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Professional Discipline of Death Penalty Lawyers and Judges

Monroe H. Freedman

Maurice A. Deane School of Law at Hofstra University

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PROFESSIONAL DISCIPLINE OF DEATH PENALTY LAWYERS AND JUDGES

*Monroe H. Freedman**

I. INTRODUCTION

On this, the fiftieth anniversary of *Gideon v. Wainwright*'s¹ broken promise,² I have been asked to propose guidelines that (a) provide professional discipline of lawyers who fail to provide competent representation in death penalty cases, but that (b) do not discourage good lawyers from taking death cases or from cooperating with successor counsel who is trying to show that the lawyers were ineffective at trial.

It is a pointless exercise. And I have added another pointless exercise, drafting guidelines that will discipline judges who appoint lawyers in death cases whom the judges know or should know will give incompetent representation.

The assignment is pointless, because we already have ample rules and guidelines to do the job. This is shown by a small number of disciplinary proceedings that have been brought. In general, however, disciplinary bodies are either inadequately equipped to enforce existing rules, or they prefer to let the "machinery of death" continue to grind on, defying due process and destroying lives.³

Before getting into the substance of these issues, it is important to note the difference between rules and guidelines. As explained in the

* Professor of Law, Maurice A. Deane School of Law, Hofstra University. Co-author with Abbe Smith, *UNDERSTANDING LAWYERS' ETHICS* (4th ed. 2010). All inconsistencies in formatting are at the author's discretion.

1. 372 U.S. 335 (1963).

2. *See id.* at 344 (explaining that before a state can imprison an indigent person as a felon, due process requires that the state provide him with the guiding hand of counsel at every step of the proceedings against him).

3. The phrase "machinery of death" was used by Justice Harold Blackmun, dissenting in *Callins v. Collins*, in which the Supreme Court permitted an execution to go forward. *Callins v. Collins*, 510 U.S. 1141, 1143, 1145 (1994) (Blackmun, J., dissenting).

Scope section of the Model Rules of Professional Conduct (“Model Rules”), the comments to the rules are intended as “guides to interpretation” but they “do not add obligations to the Rules.”⁴ Specifically, if a comment appears to expand or contract its rule, it is the text of the rule, not the comment, that is “authoritative.”⁵ Similarly, ABA standards are ordinarily guides with the same effect as comments.⁶

Significantly, however, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases⁷ states that the commentary of the original edition of the Guidelines said that “it was designed to express existing ‘practice norms and constitutional requirements.’” This thought has been moved to the black letter in order to emphasize that these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.”⁸ However, the ABA standards would only be binding on courts and disciplinary authorities in jurisdictions that have adopted these Guidelines. Even if not adopted in a particular jurisdiction, however, the Guidelines would be persuasive authority.⁹

II. PROVISIONS FOR DISCIPLINING INCOMPETENT REPRESENTATION

A. *The Model Rules*

Model Rule 1.1 provides the basis for discipline of incompetent lawyers, without the need for additional guidelines.¹⁰ The Rule requires a lawyer to provide competent representation to a client.¹¹ The Rule then defines competence as requiring “the legal knowledge, skill,

4. MODEL RULES OF PROF'L CONDUCT scope ¶ 14, 21 (2007).

5. *Id.* ¶ 21.

6. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-1.1 (3d ed. 1993).

7. The Guidelines are published in 31 HOFSTRA L. REV. 913 (2003).

8. ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 1.1 hist. n. (rev. ed. 2003), *in* 31 HOFSTRA L. REV. 913, 920 (2003) [hereinafter ABA GUIDELINES].

9. The United States Supreme Court has recognized the Guidelines in analyzing ineffective assistance of counsel. *Rompilla v. Beard*, 545 U.S. 374, 387-88 n.7 (2005).

10. MODEL RULES OF PROF'L CONDUCT, R. 1.1 (2007).

11. *Id.*

thoroughness and preparation reasonably necessary for the representation.”¹² Also, the Comment to Rule 1.1 mentions the “specialized nature of the matter” as relevant to assessing requisite competence, and notes that “[e]xpertise in a particular field of law may be required in some circumstances.”¹³ In addition, the Comment recognizes that “what is at stake” is relevant to determining that a matter is one that can require “more extensive treatment than matters of lesser . . . consequence.”¹⁴

Accordingly, professional discipline is justified, and has long been justified, whenever a lawyer provides incompetent representation in a death penalty case.

