

Terry Lenamon on the Death Penalty

Sidebar with a Board Certified Expert Criminal Trial Attorney



Terence M. Lenamon is a Florida Bar certified expert in the area of criminal trial law. With over 17 years experience he has built a reputation as one of Florida's most respected criminal defense lawyers. His defense has been sought by many high-profile clients and has led him through 20 first-degree murder trials and eight death penalty cases. That experience has brought him national recognition as a go-to commentator on death penalty issues. He is the force behind both deathpenaltyblog.com and Florida Capital Resource Center (floridacapitalresourcecenter.org), and can be reached at terry@lenamonlaw.com.

What is a Mitigation Specialist in a Death Penalty Case?

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According to the [American Bar Association \[ABA\] Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases \(Rev. Ed. Feb. 2003\)](#), a **mitigation specialist** (if not more than one) is a mandatory part of the defense in any capital case. *See*, ABA Guideline 10.4 (C)(2)(a). In fact, the ABA Guidelines require every criminal defense team facing a capital punishment sentence have at the minimum two attorneys, a private investigator, and a mitigation specialist. *See* ABA Guideline 1.1, 4.1, and Commentary.

Failure to include a mitigation specialist in a death case is arguably *per se* ineffective assistance of counsel, violating the defendant's rights under both the Sixth and Eighth Constitution according to the United States Supreme Court. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005).

Therefore, part of the expense of today's indigent defense in a death penalty case mandates the expenditure of hiring a competent and capable mitigation specialist. It's more than a suggestion by the national bar association; it is the law of the land.

A mitigation specialist is not another attorney, death-qualified or not, on the defense team.

Investigators and attorneys are easily understood – their roles are well-known, their backgrounds, education, and expertise understood. But exactly what is a “mitigation specialist” – does the public at large know who these professionals are, how much they cost, and why they are

needed?

The ABA Guidelines detail the vital and imperative role of a mitigation specialist in the criminal defense team's fight against the State's desire to seek the death penalty, should a defendant be found guilty and his or her trial reach the penalty phase:

*A **mitigation specialist** is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and ability to elicit sensitive, embarrassing and often humiliating evidence (e.g. family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental, or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.*

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integral into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

Commentary, ABA Guideline 4-1 (2003).

Mitigation Specialists – Background, Experience, and Education

Today, the [National Legal Aid and Defender Association](#) (NLADA) has a section devoted to mitigation specialists, the [National Alliance of Sentencing Advocates and Mitigation Specialists](#) (NASAMS). In doing so, NLADA has provided nationally accepted criteria to

be met for those professionals seeking to work within this specialized area. NLADA also maintains a national database of recognized mitigation specialists available for death penalty trials across the country.

Some states establish their own requirements for mitigation specialists working within their jurisdiction. For example, the North Carolina Office of Indigent Defense Services has set up standards for [Mitigation Specialist I, II, and III](#) for death penalty cases. The different levels are distinguished by levels of education and experience.

By its very nature, the work of a mitigation specialist on a capital case requires specific training, education, and experience and the honing of skills that are distinctly different from that of the trial lawyer or the private investigator. *See, Welsh White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 2 U Ill.L Rev. 323(1993)*. Mitigation specialists usually have advanced education in the form of graduate degrees in a form of social work or psychology as well as a background in criminal justice, particularly capital defense matters.

Within their skill set, they have an ability to gather and analyze voluminous amounts of psychological, psychiatric, and other mental health documentation and records, as well as police records, school records, and family histories. Mitigation specialists are also expert at dealing with people in a non-confrontational manner. They interview and discuss the defendant with his family, friends, former employers, teachers, physicians, counselors, and psychiatrists. Their ability to work with people in difficult situations and in discussing often painful or embarrassing situations requires a particular finesse.

The Size of the Task Performed by the Death Penalty Mitigation Specialist

Consider the enormity of the job. Each mitigation specialist on a death penalty case must identify, locate, and retrieve **all** the records ever generated about the defendant, along with all the records that have been generated about their immediate and extended family members. These include but are not limited to (for the defendant as well as family members):

1. birth certificates
2. hospital birth records
3. medical records, including private physicians, clinics and hospitals.
4. school records

5. social service records
6. records from agencies and foster homes
7. juvenile records
8. adult criminal records
9. probation and parole records
10. employment records
11. psychological and psychiatric records
12. military records

The job does not end with gathering boxes and boxes of documents. The mitigation specialist undertakes comprehensive, lengthy, and sensitive interviews that often deal with personal, private issues with the client and as many individuals as possible who have known the client, such as:

1. family members
2. friends
3. neighbors
4. teachers
5. counselors
6. church members
7. Sunday School teachers
8. co-workers
9. employers
10. spouses, ex-spouses
11. boyfriends/girlfriends and ex-boyfriends/girlfriends
12. physicians
13. nurses
14. mental health providers (psychiatrists, psychologists)
15. social services personnel

16. military peers
17. probation officers
18. parole officers
19. attorneys
20. guards
21. police officers.

Once they have the documentation collected and the interviews completed, and with this a detailed, coordinated investigation into the defendant's life history, the mitigation specialists must take all they have learned and report to the trial lawyers the issues that may need additional exploration by other professionals. Doctors may need to assess I.Q. Investigators may need to delve into new facts of the case. Psychiatrists may need to determine the impact of childhood abuse.

Working together with the rest of the team, the mitigation specialist works to find and fully understand the factual circumstances of the defendant's life that allow the mitigation factors ("mitigators") under state or federal law to apply in the case. In doing so, the importance of the mitigation specialist cannot be underestimated.

Mitigation specialists take the enormous amount of information they obtain – both in interviews and in documents – and compile a final, detailed mitigation investigation which opines on "family history and social history to explain its impact on the defendant's current functioning." Maria Homan, *Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 *Brook. L. Rev.* 767 (1987). Oftentimes, they may be asked to take the witness stand to explain their actions, define their conclusions, and defend their opinions against State challenge.

Defense lawyers rely upon the mitigation specialist to find and flesh out the mitigation fact patterns that will be presented at trial. The failure of the mitigation specialist to perform their stressful, expansive, and detailed tasks can mean the difference between life and death.