

2008

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### Recommended Citation

Maher, Robin M. (2008) "The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases," *Hofstra Law Review*. Vol. 36 : Iss. 3 , Article 5.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol36/iss3/5>

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## THE ABA AND THE SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES

*Robin M. Maher\**

On February 10, 2003, the American Bar Association House of Delegates overwhelmingly approved the revised *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (“ABA Guidelines”).<sup>1</sup> In doing so, the ABA renewed the serious concerns it has voiced for decades about the fairness and reliability of the death penalty. All jurisdictions were urged to adopt the ABA Guidelines to ensure that capital trial and death row defendants had access to qualified, competent counsel and the expert assistance and funding that make capital legal representation meaningful.<sup>2</sup>

For the nation’s largest organization of lawyers, the quality and availability of counsel for those facing execution is of paramount concern. Although the ABA does not take a position on the death penalty itself, it has long recognized that “[a] system that would take life must first give justice.”<sup>3</sup> The efforts of the ABA—through policy statements,<sup>4</sup> amicus briefs,<sup>5</sup> task forces,<sup>6</sup> and projects such as the Death

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1. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Introduction (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA GUIDELINES are also available online at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>.

2. *Id.* at Guideline 1.1(A).

3. *Violent Crime Control Act of 1991: Hearing on S. 618 and S. 635 Before the S. Comm. on the Judiciary*, 102d Cong. 334 (1992) (statement of John C. Curtin Jr., President, American Bar Association).

4. See, e.g., ABA, REPORT SUBMITTED WITH RECOMMENDATION ON DEATH PENALTY MORATORIUM (1997), available at <http://www.abanet.org/irr/rec107.html> (calling “upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures,” including *inter alia* “[i]mplementing ABA ‘Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases’ . . . and Association policies

intended to encourage competency of counsel in capital cases,” “to . . . ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and . . . minimize the risk that innocent persons may be executed”); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON ACCESS TO COUNSEL IN THE MILITARY FOR POST-CONVICTION HABEAS CORPUS DEATH PENALTY CASES (1996), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/101b.pdf> (urging “that military capital prisoners be provided with the same opportunity for the assistance of counsel in seeking federal post-conviction habeas corpus relief as is now provided by federal law for persons sentenced to death in the civilian courts”); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON COMPETENT COUNSEL IN DEATH PENALTY CASES (1990), *available at* <http://www.abanet.org/irr/feb90.html> (“[S]tate and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants/appealants/petitioners, as well as to provide sufficient resources for investigation, expert witnesses, and other services, at all stages of capital punishment litigation. The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases should govern the appointment and compensation of counsel.”); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON GUIDELINES FOR COUNSEL IN DEATH CASES (1989) (adopting the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (1998) [hereinafter 1989 GUIDELINES] and urging the adoption of the of the Guidelines by any entity providing counsel in capital cases); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON REPRESENTATION PLAN FOR HABEAS CORPUS IN DEATH PENALTY CASES (1987), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/125.pdf> (“[T]he American Bar Association urges each federal district and circuit court to adopt and each federal circuit judicial council to approve a plan for providing representation in federal habeas corpus death penalty proceedings which includes,” among other things: (1) “appointment and compensation of counsel, and of expert legal consultants if requested by counsel, in every federal habeas corpus death penalty case whether or not the petition was prepared, or counsel previously appeared, pro bono;” (2) “the appointment for federal habeas corpus proceedings of eligible attorneys who provided representation in the state post-conviction proceedings for the same case, unless the petitioner objects for cogent reasons, there is evidence of a conflict, or other good cause appears for appointing new counsel;” (3) “the appointment of two attorneys in every federal habeas corpus death penalty case as counsel of record;” (4) “pre-assignment screening of attorneys considered for appointment to such cases to assure that only trained and experienced attorneys are appointed;” and (5) “support for creation of state and regional centers to provide expert advice and assistance to appointed counsel in federal habeas corpus death penalty litigation.” The ABA also urged the federal courts “to ensure the maximum extent of coordination and consistency concerning the standards and procedures governing appointment of counsel in state and federal post-conviction proceedings involving death penalty cases.”); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON APPOINTMENT OF TWO ATTORNEYS IN DEATH PENALTY CASES (1985), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/109.pdf> (recommending that “two attorneys shall be appointed as trial counsel to represent the defendant” in a death penalty case); ABA, REPORT SUBMITTED WITH RECOMMENDATION ON RIGHT TO COUNSEL IN POST-CONVICTION DEATH CASES (1979), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/102b.pdf> (“[T]he American Bar Association recommends that the United States Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate postconviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel,” “offer to assist . . . in identifying qualified attorneys who are willing to accept appointment,” and “recommend to Congress that the Criminal Justice Act . . . be amended to provide for the payment of adequate compensation to counsel . . . in state death penalty cases.”).

