants charged with capital crimes can hope to have their slice of due process that is guaranteed by the Ohio and United States Constitutions.

GEORGE J. TICORAS

125 C.P.Sup.R. 65 (III)(C) (Baldwin 1987).
126 C.P.Sup.R. 65 (III)(A) (Baldwin 1987).
RULE 65

Qualification for Eligibility to be Court-appointed Counsel for Indigent Defendants Charged with a Capital Offense in the Courts of Ohio

A. Trial Counsel:

(1) At least two attorneys must be court-appointed to represent an indigent defendant charged with a capital offense. At least one of the appointed counsel must maintain a law office in the State of Ohio and have experience in Ohio criminal trial practice.

The counsel appointed shall be designated "lead counsel" and "co-counsel."

(2) Court-appointed "Lead Counsel" must:

a. Be admitted to the Ohio Bar or admitted to practice pro hac vice; and
b. Have at least three years of litigation experience, criminal or civil; and
c. Have had some specialized training in the defense of persons accused of capital crimes; and
d. Have at least one of the following qualifications (i to iv):
   i. Experience as "lead counsel" in the jury trial of at least one capital case;
   ii. Experience as "co-counsel" in the trial of at least two capital cases;
   iii. Experience as "co-counsel" in the trial of a capital case; and
      — Experience as "lead counsel" in the jury trial of at least one murder or aggravated murder case; or
      — Experience as "lead counsel" in ten or more criminal or civil jury trials, at least three of which were felony jury trials; or

* Reporter's Note: The Rules of Superintendence for Courts of Common Pleas appear in 29 and 59 Ohio St. 2d. Amendments appear in 50, 51, 52, 56, 58 Ohio St. 2d and 2, 9, 13, 16, 21, 24, 33 Ohio St. 3d.
iv. Experience as “lead counsel” in at least:
- Three murder or aggravated murder jury trials; or
- One murder or aggravated murder jury trial and three felony jury trials; or
- Three aggravated or first- or second-degree felony jury trials in a Common Pleas Court within the past three years, at least one of which shall have involved a charge of a violent crime.

(3) Court-appointed “Co-Counsel” must:
   a. Be admitted to the Ohio Bar or admitted to practice pro hac vice;
   b. Have at least one of the following qualifications:
      i. Qualify as “lead counsel” under (A)(2) above;
      ii. Experience as “lead” or “co-counsel” in a capital case;
      iii. Experience as “co-counsel” in one murder or aggravated murder trial;
      iv. Experience as “lead counsel” in one first-degree felony jury trial;
      v. Experience as “lead” or “co-counsel” in at least two felony jury or civil jury trials in Common Pleas Court; or
      vi. Specialized training in the defense of persons accused of capital crimes.

(4) Exceptional Circumstances
   If an attorney does not meet the qualification requirements of paragraphs (A)(2) or (A)(3) above, the attorney may still be court-appointed “lead” or “co-counsel” at trial if it can be demonstrated to the satisfaction of the majority of the Committee (See II of this Rule) that competent representation will be provided to the defendant. In determining whether an attorney may be qualified under this paragraph, the Committee may consider the following:
   a. Experience in the trial of criminal cases;
   b. Specialized post-graduate training in jury trials;
   c. Specialized training in the defense of persons accused of capital crimes;
   d. Any other relevant considerations.

(5) As used in this Rule, “trial” means a case concluded with a Criminal Rule 29 judgment of acquittal or submission to the trial court or jury for decision and verdict.
B. Appellate Counsel:

(1) At least two attorneys must be court-appointed to appeal cases where the court has ordered the death penalty and where trial counsel has been granted leave to withdraw or supplemental counsel is being appointed. Both counsel must possess adequate criminal appellate, post-conviction, or habeas corpus experience commensurate with the appellate responsibilities of a capital case. At least one of the appointed counsel must maintain a law office in Ohio.

(2) Both Appellate Counsel must:
   a. Be admitted to the Ohio Bar or admitted to practice pro hac vice;
   b. Have three years of litigation experience; and
   c. i. Have experience as counsel in the appeal of a case where the death penalty was the sentence; or
      ii. Have experience as counsel in the appeal of at least three felony convictions within the past three years and have specialized training in the trial or appeal of cases in which the death penalty was the sentence.