B. The ABA Defense Function Standards

For two decades—since their promulgation in 1993—the Defense Function Standards have reinforced the criminal defense lawyer’s obligation of competent representation. Standard 4-1.2(b) defines defense counsel’s “basic duty” to include “effective, quality representation.”¹⁵ With specific reference to death penalty cases, Standard 4-1.2(c) notes that “the death penalty differs from other criminal penalties in its finality,” and requires that counsel render “extraordinary efforts on behalf of the accused.”¹⁶ The Comment to the Standard explains further: “Because the client’s life is on the line, . . . defense counsel should endeavor . . . to leave no stone unturned in the investigation and defense of a capital client.”¹⁷

C. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

The Commentary to Guideline 1.1 of the Guidelines explains that capital “cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in

12. *Id.*

13. *Id.* cmt. ¶ 1.

14. *Id.* cmt. ¶ 5.

15. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-1.2(b) (3d ed. 1993).

16. *Id.* at 4-1.2(c).

17. *Id.* standard 4-1.2 cmt.

ordinary criminal cases.”¹⁸ Accordingly, under the commentary to Guideline 1.1, it is noted that it is widely accepted that “the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master. . . . Counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns.”¹⁹ Counsel must therefore “be able to develop and implement advocacy strategies applying existing rules in the . . . environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment.”²⁰

After requiring that each jurisdiction develop and publish qualification standards for defense counsel, Guideline 5.1 stipulates that these standards should ensure:

1. That every attorney representing a capital defendant has:
 - a. obtained a license or permission to practice in the jurisdiction;
 - b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
 - c. satisfied the training requirements set forth in Guideline 8.1.
2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:
 - a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
 - b. skill in the management and conduct of complex negotiations and litigation;
 - c. skill in legal research, analysis, and the drafting of litigation documents;
 - d. skill in oral advocacy;
 - e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

18. ABA GUIDELINES, *supra* note 8, Guideline 1.1 cmt., at 923.

19. *Id.*

20. *Id.*; see also Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1174-75, 78 (2003).

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.²¹

These Guidelines have been in effect for ten years.²² Nevertheless, neither these Guidelines nor widely adopted ethical rules regarding competence have resulted in a significant number of disciplinary proceedings against lawyers who fall far short of the requisite level of competence.

III. DISCIPLINARY PROCEEDINGS AGAINST INCOMPETENT LAWYERS IN CAPITAL CASES SHOW THAT THE PRESENT RULES ARE ADEQUATE BUT SELDOM USED

A. *A Vivid Illustration of the Failure of Disciplinary Rules*

1. The Facts of *Maples v. Thomas*²³

In a case involving the doctrine of *res ipsa loquitur* (meaning, “the thing speaks for itself”), the Mississippi Supreme Court held: “We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless.”²⁴ The chewing tobacco case comes to mind when reviewing the United States Supreme Court opinion in *Maples v. Thomas*, which provides a vivid, speaks-for-itself account of multiple instances of incompetent representation by lawyers in a capital case.²⁵

Cory Maples was represented at trial by two court-appointed lawyers who were “minimally paid and with scant experience in capital

21. *Id.* Guideline 5.1(B), at 961-62.

22. The Guidelines were “approved . . . on February 10, 2003.” *Id.* intro. at 916.

23. 132 S. Ct. 912 (2012).

24. *Pillars v. R. J. Reynolds Tobacco Co.*, 78 So. 365, 366 (Miss. 1918).

25. *Maples*, 132 S. Ct. at 916-17, 19-21, 25, 27; see also Deborah A. DeMott, “Abandoned . . . Without a Word of Warning”: Perspectives on *Maples v. Thomas*, 8 DUKE J. OF CONST. LAW & PUB. POL’Y SPECIAL ISSUE 39, 45-46, 48, 50 (2012) (providing specific instances of incompetent representation by the lawyers in *Maples v. Thomas*, a capital case).

cases.”²⁶ Indeed, one of Maples’s trial lawyers had never before served in a capital case and the other had never tried the penalty phase of a capital case.²⁷ To carry out the high quality representation that is necessary in the complexities of a capital case,²⁸ these inexperienced lawyers received twenty dollars an hour for work on the case out-of-court (capped at \$1000) and forty dollars an hour for work in court.²⁹ Not surprisingly, in his collateral attack on his conviction and death sentence, Maples asserted that his trial lawyers “failed to develop and raise an obvious intoxication defense, did not object to several egregious instances of prosecutorial misconduct, and woefully underprepared for the penalty phase of his trial.”³⁰