5. *See, e.g.*, Brief of the ABA as Amicus Curiae in Support of Petitioner at 1-2, *Medellin v. Texas*, 2008 U.S. LEXIS 2912 (U.S. Mar. 25, 2008) (No. 06-984); Brief Amicus Curiae of the ABA in Support of Respondent at 1-3, *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007) (No. 05-1575); Brief

Penalty Representation Project<sup>7</sup>—have been directed at identifying problems and working to improve the systems that provide counsel to indigent defendants. As stated in its 1990 Task Force Report:

The American Bar Association is persuaded that the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings. The absence of adequate representation not only deprives capital defendants and death-sentenced prisoners of a meaningful defense and of meaningful access to state post-conviction remedies, but also greatly aggravates and protracts the death penalty review process. Specifically, the lack and inadequacy of counsel in state capital proceedings forces state and federal post-conviction judges to: adjudicate cases on the basis of incomplete and often incomprehensible records; resolve manifold colorable claims of ineffective assistance of counsel; dispose of myriad procedural questions—including exhaustion of state remedies, procedural default, and successive petition issues—arising from the failure of counsel to notice and assert meritorious claims for relief; and

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of the ABA as Amicus Curiae in Support of Petitioner at 1, *Bustillo v. Johnson*, 548 U.S. 331 (2006) (No. 05-51); Brief of the ABA as Amicus Curiae in Support of Petitioner at 1-2, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); Brief Amicus Curiae of the ABA in Support of Petitioner at 1-4, *Rompilla v. Beard*, 545 U.S. 374 (2005) (No. 04-5462); Brief Amicus Curiae of the ABA in Support of the Respondent at 1-2, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633); Brief Amicus Curiae of the ABA in Support of the Petitioner at 1-4, *Banks v. Cockrell*, No. 02-8286 (U.S. July 11, 2003); Brief Amicus Curiae of the ABA in Support of Petitioner at 2-5, *Wiggins v. Smith*, 539 U.S. 510 (2003) (No. 02-311); Brief Amicus Curiae of the ABA in Support of Petitioner at 1, *McCarver v. North Carolina*, cert. dismissed, 533 U.S. 975 (2001) (No. 00-8727), considered in *Atkins v. Virginia*, 536 U.S. 304, 306 (2002); Motion of the ABA to File Brief as Amicus Curiae and Brief of Amicus Curiae in Support of Petitioner at 2, *Gibson v. Head*, cert. denied, 528 U.S. 946 (1999) (No. 99-77); Brief of Amicus Curiae ABA in Support of Petitioner at 2, *Williams v. Taylor*, 529 U.S. 362 (2000) (No. 98-8384).

6. The 1990 Report of the ABA Task Force on Death Penalty Habeas Corpus involved an intensive, national study of cases in which defendants had been sentenced to death that included an investigation of “the entire system of post-conviction review of capital convictions and sentences.” Ira P. Robbins, ABA, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 13 (1990). The report concluded that “[c]ompetent and adequately compensated counsel from trial through collateral review is thus the *sine qua non* of a just, effective, and efficient death penalty system.” *Id.* at 17.