(3) Exceptional Circumstances:

   If any attorney does not meet the qualification requirements of paragraph (B)(2) above, the attorney may still be court-appointed appellate counsel if it can be demonstrated to the satisfaction of a majority of the Committee (See II of this Rule) that competent representation will be provided to the capitally convicted and sentenced indigent defendant. In so determining, the Committee may consider the following:
   a. Specialized training in the trial or appeal of cases in which the death penalty may be imposed;
   b. Experience in the trial or appeal of criminal or civil cases;
   c. Any other relevant considerations.

   COMMITTEE COMMENTS

   These minimum qualifications for counsel appointed in capital cases closely track the current criteria used for such appointments by the Ohio Public Defender Commission set out in Ohio Adm. Code 120-1-10. These qualifications have gained wide acceptance by the trial courts of this State. However, the standards promulgated by the Ohio Public Defender Commission are not mandatory upon the courts, and therefore the qualifications of a significant number of counsel appointed to capital cases do not meet the minimum expected standard. Standards adopted by the Ohio Supreme Court would be universally accepted and mandatory on all courts in Ohio.
The proposed minimum standards for eligibility to be court-appointed counsel for indigent capital defendants are recommended for adoption in recognition of and in response to the risks of having inexperienced, ill-prepared counsel appointed to represent persons charged with capital crimes, thereby risking that an innocent person may be convicted or that one convicted of a capital crime may be inappropriately sentenced to death. Further, the proposed Rule seeks to advance the right of the defendant convicted and sentenced to death to qualified appellate counsel.

These minimum qualifications would apply only to court-appointed counsel.

The fact that an attorney meets the minimum qualifications to be court-appointed counsel for indigent capital defendants cannot be the sole criterion in assessing the effectiveness of such counsel in a particular case. When a claim of ineffective assistance of counsel is raised, even the actions of those attorneys appearing to possess the necessary skill and knowledge must be judged by the usual standards. Compliance with this Rule cannot, nor is it expected to, eliminate the occasional validity of such claims.

COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES

A. The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases is hereby created.

(1) Selection of Committee Members:

The Committee shall be composed of five attorneys. Three members of the Committee shall be selected by a majority vote of all members of the Supreme Court of Ohio; one shall be selected by the Ohio State Bar Association; and, one shall be selected by the Ohio Public Defender Commission.

(2) Eligibility for Appointment to the Committee:

a. Member of the Ohio Bar;

b. Represented criminal defendants for not less than five (5) years;

c. Demonstrates a knowledge of the law and practice of capital cases;

d. Currently not a prosecuting attorney, city director of law, village solicitor, or similar officer or their assistant or employee, nor an employee of any court.
The goal in providing defense services in capital cases should be to assure high quality legal representation to persons unable to afford counsel. The caseload of an attorney receiving assignments pursuant to these standards should, therefore, permit him to provide each client with the time and effort necessary to ensure effective representation. See Ohio Adm. Code 120-1-07. As the American Bar Association has noted:

"One of the single most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. All too often in defender organizations attorneys are asked to provide representation in too many cases. Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system." ABA Standards, 5-4.3, Comm., at 5.48.

Judges making appointments should distribute assignments in light of each attorney's duties under the Code of Professional Responsibility not to accept "employment . . . when he is unable to render competent service . . . ." Code of Professional Responsibility EC 2-29, or to handle cases "without preparation adequate in the circumstances." *Id.* at DR 6-101(A)(2). Similarly, attorneys should be admonished not to accept more assignments than they can reasonably discharge. ABA Standards, 4-1.2(d), or accept a client where the representation will be materially limited by the attorney's responsibilities to another client or to a third person, Model Rules of Professional Conduct 1.1 (1983).

In accordance with these principles, judges are urged to assess the private practice and death penalty workloads of eligible attorneys to determine whether the workloads are excessive. To assist in assessing workloads, some defender officers have established caseload guidelines which are useful in determining whether the workload of a particular attorney is excessive. Judges should limit the number of assignments per attorney to an appropriate level consistent with the lawyer's ability to provide each client with quality representation in accordance with constitutional and professional standards.

A recent capital case reaffirms that fundamental fairness entitles indigent defendants to the "basic tools of an adequate defense." *Ake v. Oklahoma* (1985), 470 U.S. 68, 77, 105 S. Ct. 1087, 1094, 84 L. Ed. 2d 53, 62. In *Ake* the United States Supreme Court stated that:

"We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."
We reiterate the proposition adopted by other national standards on defense services that quality representation cannot be rendered by assigned counsel unless the lawyers have available for their use adequate supporting services. These services may include:

"... expert witnesses capable of testifying at trial and at other proceedings, personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencings, and trained investigators to interview witnesses and to assemble demonstrative evidence." ABA Standards, 5-1.4, Comm., at 5.19-5.20; See, also, Ohio R.C. 2929.024.