In Maples’s post-conviction proceedings, three associates in the New York office of Sullivan & Cromwell, at least one partner in that firm, and the firm itself, were involved in Maples’s representation.³¹ Two of his lawyers of record, Jaasi Munanka and Clara Ingen-Housz, were associates with the firm.³² The partner overseeing the representation was Marc De Leeuw.³³ In addition, another associate in the firm, Felice Duffy, worked on the case.³⁴

The law firm shared responsibility for Maples’s representation, because a premise of the lawyers’ ethics is that “each lawyer [in the firm] is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.”³⁵ Also, “a firm of lawyers

26. *Maples*, 132 S. Ct. at 916.

27. *Id.* at 918.

28. See ABA GUIDELINES, *supra* note 8, Guideline 1.1(A), at 919.

29. *Maples*, 132 S. Ct. at 917-18.

30. *Id.* at 919.

31. *Id.* at 918, 925. A Legal Aid lawyer entered an appearance before the Sullivan & Cromwell lawyers did so. *Maples v. Campbell*, CV 03-B-2399-NE, 2007 U.S. Dist. LEXIS 101481, at *1 (N.D. Ala. Sept. 26, 2007); *Maples v. Campbell*, 5:03-CV-2399-SLB-PWG, 2006 U.S. Dist. LEXIS 98980, at *1 (N.D. Ala. Sept. 29, 2006). When the petition for relief was filed in the trial court, the two Sullivan lawyers and local counsel signed a verification that they were the three lawyers in the matter for Maples, and that they were the lawyers who were to receive all notices in the case. See *Maples*, 132 S. Ct. at 918-19.

32. *Maples*, 132 S. Ct. at 918.

33. *Id.* at 925 (“[P]artner Marc De Leeuw stated that he had been ‘involved in [Maples]’ case since the summer of 2001.”) (second alteration in original).

34. *Id.* (“Another Sullivan & Cromwell attorney, Felice Duffy, stated, in an affidavit submitted to the Alabama trial court in September 2003, that she ‘ha[d] worked on [Maples]’ case since October 14, 2002.”) (alterations in original).

35. MODEL RULES OF PROF’L CONDUCT R. 1.10 cmt. ¶ 2 (2007).

is essentially one lawyer for purposes of the rules governing loyalty to the client”³⁶ This is so regardless of whether the firm is identified when a member of the firm signs on as counsel of record.³⁷ “When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained”³⁸

Moreover, “[a] law firm is required to ensure that the work of partners and associates is adequately supervised . . . taking into account . . . the experience of the [lawyer] whose work is being supervised.”³⁹ “A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the [applicable ethical rules].”⁴⁰ In Maples’s case, the partner in the supervisory position was De Leeuw.⁴¹

In addition, at least one partner in a firm is required to make reasonable efforts to establish policies and procedures that ensure that all lawyers in the firm conform to the Model Rules, including “identify[ing] dates by which actions must be taken in pending matters”⁴² As discussed below, a crucial filing date was missed by Maples’s lawyers.⁴³ The partner responsible for establishing the policies and procedures in this regard might have been De Leeuw or it might have been one or more other partners, potentially adding to the list of culpable lawyers.⁴⁴

In addition to the Sullivan & Cromwell lawyers implicated in Maples’s representation, John Butler was also an attorney of record in the case.⁴⁵ Under Alabama law, a local attorney’s name must appear on all documents filed in a case in which out-of-state lawyers are counsel of

36. *Id.*

37. Although the Sullivan & Cromwell lawyers do not include the firm’s name when they become counsel of record in pro bono cases, the firm, with justifiable pride, takes credit for its pro bono litigation on its website. See *Pro Bono*, SULLIVAN & CROMWELL LLP, <http://www.sullcrom.com/about/probono/> (last visited July 18, 2013).

38. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 31 cmt. f (2000).

39. N.Y. RULES OF PROF’L CONDUCT R. 5.1(c) (2012). This provision of the New York Rules is not in the Model Rules.

40. MODEL RULES OF PROF’L CONDUCT R. 5.1(b) (2007).

41. See *Maples v. Thomas*, 132 S. Ct. 912 (2012).

42. MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. ¶ 2 (2007).

43. See *infra* text accompanying notes 51-69.

44. For example, Sullivan & Cromwell has stated on its website that it “created the position of Special Counsel for Pro Bono to enhance the Firm’s deep commitment to pro bono work and broaden the opportunities and types of pro bono matters available. In addition, the Firm has designated a day-to-day coordinator of pro bono activities.” *Pro Bono*, *supra* note 37.