7. The Death Penalty Representation Project was created in 1986. ABA, Death Penalty Representation Project, <http://www.abanet.org/deathpenalty> (last visited May 11, 2008). Its goals include “rais[ing] awareness about the lack of representation available to death row inmates, . . . address[ing] this urgent need by recruiting competent volunteer attorneys and . . . offer[ing] these volunteers training and assistance, . . . [and] work[ing] for systemic changes in the criminal justice system that would assure those facing death are represented at all stages of the proceedings from trial through clemency by qualified, adequately compensated counsel.” *Id.*

grant constitutionally mandated relief and costly retrials in numerous cases.<sup>8</sup>

Since their approval in 2003, the revised ABA Guidelines have been recognized as national standards regarding the obligations of jurisdictions and defense counsel in capital cases.<sup>9</sup> They have provided important guidance to judges and defense counsel regarding the minimum requirements of competent and effective legal representation. Courts have increasingly turned to the ABA Guidelines when deciding whether defense counsel's performance met the requirements of the Sixth Amendment and delivered the "high quality" legal representation that each capital defendant and death-sentenced prisoner deserves.<sup>10</sup>

The revised edition of the ABA Guidelines greatly expanded and updated an earlier set that had been published in 1989.<sup>11</sup> In addition to taking into account intervening legal and case law developments,<sup>12</sup> the ABA Advisory Committee<sup>13</sup> also identified areas of legal practice that had proved particularly problematic and sought to provide specific guidance to remedy some of the most serious mistakes made by counsel and other actors in the criminal justice system.

One of these errors was the frequent failure of defense counsel to investigate and present mitigation evidence during the penalty phase of a capital trial. This was true despite the fact that the importance of mitigation evidence was not a new concept. It has long been held that

8. Robbins, *supra* note 6, at 16 (footnote omitted).

9. "The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction." ABA GUIDELINES, *supra* note 1, at Guideline 1.1(A).

10. More than eighty state and federal death penalty cases, including cases decided by the United States Supreme Court, cite the ABA Guidelines as authority in cases in which the performance and obligations of defense counsel are considered. See ABA, Cases that Cite to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, [http://www.abanet.org/deathpenalty/resources/docs/List\\_of\\_Cases\\_that\\_cite\\_to\\_GL\\_MAR\\_2008.doc](http://www.abanet.org/deathpenalty/resources/docs/List_of_Cases_that_cite_to_GL_MAR_2008.doc) (last visited May 11, 2008).

11. See ABA GUIDELINES, *supra* note 1, at Introduction; see generally 1989 GUIDELINES, *supra* note 4.

12. Among these was the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996 which, *inter alia*, established strict deadlines for the filing of federal habeas petitions, limited the scope of review of state court decisions, severely restricted the ability of prisoners to file successive petitions, and generally limited the availability of federal habeas for state prisoners. See ABA GUIDELINES, *supra* note 1, at Guideline 1.1, commentary n.34.

13. Members of the ABA Advisory Committee included experienced capital defenders, volunteer death penalty lawyers, law school professors, representatives from national defender organizations and members of many ABA Sections, including the Criminal Justice Section. For a complete list of Advisory Committee Members, see *id.* at Acknowledgements.

“[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.”<sup>14</sup> Mitigation evidence took on a more urgent importance after the Supreme Court reinstated the death penalty in 1976. In *Gregg v. Georgia*,<sup>15</sup> the United States Supreme Court believed it could eliminate concern about the arbitrariness of the death penalty with a bifurcated trial procedure.<sup>16</sup> The Court sought to guide and narrow a jury’s discretion in a discrete penalty phase and permit it to consider specific information about the appropriateness of sentencing a particular defendant to death:

Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. . . . To the extent that this problem is inherent in jury sentencing, it may not be totally correctable. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.<sup>17</sup>

The Court went on to explain:

[T]he jury’s attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime).<sup>18</sup>

To achieve the objective of “individualizing sentencing”<sup>19</sup> in capital cases, therefore, it was clear that defense counsel had to develop and present a detailed picture of the defendant’s background, character, and

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14. *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937); see also *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959); *Williams v. New York*, 337 U.S. 241, 247 (1949). Otherwise, “the system cannot function in a consistent and a rational manner.” ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO: SENTENCING ALTERNATIVES AND PROCEDURES 201 (Approved Draft 1968); see PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 144 (1967); MODEL PENAL CODE § 7.07 cmt. 1 (Tentative Draft No. 2, 1954).

15. 428 U.S. 153 (1976).

16. *Id.* at 195.