It is critical, therefore, for courts to authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for the trial and sentencing phases, and to procure the necessary expert witnesses and documentary evidence.

Resources available to appointed capital defense counsel should be equivalent to yet independent of, those available to the prosecution.

(3) Overall Composition:

The overall composition of the Committee shall meet the following criteria:

a. No more than three members shall be registered members of the same political party;

b. No more than two members shall reside in the same county; and

c. No more than one shall be a judge.

(4) Initial Appointments, Terms, Vacancies:

Initial appointments to the Committee shall be made by the respective appointing authorities (listed in [A] above) within forty-five days of the effective date of this Rule.

Of the three initial appointments to be made by a majority vote of all members of the Supreme Court of Ohio, one shall be for a term of five years, one for a term of two years, and one for a term of one year.

The Ohio State Bar Association's initial appointment shall be for a term of four years.

The Ohio Public Defender Commission's initial appointment shall be for a term of three years.

Thereafter, the term of office for each member shall be five (5) years, each term ending on the same day of the same month as did the term in which it succeeds.

When a vacancy occurs (at the expiration of a term, or by a member's voluntary resignation), the authority who appointed the departing member of the Committee shall appoint the successor to office. Any
member appointed to fill a vacancy occurring prior to the expiration of a term shall hold office for the remainder of the term. Any member shall continue in office subsequent to the expiration date of the term until a successor takes office or until a period of sixty (60) days has elapsed, whichever occurs first.

(5) Powers and Duties of the Committee:

The Committee shall:

a. Draft, and at least once per year notify the Bar of, the procedures for applying for inclusion on the list(s) of those eligible to be court-appointed counsel for indigent capital defendants;

b. Provide all municipal, county, common pleas, and appellate court judges and the Ohio Public Defender with the list of all attorneys who meet the qualifications for eligibility to be court-appointed counsel for indigent defendants charged with a capital offense in the courts of Ohio, and who may therefore receive court appointments to defend or appeal capital cases;

c. Periodically review the lists, all court appointments given to attorneys in capital cases, and the result and status of those cases;

d. Develop criteria and procedures for retention on or deletion from lists of eligible counsel including, but not limited to, some form of mandatory continuing legal education on the defense of capital cases;

e. Expand, reduce, or otherwise modify the lists of qualified attorneys as it deems appropriate and necessary in accord with item d above.

f. Sponsor or co-sponsor specialized training on the defense of capital cases with organizations such as local bar associations, the Ohio State Bar Association, and the Ohio Public Defender Commission; and

g. If and when deemed appropriate, recommend to the Ohio Supreme Court amendments to this Rule.

(6) Meetings:

Meetings shall be called by written notice of at least one month given to all members either by the Chairman, and three (3) members of the Committee, or at the request of the Ohio Supreme Court. The Committee shall meet at least once every three (3) months. A quorum will consist of three members. A majority of the entire Committee is necessary for the Committee to select a Chairman and take any other action.

(7) Compensation:

All members of the Committee shall receive equal compensation in an amount to be established by the Ohio Supreme Court.
The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases is established to improve the quality of legal representation given to such defendants. This state-wide Committee will compile lists of attorneys eligible for such court appointments. All municipal, county, common pleas, and appellate judges shall receive the lists of all attorneys eligible for appointments in their jurisdiction and in all adjacent jurisdictions. Judges may also be provided, either upon request or upon the initiative of the Committee, any or all other lists of eligible attorneys from other jurisdictions within the State. There will be only one list per county. Each list will be categorized according to eligibility as:

1. "lead counsel";
2. "co-counsel"; and
3. "appellate counsel."

The Committee may also perform related administrative duties.

The members of the Committee should be members of the Bar, as this tends to assure an understanding of a lawyer's professional duties and responsibilities and an awareness of needs and problems inherent in these matters. Similarly, because of the unique aspects of defending defendants charged with capital offenses, it is appropriate for all of the Committee members to have not only a general background in criminal defense, but also a working knowledge of the issues involved in litigating a death penalty case.