45. *Maples*, 132 S. Ct. at 919.

record, and the local lawyer must “accept joint and several responsibility with the foreign attorney to the client . . . in all matters [relating to the case].”⁴⁶ “Butler told the Sullivan & Cromwell lawyers, [that] he could not ‘deal with substantive issues in the case.’”⁴⁷ However, it does not appear that this disclaimer to out-of-state lawyers could absolve Butler of duties imposed upon him by the Alabama State Bar Rules. Note, too, that Butler, by his own admission, was unable to provide the high quality representation that is necessary in the complex litigation of a capital case.⁴⁸

Having entered their appearances on Maples’s behalf, Munanka and Ingen-Housz assisted him in filing a petition for post-conviction relief under Alabama rules.⁴⁹ “The State responded by moving for summary dismissal” and the trial court denied the State’s motion.⁵⁰

Some seven months later, without having attempted to get a hearing on Maples’s petition or having taken any further action in the trial court, Munanka and Ingen-Housz left Sullivan & Cromwell, taking positions that precluded them from working further on Maples’s case.⁵¹ Neither lawyer told Maples of their departure, and neither sought leave to withdraw from the representation, nor did any other Sullivan & Cromwell lawyer enter an appearance on Maples’s behalf or otherwise notify the court of any change in his representation.⁵²

An additional nine months of inaction by Maples’s lawyers then passed with Munanka, Ingen-Housz, and Butler as his only attorneys of record.⁵³ At that point, the trial judge, without holding a hearing, entered an order denying Maples’s petition, and the clerk of court mailed copies of the order to Maples’s three attorneys of record.⁵⁴ When the copies arrived at Sullivan & Cromwell, a mailroom employee returned them unopened to the court clerk, with a stamp indicating that Munanka was

46. *Id.* at 918-19 (alterations in original) (quoting RULES GOVERNING ADMISSION TO THE ALABAMA STATE BAR R. VII(C) (2003)).

47. *Id.* at 919.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 919-20.

unknown and that Ingen-Housz had left the firm.⁵⁵ The court clerk did nothing further.⁵⁶ Nor did Butler do anything, assuming that the Sullivan & Cromwell lawyers were still on the case and would take the necessary action.⁵⁷

Forty-two days after the petition was denied, the time ran out to file a notice of appeal.⁵⁸ About a month thereafter, the Alabama Attorney General informed Maples that he had four weeks to file a federal habeas petition, and Maples's mother telephoned Sullivan & Cromwell to ask about the case.⁵⁹ De Leeuw and two associates then asked the trial judge to change the record to give them more time to file the state notice of appeal, but the judge, noting that only Munanka and Ingen-Housz were attorneys of record, said that he was "unwilling to enter into subterfuge in order to gloss over mistakes made by counsel for the petitioner."⁶⁰ The judge added, rhetorically, "[h]ow . . . can a Circuit Clerk in Decatur, Alabama, know what is going on in a law firm in New York, New York?"⁶¹

Thereafter, the Alabama Court of Criminal Appeals denied a request for leave to file an out-of-time appeal, noting that Butler's receipt of the order was sufficient to put all counsel for Maples on notice.⁶² The Alabama Supreme Court summarily affirmed the Court of Criminal Appeals, and the Supreme Court denied certiorari.⁶³

It appears, therefore, that at least five or six lawyers, and a law firm, were guilty of incompetence in the state post-conviction phase of Cory Maples's case. This incompetence cannot be avoided by blaming the mailroom employee at Sullivan & Cromwell or the clerk of the Alabama court.⁶⁴ For seven months before leaving Sullivan & Cromwell, Munanka and Ingen-Housz failed to seek a hearing on Maples's petition

55. *Id.* at 920.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 920-21.

61. *Id.*

62. *Id.* at 921.

