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

Eric M. Freedman

Maurice A. Deane School of Law at Hofstra University

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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”),¹ 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.”² 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.³ While this development may be satisfying to the many

* Maurice A. Deane Distinguished Professor of Constitutional Law, Maurice A. Deane School of Law, Hofstra University (Eric.M.Freedman@Hofstra.edu). B.A. 1975, Yale University; M.A. 1977, Victoria University of Wellington (New Zealand); J.D. 1979, Yale University. Professor Freedman is the Reporter for the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003). The opinions expressed herein, however, are attributable solely to him.

1. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA Guidelines are also available online at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/deathpenaltyguidelines2003.authcheckdam.pdf>.

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

3. Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 645 (2013); see “List of Cases Citing to the ABA Guidelines (1989 and 2003), available at http://www.americanbar.org/advocacy/other_aba_initiatives/death_penalty_representation/resources/aba_guidelines.html (last visited July 18, 2013); see, e.g., *Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (relying on noncompliance with the prevailing norms of practice reflected in first edition of Guidelines to support holding of ineffective assistance of counsel); see also *Bobby v. Van Hook*, 558 U.S. 4, 7-8 (2009) (per curiam) (holding that Court of Appeals erred in uncritically applying Guidelines not in effect at time of attorney performance and treating them as inexorable commands rather than guides to reasonable performance).

dedicated professionals involved in the development of the Guidelines,⁴ there is certainly no cause for complacency.

First, the situation on the ground is still very far from satisfactory.⁵ 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.⁶

Part One of the Symposium begins with my piece: *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*.⁷ Although the Guidelines mandate effective counsel at every stage of capital proceedings,⁸ 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.⁹ 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

4. The Guidelines were the result of extended consultation and research by many individuals and groups. See ABA GUIDELINES, *supra* note 1, acknowledgments & intro., at 914-16. Subsequently, an equally exhaustive process resulted in the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (“Supplementary Guidelines”). SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES intro., in 36 HOFSTRA L. REV. 677, 677-78 (2008); see 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, 697-702 (2008) (describing the creation of the Supplementary Guidelines). The Supplementary Guidelines enhance the Guidelines by “spell[ing] out important features of the existing standards of practice.” Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 770-71 (2008).

5. See *Death Penalty Assessments*, AM. BAR ASS’N, http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project/death_penalty_assessments.html (last visited July 18, 2013) (linking to texts of ABA assessments of death penalty systems in Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, and Tennessee).

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*.

7. Eric M. Freedman, *Enforcing ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. 591 (2013); see also *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

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 Money*¹⁵ 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

10. Freedman, *supra* note 7, at 600.

11. *Id.* At 601-02.

12. Monroe H. Freedman, *Professional Discipline of Death Penalty Lawyers and Judges*, 41 HOFSTRA L. REV. 603 (2013).

13. *Id.* at 607, 620-21.

14. *Id.* at 603-04.

15. Meredith Martin Rountree & Robert C. Owen, *Overlooked Guidelines: Using the Guidelines to Address the Defense Need for Time and Money*, 41 HOFSTRA L. REV. 623 (2013).

16. *Id.* at 633-34.

17. See ABA GUIDELINES, *supra* note 1, Guideline 9.1(A), at 981.

18. Rountree & Owen, *supra* note 15, at 633-34.

School, whose fields include both legal ethics and torts, contribute *The ABA Guidelines and the Norms of Capital Defense Representation*,¹⁹ 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.

19. Stetler & Wendel, *supra* note 3, at 635.

20. *See id.* at 639, 695-96.

21. ABA GUIDELINES, *supra* note 1, Guideline 1.1(A), at 919.