An effective means of securing professional independence for assigned counsel is to place responsibility for the decisions concerning the qualifications of assigned counsel in a Committee whose members are themselves free to act as dictated by their best professional judgment. Consequently, it is recommended that the membership of the Committee not include prosecutors or more than one judge. These restrictions are necessary to "remove any implication that defense attorneys under the system are subject to the control of those who appear as their adversaries or before whom they must appear in the representation of defendants, except judges as charged with the disciplinary supervision of all members of the bar." ABA Standards for Criminal Justice (2 Ed. 1980), 5-1.3, Commentary, at 5.17-5.18. (Hereinafter "ABA Standards.") See, also, California Standing Committee on Delivery of Legal Services to Criminal Defendants, Report on the Independence of the Criminal Defense Bar and Standards Relating to Professional Competence of Appointed Counsel (1980), at 3-4.

Qualifications and procedures for eligibility will be written and publicized in a manner which encourages participation from a large number of attorneys throughout Ohio and attracts public interest. Public awareness and trust in assigned-counsel programs is essential if they are to be financed adequately and operated effectively. ABA Standards, 5-1.5, Comm.
Applications for eligibility and the review thereof should include the attorney's experience, training and demonstrated qualifications. Information may also be provided by judges before whom the applicant has appeared, and by others familiar with the applicant's professional abilities.

The Committee will monitor the performance of assigned counsel and consider whether counsel has met the basic responsibilities of a trial or appellate lawyer. If counsel has clearly not done so, his name shall be removed from the list.

However, the Committee shall not attempt to interfere with the conduct of a particular case, nor seek to remove counsel over the objection of the attorney and client. In order to preserve the nature of the attorney-client relationship, counsel for the accused must have total freedom to represent their clients as they deem professionally appropriate. Clients, moreover, should have the right to continue satisfactory relationships with their appointed lawyers in whom they have reposed their confidence and trust. Removal of counsel from representation therefore should not occur unless the attorney and client agree to a substitute counsel. Where the assigned lawyer is unable to provide effective representation due to a mental or physical impairment it is the court's responsibility to intervene.

It is critical that the Committee ensure that comprehensive training programs which focus on criminal defense advocacy, with particular emphasis on capital cases, be regularly offered throughout the State. Required continuing legal education should enhance trial practice skills and instruct on the current law relating to death penalty cases.

I. PROCEDURES FOR COURT APPOINTMENTS OF COUNSEL

A. Appointing Counsel:

All municipal, county, common pleas, and appellate courts within the State shall appoint counsel to represent indigent defendants charged with a capital offense in accordance with Section I of this Rule. Each court shall be free to adopt local rules requiring qualifications in addition to the mandatory minimum requirements established by this Rule. The appointing court shall not assign, and counsel shall not accept, an appointment which creates a total workload so excessive that it interferes with or effectively prevents the rendering of quality representation in accordance with constitutional and professional standards. Appointments of counsel for these cases should be distributed as widely as possible among the eligible members of the Bar in an appointing court's jurisdiction. An appointing court shall, whenever possible, appoint at least one eligible attorney who routinely practices in that court's jurisdiction. When no one is available and it is necessary or in the interests of justice appropriate to do
so, the court may appoint counsel from another jurisdiction, preferably at least one of whom has had experience in the appointing court’s jurisdiction.

B. Notice to the Committee:

(1) Within two weeks of appointment, the appointing court shall notify the Committee Chairman of the appointment. The written notice shall include:

a. The court and the judge assigned to the case;
b. The full case name and number;
c. A copy of the indictment;
d. The names, business addresses, phone numbers, and, if applicable, status (“lead” or “co-counsel”) of all attorneys appointed; and
e. If none of the attorneys appointed maintains a law office or regular practice in the appointing court’s jurisdiction, why their appointment was deemed necessary.

(2) The appointing court shall further notify the Committee Chairman, in writing, of the ultimate disposition of the case within one week of final disposition. The notice shall include:

a. The title and section of the Revised Code of all crime(s) of which the defendant plead and/or was found guilty;
b. The date sentence was rendered;
c. The court’s sentence;
d. A copy of the court’s entry reflecting the above; and

e. A statement concerning the appointment of counsel for the appeal, if the death penalty was imposed or if the defendant requested appointment of counsel for an appeal.

C. Support Services:

The appointing court shall provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator(s), social worker(s), mental health professional(s), or other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare and present an adequate defense at every stage of the proceedings — before, during and after trial — including, but not limited to, determinations relevant to competency to stand trial, a Not Guilty by Reason of Insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for the sentencing phase of the trial.