63. *Id.*

64. In handling this appeal, Sullivan & Cromwell had a conflict of interest, leading it to attempt to place the blame on a clerk rather than on its own abandonment of Maples. *See id.* at 925 n.8.

or to take any other action in the trial court.⁶⁵ In addition, neither lawyer told Maples of their departure from the firm and from his case, and neither sought leave to withdraw from the representation.⁶⁶ Nor did any other Sullivan & Cromwell lawyer enter an appearance on Maples's behalf or otherwise notify the court of any change in his representation.⁶⁷ Moreover, after Munanka and Ingen-Housz departed, none of Maples's lawyers took any action for nine months, leaving Munanka, Ingen-Housz, and Butler as Maples's only attorneys of record.⁶⁸

With good reason, therefore, all nine Supreme Court Justices agreed, in Maples's federal habeas corpus appeal to the Court, that Maples's lawyers had not performed competently.⁶⁹ As a result of that incompetence, Maples was left to die.⁷⁰

2. The Failure of Disciplinary Action in *Maples v. Thomas*

As shown above, existing disciplinary rules and other authorities provide ample grounds for professional discipline of the lawyers in Maples's case. Earlier reference has been to the ABA's Model Rules of Professional Conduct. New York, where the Sullivan & Cromwell lawyers were located, like virtually every state, has adopted ethical rules that are patterned on the Model Rules.⁷¹

Accordingly, Jorge Dopico, Chief Counsel of the Departmental Disciplinary Committee in New York's First Judicial Department, sua sponte undertook an ethics investigation of Jaasi Munanka.⁷² However,

65. See *id.* at 919.

66. *Id.*

67. *Id.*

68. *Id.*

69. See generally *id.* (agreeing that Maples's attorneys had abandoned their client). Justice Antonin Scalia, with Justice Clarence Thomas concurring, contended that, on agency principles, Maples was responsible for his attorneys' incompetence. *Id.* at 929-30 (Scalia, J., dissenting).

70. In his federal habeas corpus appeal, the Supreme Court overruled lower court decisions and held that Maples had been abandoned by his lawyers. *Id.* at 917 (majority opinion). The Court therefore remanded the case for a determination of whether the failure to file a timely notice of appeal prejudiced Maples. *Id.* at 928. I was one of ninety-two ethics professors and practitioners who filed an amicus curiae brief on behalf of Maples.

71. With one exception, the N.Y. Rules discussed in this Article are the same as the Model Rules. See generally, N.Y. RULES OF PROF'L CONDUCT R. 5.1 (2012). The exception, mentioned above, is N.Y. Rule 5.1(c), which specifically requires a law firm to ensure that the work of partners and associates is adequately supervised, taking into account the experience of the lawyer whose work is being supervised. *Id.* R. 5.1(c).

72. Letter from Jorge Dopico, Chief Counsel, Departmental Disciplinary Comm., Supreme

the Disciplinary Committee then decided that “there is no basis for taking disciplinary action” against Munanka and closed the matter.⁷³ Unfortunately, neither Dopico nor the Committee has given any reasons for the Committee’s decision. Also, Munanka’s lawyer, while complaining that the amicus brief filed by ninety-two ethics professors and practitioners was based on erroneous facts, chose not to indicate which facts were erroneous and what the correct facts were.⁷⁴

The facts relied upon in the amicus brief were based directly on those related by the Supreme Court⁷⁵ and, as shown above, incompetence on Munanka’s part is clear on those facts. We can only speculate, therefore, about what, if anything, the Supreme Court might have gotten wrong and what the reason might have been for the Committee’s decision to end its inquiry. A possibility is that Munanka did expressly relinquish all responsibility to De Leeuw, the supervising partner. Even then, however, Munanka failed to obtain leave of the Alabama court to withdraw as counsel of record;⁷⁶ therefore, as far as the clerk was aware, Munanka remained one of the lawyers responsible for receiving notices in Maples’s case. The same, of course, would be true

Court, Appellate Div., to Jaasi J. Munanka (Sept. 21, 2012), *attached in* Letter from Kevin D. Evans, Attorney, to Authors and Signatories of the *Amici Curiae* Brief of Legal Ethics Professors and Practitioners and the Ethics Bureau at Yale in *Maples v. Thomas* Supreme Court Case No.10-63 (Jan. 19, 2013), *available at* <http://www.legalethicsforum.com/files/letter-re-mr.-munanka---maples-v.-thomas1.pdf>.