17. *Id.* at 192 (citation omitted); see also ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 14, at 46-47; PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 14, at 145.

18. *Gregg*, 428 U.S. at 197.

19. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

life experiences to the jury. To present a complete portrait, however, counsel had to move well beyond the limited statutory factors that most capital sentencing statutes identified.<sup>20</sup> Experience taught them that the best mitigation evidence was found on front porches in conversations with family members, and in discussions with school teachers who remembered the neglected and abused children from their classes years earlier. There was no blueprint for the mitigation investigation that had to occur for a client's life to be saved. But these compelling details had the potential to transform the prosecution's "monsters" and "cold-blooded killers" into tragic figures for whom juries could find mercy.<sup>21</sup> Mitigation evidence took center stage in death penalty cases as potentially the *only* way defense counsel could humanize their client and save his life.

It was surprising, therefore, that notwithstanding its literal life and death significance, the ABA Advisory Committee found many cases where a thorough and independent investigation and presentation of mitigation evidence had not occurred.<sup>22</sup> Worse, appellate decisions left no doubt that the result would have been different if the jury had heard the mitigation evidence at trial.<sup>23</sup> Given the general unavailability of

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20. Statutory mitigating factors generally track the language proposed by the Model Penal Code. MODEL PENAL CODE § 210.6(3)-(4) (Proposed Official Draft 1962), *quoted with approval in Gregg*, 428 U.S. at 193 n.44. For examples of statutes that track the mitigating factors of the Model Penal Code, see 18 U.S.C. § 3592(a) (2000); ALA. CODE § 13A-5-51 to -52 (2006); ARIZ. REV. STAT. ANN. § 13-703(G) (2007); ARK. CODE ANN. § 5-4-605 (2006); CAL. PENAL CODE § 190.3 (West 1999); COLO. REV. STAT. ANN. § 18.1.3-1201(4) (West 2007); FLA. STAT. ANN. § 921.141(6) (West 2006); 720 ILL. COMP. STAT. ANN. § 5/9-1(c) (West Supp. 2007); IND. CODE ANN. § 35-50-2-9(c) (West 2004 & Supp. 2007); KAN. CRIM. CODE ANN. § 21-4626 (West Supp. 2007); KY. REV. STAT. ANN. § 532.025(2)(b) (LexisNexis 1999 & Supp. 2007); LA. CODE CRIM. PROC. ANN. art. 905.5 (1997); MD. CODE ANN., CRIM. LAW § 2-303(h)(2) (LexisNexis 2002 & Supp. 2007); MISS. CODE ANN. § 99-19-101(6) (West 2006); MO. ANN. STAT. § 565.032(3) (West 1999); MONT. CODE ANN. § 46-18-304 (2007); NEB. REV. STAT. ANN. § 29-2523(2) (LexisNexis 2003); NEV. REV. STAT. ANN. § 200.035 (West 2000); N.H. REV. STAT. ANN. § 630.5(VI) (2007); N.M. STAT. ANN. § 31-20A-6 (West 2003); N.Y. CRIM. PROC. LAW § 400.27(9) (McKinney 2005); N.C. GEN. STAT. § 15A-2000(f) (2007); OHIO REV. CODE ANN. § 2929.04(B) (West 2006); 42 PA. CONS. STAT. ANN. § 9711(e) (West 2007); S.C. CODE ANN. § 16-3-20(C)(b) (2003); TENN. CODE ANN. § 39-13-204(j) (2006); UTAH CODE ANN. § 76-3-207(4) (2003); VA. CODE ANN. § 19.2-264.4(B) (2004); WASH. REV. CODE ANN. § 10.95.070 (West 2002); WYO. STAT. ANN. § 6-2-102(j) (2007); OKLA. UNIFORM JURY INSTRUCTIONS: CRIMINAL OUJI-CR 4-79 (Vernon's 2d ed. 2007).

21. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 300-03 (1983).

22. See ABA GUIDELINES, *supra* note 1, at Guideline 10.7, commentary n.205.

23. See *id.*; see also Sean D. O'Brien, *When Life Depends On It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 716-17 (2008) (quoting *Williams v. Taylor*, 529 U.S. 362, 395, 398 (2000)); Mark E. Olive & Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 36 HOFSTRA L. REV. 1067, 1069-

competent counsel in post-conviction proceedings,<sup>24</sup> the number of defendants affected by the failure to find and present mitigation evidence at trial was incalculable.

