

Memorandum

To: Attorneys Certified to Accept Appointments in Capital Cases
From: The Commission on Appointment of Counsel in Capital Cases (Capital Commission)
Re: Death-Penalty CLE Requirements
Date: April 4, 2022

Abstract –Death-Penalty CLE by Live-stream for 2022

The Capital Commission has extended for calendar year 2022 the authorization for attorneys to complete by live-stream the required CLE in order to become certified or renew certification to represent indigent criminal defendants in capital cases.

Summary

This memorandum sets forth the Capital Commission’s plans to certify remote, live-streaming, death-penalty continuing education for the remainder of 2022. The Capital Commission accredits all CLE courses for death-penalty credit. *See* Appt.Coun.R. 4.01 and 4.03. Traditionally, the Capital Commission has only accredited death-penalty continuing education seminars involving in-person attendance.

At the same time, the COVID-19 pandemic has obviously affected the continuing legal education landscape. To allow attorneys to safely meet their 2022 death-penalty CLE requirements the Capital Commission will accredit 2022 live webinars that meet three criteria:

- (1) Commission on Continuing Legal Education CLE credit approval, secured by the course sponsor,
- (2) Capital Commission content approval (including for appellate credit when applicable), and
- (3) An in-person and/or live-webinar format that allows for real-time audience participation.

The Capital Commission believes this strikes the proper balance between upholding the death-penalty CLE requirements and respecting the extraordinary circumstances presented in 2022. This is the same accommodation enacted for seminars in 2021 and 2020.

Although the Capital Commission is approving remote 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 2022, 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 the course in person.

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

Most Ohio attorneys seeking to obtain or maintain capital counsel certification attend one of two in-state CLE programs specifically designed for capital litigants. The Ohio State Bar Association (OSBA) and Ohio Association of Criminal Defense Lawyers (OACDL) offer these courses annually. Typically, each program provides the required 12 hours of death-penalty-specific training (including 6 hours of appellate-specific training for attorneys seeking to obtain or maintain capital appellate counsel certification). The OSBA and OACDL traditionally ensure that their respective programs receive all required CLE approval, including death-penalty accreditation, by making application in advance to both the Supreme Court Commission on Continuing Legal Education and to the Capital Commission. The Capital Commission only considers death-penalty CLE accreditation for courses where the sponsors have secured approval for non-death-penalty CLE credit by the Commission on Continuing Legal Education.

The OSBA and OACDL programs are not the only avenues for receiving death-penalty specialty CLE training. Other programs offer training that may, on a course-by-course basis, be approved for death-penalty training credits. Just as it does for the OSBA and OACDL courses, the Commission reviews an application for death-penalty credit for these courses by reviewing the entire course syllabus and determining which individual presentations qualify for death-penalty credit (including appellate credit where appropriate). Attorneys planning on seeking death-penalty CLE hours for attending these programs are advised to contact the Capital Commission in advance of attending these courses -- frequently, the sponsors of these programs (most of which are out-of-state) will apply to the Commission on Continuing Legal Education for credit but will fail to also apply to the Capital Commission for death-penalty CLE accreditation. While the Capital Commission will consider a post-attendance application by an attorney for death-penalty CLE credit where the sponsor has already secured credit approval from the Commission on Continuing Legal Education Commission, approval is not guaranteed. The last thing the Capital Commission wants to do is to have to refuse an attorney credit after the attorney has gone to the time and expense of attending a program that has not received advance approval. This is particularly important in 2022 because not all programs will comply with the presentation format required for death-penalty accreditation that is discussed immediately below.

Capital Commission Calendar Year 2022 CLE Accreditation Guidelines

The safety of participating attorneys during the pandemic is obviously paramount. In addition, attorneys and course sponsors need advance notice of the rules for 2022. For these reasons, we are establishing the following guidelines for the remainder of 2022.

1. Because of the pandemic, the Capital Commission will approve a course that employs a live webinar format where attendees participate in live instruction but do so remotely, provided the course meets traditional standards for content (including content for appellate credit if appellate credit is being sought). Qualifying webinar courses must have the technical capacity for webinar participants to submit questions or comments in real time and for the instructor to address them contemporaneously.¹ The Capital Commission considers this capacity essential for death-penalty CLE accreditation. A webinar format of this type may also be part of a hybrid course where some participants are contemporaneously attending the seminar in-person (a live studio audience), provided live attendance complies with State and local health and safety regulations.

2. Because we anticipate that the OSBA and OACDL will offer death-penalty CLE courses in 2022 that meet this criteria, the Capital Commission will not grant death-penalty CLE accreditation to sponsors of courses that utilize other forms of self-study, including the use of video replay of previously offered courses.²

CLE Credits and Appt.Coun.R. 4.01 and 4.03 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 guidelines set forth in this Memorandum govern whether the Capital Commission will accredit death-penalty CLE programs under Appt.Coun.R. 4.01 and 4.03 and, to that extent only, supersede any policies the Commission on Continuing Legal Education has or will adopt in its continuing response to the Covid-19 pandemic.

Conclusion

¹ Just as in a traditional live course, the capacity for real-time participation does not limit a presenter's discretion to take those questions and comments at designated times within a particular presentation, *e.g.*, at the end of a one-hour presentation.

² Appt.Coun.R. 4.02(B) prohibits the Capital Commission from awarding credit for video replays of previously accredited courses. The Commission is not asking the Supreme Court for a variance from this prohibition.

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 does not consider the general state of the pandemic as an excuse for failing to attend a course in 2022 in light of the accommodations described above. 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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