73. *Id.*

74. Letter from Kevin D. Evans, Attorney, to Authors and Signatories of *Amici Curiae* Brief of Legal Ethics Professors and Practitioners and the Ethics Bureau at Yale in *Maples v. Thomas*, Supreme Court Case No. 10-63 (Jan. 19, 2013), *available at* <http://www.legalethicsforum.com/files/letter-re-mr.-munanka---maples-v.-thomas1.pdf>. I therefore wrote to Mr. Evans to ask why the Disciplinary Committee found that there is no basis for taking disciplinary action against Mr. Munanka. At this point, I explained, “I have no facts about Mr. Munanka’s role to rely on other than those stated in the Supreme Court’s opinion in *Maples v. Thomas*. I hope, therefore, that you will help me to provide an accurate account in my article.” Email from author to Kevin D. Evans, Attorney (Feb. 12, 2013) (on file with the *Hofstra Law Review*). Mr. Evans replied that, “what was done to Mr. Munanka in the Supreme Court . . . was to vilify him based on a false, distorted and warped record[.]” He added, however, that under Rule 1.6 and related authority, Mr. Munanka is “unable absent consent from Mr. Maples to share the full, underlying record. We have asked for permission to share the full record from Mr. Maples, and our request has gone unanswered.” *Id.*

75. *See generally* Brief of Legal Ethics Professors and Practitioners and the Ethics Bureau at Yale as *Amici Curiae* in Support of Petitioner, *Maples v. Thomas*, 132 S. Ct. 912 (2012) (No. 10-63), 2011 WL 2132708 (setting forth how Sullivan & Cromwell effectively abandoned Cory Maples).

76. *Maples v. Thomas*, 132 S. Ct. 912, 916-17 (2012).

of Ingen-Housz, who does not appear to have been the subject of any ethics investigation.

Moreover, regardless of any facts that might conceivably have led the Disciplinary Committee to end the investigation of Munanka, it is beyond understanding why disciplinary action has not been taken in New York against De Leeuw, Duffy, Brewer, and/or the firm of Sullivan & Cromwell. Like a human toe in chewing tobacco, Maples's abandonment by his lawyers to die without due process speaks for itself. Somebody in a law firm in New York, New York had been very careless.⁷⁷

B. A Case in Which Disciplinary Action Has Been Taken

As demonstrated above, additional rules providing for professional discipline of incompetent lawyers in death penalty cases are pointless, because the current rules are ample. In fact, existing rules have been used, albeit in a small number of cases, to sanction incompetent representation in capital cases. Here is an abandonment case in which, unlike *Maples v. Thomas*, disciplinary action was taken against the incompetent lawyer.

In *Myers v. Allen*,⁷⁸ Robin D. Myers, was found guilty of murder by an Alabama jury.⁷⁹ The jury recommended life without parole, but the trial court overruled the jury and, without any discussion, sentenced Myers to death.⁸⁰ The Alabama courts affirmed the conviction and sentence, and the Supreme Court denied certiorari.⁸¹

Shortly thereafter, attorney Earle Schwarz, representing Myers pro bono in post-conviction proceedings, filed a petition in the circuit court of Alabama.⁸² However, Schwarz failed to comply with the Alabama post-conviction deadlines.⁸³ As the court stated in *Myers*, Schwarz had

77. It is possible that the Disciplinary Committee issued letters of reprimand to one or more lawyers, in which case the Committee's action would not have been made public. Even if such action was taken, however, it would be grossly inadequate in view of the extent of the incompetence and the fact that it occurred in a capital case.

78. 420 F. App'x 924 (11th Cir. 2011).

79. *Id.* at 925.

80. *Id.* at 926.

81. *Myers v. Alabama*, 522 U.S. 1054 (1998).

82. *Myers*, 420 F. App'x at 926.

83. *Id.*

sixty days to assemble affidavits in support of Myers's substantive claim, but he failed to do so.⁸⁴ Schwarz instead waited until the deadline to request more time.⁸⁵ The court denied this request and also denied the petition without a hearing.⁸⁶ Schwarz then filed Myers's appeal to the Alabama Court of Criminal Appeals, "but after filing the briefs, he abandoned Myers without telling either Myers or the courts of his abandonment."⁸⁷ Although the court denied Myers's appeal in February 2003, Myers still "believed [that] his appeal was pending until February 2004, when the Alabama Attorney General sent Myers a copy of a letter mailed to Schwarz advising [him] that [the prosecution was] seeking an execution date because Myers's time for filing appeals had expired."⁸⁸ Myers was then assisted by other prisoners with locating new counsel.⁸⁹ This counsel then filed a federal habeas petition on March 25, 2004.⁹⁰

