

# Memorandum

To: Attorneys Certified to Accept Appointments in Capital Cases

From: The Commission on Appointment of Counsel in Capital Cases (Capital Commission)

Re: Capital Counsel CLE during Covid-19 Pandemic

Date: May 20, 2020

## Summary

This memorandum sets forth the Capital Commission's plans to certify death-penalty continuing education for the remainder of 2020. The Capital Commission accredits all CLE courses for death-penalty credit. *See* Appt. Coun. R. 4.01. Traditionally, the Capital Commission only accredited death-penalty continuing education seminars involving in-person attendance. We did not certify any form of self-study CLE as qualifying a person to either obtain or to maintain certification of eligibility to accept appointment in capital cases.

The COVID-19 pandemic has obviously affected the continuing legal education landscape for the remainder of 2020. To allow attorneys to safely meet their 2020 death-penalty CLE requirements the Capital Commission will accredit 2020 live webinars that meet two criteria:

- (1) Commission on Continuing Legal Education CLE credit approval, and
- (2) Capital Commission death-penalty CLE accreditation (including appellate credit when applicable).

The Capital Commission believes this strikes the proper balance between upholding the death-penalty CLE requirements and respecting the extraordinary circumstances presented in 2020. The Capital Commission informally consulted with the Ohio State Bar Association (OSBA) and Ohio Association of Criminal Defense Lawyers (OACDL). We understand that both organizations will offer death-penalty CLE courses this year that will meet these 2020 requirements.

Although the Capital Commission is approving self-study CLE options under the narrow circumstances this memorandum describes, the Capital Commission will not give death-penalty CLE accreditation for other forms of self-study, including video replays of previously offered death penalty CLE programs.

The end result is akin to what has always been required for death-penalty CLE credit. Capital certification CLE standards have always required attorneys to block out specific days in their calendar to attend a death-penalty CLE every two years. In 2020, this requirement remains, but the attorney who attends a course that meets the qualifications of this memorandum may now participate virtually as opposed to attending a live CLE event.

## **Background: A Review of the Death-Penalty CLE Accreditation Process**

Traditionally, attorneys seeking to obtain or maintain capital counsel certification attend one of two in-state CLE programs specifically designed for capital litigants. The OSBA and OACDL offer these courses annually. Typically, each program provides the required 12 hours of capital-specific training (including 6 hours of appellate-specific training for attorneys seeking to obtain or maintain capital appellate counsel certification).

Each year, some attorneys seek credit for other courses offered by other organizations that generally do not receive advance Capital Commission accreditation.<sup>1</sup> Typically, attorneys who attend these out-of-state, in-person trainings seek Capital Commission CLE credit by submitting a letter that includes the course materials and course information. The Capital Commission acts upon these requests on a course-by-course basis, holding these courses to the same requirements as employed for advance accreditation. The Capital Commission only considers death-penalty CLE accreditation for courses approved for CLE credit by the Commission on Continuing Legal Education.

The Capital Commission encourages attorneys planning to seek death penalty certification or recertification via one of these courses to contact the Capital Commission before attending these courses. For the reasons stated below, this is particularly important this year to make sure that a particular course is using a presentation format that complies with this memorandum.

### **Capital Commission Calendar Year 2020 CLE Accreditation Guidelines**

1. Appt. Coun. R. 4.02(B) prohibits the Capital Commission from awarding credit for video replays of previously accredited courses. This is consistent with past Capital Commission practice not to certify anything other than "live" courses where participants are required to gather in a central location for the requisite hours of classroom-type training (which usually also include smaller breakout sessions). This is the preferred format for death penalty training. Unfortunately, this type of training is not practical during calendar year 2020. The safety of participating attorneys during the pandemic is obviously paramount.

2. Because of the pandemic, the Capital Commission will approve courses that employ a webinar format where attendees participate in a live course but do so remotely, provided the course meets traditional standards for content (including content for appellate credit if appellate credit is being sought). Webinar courses, while not offering the same opportunity for audience participation as the traditionally-approved courses, still provide the opportunity for webinar participants to submit questions in real time and for the instructor to address them contemporaneously. The Capital Commission considers this ability to ask questions essential for

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<sup>1</sup> Although those courses may receive advance approval for CLE credits from the Commission on Continuing Legal Education, the sponsors do not always seek specific Appt.Coun.R. 4.01 death-penalty accreditation.

any death-penalty CLE we accredit. OSBA and OACDL will be offering capital-specific webinar courses in 2020.

3. Because OSBA and OACDL are offering capital-specific CLE webinar courses in 2020, the Capital Commission will not grant death-penalty accreditation to sponsors of courses that utilize other forms of self-study, including the use of video replay of previously offered courses. The Capital Commission considered, and rejected, asking the Supreme Court to temporarily relax Appt. Coun. R. 4.02(B). The Capital Commission concluded there is no need to relax Appt. Coun. R. 4.02(B) because Ohio attorneys will have at least two opportunities to participate in a live webinar from a remote (and thus safe) location in calendar year 2020.

4. The Capital Commission will continue to accredit content-appropriate live CLE programs in 2020. Sponsors must comply with all applicable health and safety regulations. Sponsors may provide blended courses (which allow for both live attendance at a central location as well as webinar participation) if they comply with appropriate health and safety regulations. For example, a Sponsor who complies with health and safety regulations may conduct a death-penalty CLE where a limited number of persons gather in the room where the speaker is presenting (a live studio audience) while other participants participate via webinar.

#### **CLE Credits and Appt.Coun. R. 4.01 Credits Distinguished**

The Commission on Continuing Legal Education accredits CLE programs. Nothing in this memorandum changes or modifies an attorney's obligation to satisfy the CLE requirements pursuant to Rule X of the Rules Governing the Bar. However, the Capital Commission determines which CLE programs satisfy the specific requirements of the Rules for the Appointment of Counsel in Capital Cases. Accordingly, the rules set forth in this Memorandum govern whether the Capital Commission will accredit death-penalty CLE programs under Appt. Coun. R. 4.01 and, to that extent only, supersede any policies the Commission on Continuing Legal Education adopts in response to the Covid-19 pandemic.

Nothing in this memorandum addresses course content. As always, the Capital Commission must approve course content for any accredited course.

#### **Conclusion**

In rare and extraordinary circumstances, the Capital Commission may temporarily excuse certified death-penalty attorneys from the biennial education requirement. In those rare cases, the Capital Commission usually requires the applicant to take the next available accredited course. The Capital Commission strongly disfavors this extraordinary remedy and will not apply it in 2020 solely due to the current state of pandemic. Accordingly, the Capital Commission reminds death-penalty certified attorneys, or those seeking qualification for the first time, that twelve hours of biennial death-penalty CLE credit are, as always, required.

Please direct questions to Tammy White, Attorney Services Manager, Office of Attorney Services, Ohio Supreme Court: tammy.white@sc.ohio.gov; (614) 387-9330.

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