It became apparent that the reason for this failure was not that lawyers did not understand that the development of mitigation evidence was critical. It was that most of them just did not know how to do it properly. Lawyers are generally unprepared and ill-equipped to discover mitigation evidence without expert assistance. The special skills and abilities necessary to obtain the sensitive and sometimes embarrassing evidence about a client's life experiences from family members and other sources are often beyond the abilities of even the most skilled courtroom lawyer.<sup>25</sup> While there is no question that obtaining mitigation evidence and presenting it at trial and in post-conviction proceedings remains the ultimate responsibility of defense counsel, it is equally clear that the assistance of a mitigation specialist is necessary to achieve that objective.

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73 (2008) (discussing *Rompilla v. Beard*, 545 U.S. 374 (2004); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams*, 529 U.S. at 362).

24. See Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086-88 (2006).

25. See ABA GUIDELINES, *supra* note 1, at Guideline 4.1, commentary ("Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed."); SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Guideline 5.1(C)-(D), in 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES]. As outlined in the Supplementary Guidelines:

Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures. They must have the ability to advise counsel on appropriate mental health and other expert assistance. . . . The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client in order to aid counsel in developing an affirmative case for sparing the defendant's life.

*Id.*

The ABA addressed this problem in the revised ABA Guidelines with the concept of the “defense team.”<sup>26</sup> It made clear the absolute requirement that capital defenders retain the assistance of a mitigation specialist as an essential member of any defense team.<sup>27</sup> The ABA Guidelines also require jurisdictions to provide the necessary funding to the defense to hire a mitigation specialist.<sup>28</sup> The ABA’s strong endorsement of the value and importance of mitigation specialists in capital cases and post-conviction proceedings helped cement their role in capital cases.

The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (“Supplementary Guidelines”)<sup>29</sup> are a natural and complementary extension of the ABA Guidelines. They spell out important features of the existing standards of practice that enable mitigation specialists and defense attorneys to work together to uncover and develop evidence that humanizes the client.<sup>30</sup> Most importantly, the Supplementary Guidelines will help defense counsel understand how to supervise the development of mitigation evidence and direct a key member of the defense team. This guidance is urgently needed. In my role as Director of the ABA Death Penalty Representation Project, I often receive inquiries from judges and lawyers about what training and experience a mitigation specialist should have before being appointed and what his or her responsibilities in a capital case should be. I also receive calls from mitigation specialists themselves, frustrated because defense counsel does not understand their role and what they need by way of support and direction. The Supplementary Guidelines will provide answers to many of those questions, continuing what the

26. ABA GUIDELINES, *supra* note 1, at Guideline 4.1. The “defense team” should comprise a minimum of two attorneys, one investigator, and one mitigation specialist. *Id.* at Guideline 4.1(A)(1).

27. *Id.* at Guideline 4.1.

28. *Id.* at Guideline 9.1.

29. SUPPLEMENTARY GUIDELINES, *supra* note 25.

30. *See id.* at Guideline 4.1(A)-(B). The Supplementary Guidelines describe the duties of the mitigation specialist,

In performing the mitigation investigation, counsel has the duty to obtain services of persons independent of the government and the right to select one or more such persons whose qualifications fit the individual needs of the client and the case. . . . Counsel has a duty to hire, assign or have appointed competent team members; to investigate the background, training and skills of team members to determine that they are competent; and to supervise and direct the work of all team members. Counsel must take whatever steps are necessary to conduct such investigation of the background, training and skills of the team members to determine that they are competent and to ensure on an ongoing basis that their work is of high professional quality.

