Introduction: The Tenth Anniversary of the ABA Capital Defense Guidelines: The Road Traveled and the Road to be Traveled Part One

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INTRODUCTION

Eric M. Freedman*

Ten years ago, the American Bar Association ("ABA") published a revised version of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("Guidelines"), and the Hofstra Law Review published a symposium to mark the occasion. The Guidelines emphasized then that they were "not aspirational," but rather embodied "the current consensus about what is required to provide effective defense representation in capital cases." Today, the Guidelines "stand as the single most authoritative summary of the prevailing professional norms in the realm of capital defense practice," having been cited hundreds of times by courts from the Supreme Court of the United States on down.

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2. Id. Guideline 1.1 hist. n., at 920.

dedicated professionals involved in the development of the Guidelines, there is certainly no cause for complacency. First, the situation on the ground is still very far from satisfactory. Second, as in any professional field, the standard of care is not fixed but evolves as new knowledge emerges from experience and study. All of the contributions to this Symposium honoring the tenth anniversary of the Guidelines address these issues.

Part One of the Symposium begins with my piece: Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster. Although the Guidelines mandate effective counsel at every stage of capital proceedings, the implementation of this standard with respect to state post-conviction proceedings has been widely unsatisfactory because even where nominal standards exist there is no effectual enforcement mechanism. My Article suggests that recent Supreme Court decisions might provide the legal tools and institutional incentives for both the state and federal governments to work towards ameliorating the situation:

If the states create robust processes for post-conviction review, the federal courts will under [Cullen v.] Pinholster treat their individual outcomes with greater respect than before. But if the states fail to do so, they are now vulnerable not only to structural assaults for failing to provide due process but also to case-specific challenges based on the


6. The Symposium is being published in two parts. Part One appears in this issue, and Part Two is scheduled to appear in Volume 42.1 of the Hofstra Law Review.


8. ABA GUIDELINES, supra note 1, Guideline 1.1(B), at 919.

9. See, e.g., supra text accompanying note 5; see also Freedman, supra note 7, at 596 n. 35.
equitable rule of Martinez [v. Ryan]. Providing competent counsel in state post-conviction proceedings, in capital cases first of all, is an easy way for the states to push back on both fronts.10

The federal courts, for their part, save resources and adjudicate more sure-footedly when the states give death-row inmates high quality post-conviction proceedings.11 The role of capital defense lawyers is to seek implementation of the Guidelines and to encourage both state and federal courts to take a system-wide perspective.

My colleague, Professor Monroe H. Freedman, has devoted much of his long career to efforts to improve criminal defense advocacy. In his Professional Discipline of Death Penalty Lawyers and Judges,12 he considers one way in which the Guidelines have almost never been enforced: by disciplining defense lawyers who perform incompetently and judges who appoint them.13 He finds that the appropriate tools are in place but are simply not utilized, notwithstanding numerous instances in which they should be.14

Meredith Martin Rountree and Robert C. Owen, both highly experienced capital defenders who teach at the University of Texas, focus on another weakly enforced aspect of the Guidelines. Their Overlooked Guidelines: Using the Guidelines to Address the Defense Need for Time and Money15 highlights the often-neglected fact that the Guidelines impose duties on governments—on whom constitutional obligations rest—as well as on individual defense lawyers.16 In concrete terms, this means that jurisdictions are required to provide the resources necessary for the capital defense team to provide high-quality legal representation.17 The authors call upon counsel to use the Guidelines to illuminate the widespread failure of governments to abide by their institutional responsibilities.18

The final Article in this Part of the Symposium addresses the issue of defining the standard of care in a complex and rapidly moving field. Russell Stetler, the National Mitigation Coordinator for the federal death penalty projects, and Professor W. Bradley Wendel of Cornell Law

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10. Freedman, supra note 7, at 600.
11. Id. at 601-02.
13. Id. at 607, 620-21.
14. Id. at 603-04.
16. Id. at 633-34.
17. See ABA GUIDELINES, supra note 1, Guideline 9.1(A), at 981.
School, whose fields include both legal ethics and torts, contribute *The ABA Guidelines and the Norms of Capital Defense Representation*, which offers clear practical guidance to courts evaluating attorney performance. The authors emphasize that the standard of practice is set by those professionals who perform well, not those who are mediocre or worse, and that, as the overall levels of performance in the discipline improve, the standard evolves accordingly.\(^{20}\)

The tenth anniversary of the ABA Guidelines marks a milestone but decidedly not an endpoint. There is still far to go before the country achieves “high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.”\(^{21}\) The authors and editors of this Symposium hope that it constitutes a step in that direction.

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20. *See* id. at 639, 695-96.
21. *ABA GUIDELINES, supra* note 1, Guideline 1.1(A), at 919.