*Id.*

ABA Guidelines began when they first described the unique role and responsibilities of mitigation specialists.<sup>31</sup>

For volunteer attorneys recruited by this Project<sup>32</sup> and other counsel inexperienced in capital litigation, the depth and scope of an investigation that meets the demands of the ABA Guidelines and Supplementary Guidelines can prove daunting.<sup>33</sup> This task is made harder with the realization that the vast majority of the men and women who are charged with or convicted of capital crimes have backgrounds of violence, abuse, and neglect. As an essential part of any capital case investigation, families that have carefully hidden shameful secrets of incest, abuse, alcoholism, and mental illness for generations must now be persuaded to disclose these details. It is a difficult and intimidating process. These are not secrets that will be revealed to strangers on the first visit, or even perhaps the third or fourth. Yet the damaging and destructive nature of these secrets is the very evidence that might convince a jury to spare a client's life.

The crisis of counsel that exists in the death penalty system means that we must rely on the good will and assistance of members of the private bar to represent death row prisoners without counsel.<sup>34</sup> Many of the volunteer lawyers that I recruit have never handled a death penalty case before.<sup>35</sup> Developing mitigation evidence and making a case for the life of their client is one of the most important tasks defense lawyers

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31. ABA GUIDELINES, *supra* note 1, at Guideline 4.1(B), commentary.

32. For a list of volunteer firms recruited by the ABA Death Penalty Representation Project since 1998, see ABA, Volunteer Law Firms Death Penalty Representation Project, <http://www.abanet.org/deathpenalty/participatingfirms/home.shtml> (last visited May 11, 2008).

33. Daniel S. Brennan is a volunteer lawyer from DLA Piper who was recruited by the Project to represent a death-sentenced man without counsel in a southern jurisdiction. "We really were grasping for where to start," said Brennan about beginning the mitigation investigation without the assistance of a skilled and experienced mitigation specialist. After a mitigation specialist joined the defense team, they found evidence to support the claim that their client was mentally retarded and succeeded in obtaining an evidentiary hearing on the question of the client's eligibility for a death sentence. "We had to learn to keep an open mind," said Brennan.

We didn't always know where to look and what we should be looking for. Our immediate reaction to some evidence was that it might not be useful; but then she'd turn it around and help us understand how it would help our case. Often it would lead to other evidence that was useful. She helped us map out a strategy and understand the case we needed to make for our client. I know we would not have been savvy enough to understand that without her assistance.

E-mail from Daniel S. Brennan, Partner, DLA Piper US LLP, to Robin M. Maher, Director, ABA Death Penalty Representation Project (Mar. 4, 2008, 18:07) (on file with author).

34. See Robin M. Maher, *Volunteer Lawyers and Their Extraordinary Role in the Delivery of Justice to Death Row Prisoners*, 35 U. TOL. L. REV. 519 (2004).

35. However, while many volunteer lawyers have not previously handled a death penalty case, it is nonetheless possible for these lawyers to provide adequate representation. See *id.* at 521.

must handle. But unlike the law of capital punishment, which they will eventually learn and master, developing mitigation evidence that may result in a different sentence for their client is not easy for volunteer lawyers, even when they are among the country's top litigators. For out-of-state lawyers who volunteer far from home, even the local accents are sometimes hard to understand. As a matter of survival, many families and communities have learned to conceal information about illegal activity and harmful behavior from strangers. This compelling and potentially life-saving evidence is often invisible to the untrained eye.

It is in this way that mitigation specialists—skilled in interviewing techniques, experienced in developing social histories, knowledgeable about cultural and racial differences, expert in recognizing the signs of mental disorders and impairments—do what most lawyers are simply unable to do. The evidence that a competent mitigation expert gathers will provide defense counsel with the tools that can save her client's life—counsel's ultimate responsibility. Without this evidence, it is impossible for defense counsel to represent her client effectively.<sup>36</sup>

The Supplementary Guidelines assist defense counsel in choosing and supervising the work of mitigation specialists throughout the course of the investigation. For inexperienced counsel, this guidance will be indispensable. Hiring a mitigation specialist who does not have appropriate training, skills, and experience is as disastrous as not hiring a mitigation specialist at all. In either case, the evidence is unavailable. The results of any mitigation investigation are only as good as the person seeking the evidence. Mitigation specialists must know where to look, who to talk to, and how to analyze the information properly. The Supplementary Guidelines provide important information to defense counsel about who they should hire and what mitigation specialists should do during the course of an investigation.<sup>37</sup>

Like other professionals, mitigation specialists must be given the necessary tools to perform competently. Judges who use the Supplementary Guidelines will understand why they must ensure adequate funding and avoid placing unreasonable limits on the ability of mitigation specialists to interview witnesses and travel for in-person interviews.<sup>38</sup> Appellate judges will better understand the mitigation

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36. See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003) (holding that defense counsel's failure to present existing mitigation evidence fell short of professional standards); see also *supra* note 22-23 and accompanying text.

37. SUPPLEMENTARY GUIDELINES, *supra* note 25, at Guidelines 5.1, 10.11.

38. See Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case*, 36 HOFSTRA L. REV. 819, 823-27 (2008).

function and what should have happened at trial.<sup>39</sup> The Supplementary Guidelines provide a detailed description of the scope and breadth of a mitigation investigation, a process that may span multiple jurisdictions and involve several generations of a family.<sup>40</sup> Mitigation investigations must begin immediately and often require months of intense effort to gather the necessary information.<sup>41</sup> Restrictions that limit the ability of mitigation specialists to meet the requirements of independence and thoroughness may ultimately prove fatal to the client.

Unsurprisingly, an increased understanding of the value provided by mitigation specialists has resulted in an unmet demand for the services of these skilled professionals. In many jurisdictions, there is a desperate need for trained and experienced mitigation specialists to be available to defense counsel. I often receive calls asking for referrals to mitigation specialists, and the volunteer lawyers I recruit rely on me to find the necessary experts. Too often I must tell them that there are not enough trained and experienced mitigation specialists for all those who need them.

The Supplementary Guidelines can be used to create training programs and to recruit gifted and interested individuals to enter this professional field. This development should be a priority for the criminal justice community. It is only with the assistance of skilled mitigation specialists that we can finally deliver on the promise of competent legal representation for all capital defendants.

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In a previous article for the *Hofstra Law Review*, I wrote about the importance of the “guiding hand of counsel” in death penalty cases and the urgent need for reform of the systems that provide counsel to indigent defendants.<sup>42</sup> The most effective way to increase accuracy and reduce the number of wrongful convictions<sup>43</sup> is to achieve this reform.

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39. See William M. Bowen, Jr., *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805 (2008) (describing a retired appellate judge's experiences with, and appreciation of, defense teams in capital cases).

40. See SUPPLEMENTARY GUIDELINES, *supra* note 25, at Guideline 10.11.

41. See O'Brien, *supra* note 23, at 747 n.257; Olive & Stetler, *supra* note 23, at 1078-80.

42. See Robin M. Maher, *'The Guiding Hand of Counsel' and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 1091, 1091-95 (2003).

43. As of February 2008, 127 people in 26 states have been released from death row since 1973 with evidence of their innocence. Death Penalty Information Center, *The Innocence List*, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited May 11, 2008).

The unwillingness of too many death penalty jurisdictions to do so remains one of the most shameful and profound failures of our criminal justice system. As the ABA Task Force stated in 1990:

[C]apital litigation in the United States today too often begins with poor legal representation. Thereafter, the petitioner, the state, and society pay the price as each successive stage of the case becomes more complicated, more protracted, and more costly. Poor representation after the trial is also not uncommon, and it, too, imposes costs—in terms of both efficiency and fairness—at each successive stage of the litigation. The goals of better, more efficient, and more orderly justice can be achieved when the quality of legal representation at all stages of capital cases is improved.<sup>44</sup>

Our experience in death penalty cases has taught us a great deal over the years. We now understand that effective legal representation requires the work and commitment of a defense team of skilled professionals, including a mitigation specialist. We know that a pool of expertise and skill is needed to competently perform the high-wire act of defending a human being on trial for his life. And we appreciate the significant difference that effective legal representation makes in determining an outcome of life or death.

The Supplementary Guidelines join the ABA Guidelines as important tools for all those who seek to ensure justice for the men and women on death row. They will enhance the work of capital defenders and mitigation specialists. They will inform jurisdictions that must make decisions about the resources and assistance that defense teams require. They will educate judges who have questions about mitigation evidence and the professionals who develop it. While we remain far from our objective of ensuring justice and fairness for all those facing possible execution, the Supplementary Guidelines further our progress toward reaching that goal.

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44. Robbins, *supra* note 6, at 27.