After hearing the evidence, a magistrate judge ruled against Myers on the merits of his petition, and the Eleventh Circuit affirmed.⁹¹ In addition, the magistrate filed a formal complaint against Schwarz in Tennessee, where Schwarz was a member of the bar and employed by a law firm.⁹² The magistrate's complaint alleged that Schwarz had willfully neglected the representation of his client.⁹³

In response to this complaint, the Tennessee Board of Professional Responsibility found that Schwarz had neglected his client's legal matter in a death penalty case and issued a public censure against him.⁹⁴ Although this is a lenient sanction for a lawyer who abandoned a client in a capital case without telling either the client or the courts of his abandonment, the case at least demonstrates that disciplinary action is possible under existing rules.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (footnote omitted).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 926, 928.

92. *Id.* at 926 nn.2-3.

93. Informational Release, Board of Prof'l Responsibility, Supreme Court of Tenn., Memphis Lawyer Publicly Censured, (Apr. 29, 2005), available at <http://www.tbpr.org/NewsAndPublications/Releases/PDFs/Schwartz%2027660-9%20rel632503903275558402.pdf>.

94. *Id.*

IV. PROVISIONS FOR DISCIPLINING JUDGES WHO KNOWINGLY APPOINT INCOMPETENT LAWYERS IN CAPITAL CASES

*A. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*⁹⁵

These Guidelines, which have been in effect for ten years, have been discussed above. They require each jurisdiction to develop and publish standards for appointment of defense counsel that ensure, among other things, that each capital defendant within the jurisdiction receives high quality legal representation, and that every lawyer in a capital case has “demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases”⁹⁶ These standards apply to appointment of counsel who are competent to handle capital cases. They are therefore directed to judges.⁹⁷

B. ABA Model Code of Judicial Conduct

The current Model Code of Judicial Conduct (“MCJC”) was adopted in February 2007.⁹⁸ The Canons are “overarching principles of judicial ethics that all judges must observe,” and the Rules provide the basis for judicial discipline.⁹⁹ The provisions referred to here are similar to those in the 1990 MCJC.

Under the MCJC, a judge is required to “comply with the law,” which includes the Code of Judicial Conduct,¹⁰⁰ court rules, statutes, constitutional provisions, and decisional law.¹⁰¹ Also, “[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially,”¹⁰² and “perform [all] judicial and administrative duties, competently and diligently.”¹⁰³

95. See *supra* Part II.C.

96. ABA GUIDELINES, *supra* note 8, Guideline 5.1, at 961.

97. Guideline 3.1(B) expresses a preference that appointments be given to a “Responsible Agency” that is “independent of the judiciary” *Id.* Guideline 3.1(B), at 944.

98. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT, at xv (2d ed. 2011).

99. *Id.* at scope ¶ 2. The Comments “provide guidance regarding the purpose, meaning, and proper application of the Rules.” *Id.* at scope ¶ 3.

100. *Id.* at r. 1.1.

101. *Id.* at scope p. 11.

102. *Id.* at r. 2.2 (footnotes omitted).

103. *Id.* at r. 2.5.

The MCJC therefore requires judges to appoint lawyers who have both the requisite competence and the requisite ability to provide constitutionally effective assistance of counsel in capital cases, and a judge's willful failure to do so is a ground for judicial discipline.

C. Code of Conduct for United States Judges

The Code of Conduct for United States Judges was adopted by the Judicial Conference in 1973, and was revised in 1987, 1992, and 1996.¹⁰⁴ Canon 2A provides that a judge should comply with the law and act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."¹⁰⁵ Canon 3A(4) requires a judge to accord every person who is legally interested in a proceeding, or the person's lawyer, "the full right to be heard according to law."¹⁰⁶ Also, "[i]n disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of parties to be heard"¹⁰⁷ In addition, when a judge becomes aware of reliable evidence indicating a likelihood of unprofessional conduct by a lawyer, the judge should initiate appropriate action.¹⁰⁸

The Code of Conduct for federal judges therefore requires judges to appoint lawyers who have both the requisite competence and the requisite ability to provide constitutionally effective assistance of counsel in capital cases, and a judge's willful failure to do so is a ground for judicial discipline.

V. THE FAILURE OF JUDGES TO APPOINT LAWYERS WHO HAVE THE REQUISITE COMPETENCE TO PROVIDE CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL IN CAPITAL CASES

Judges have too often selected court-appointed lawyers precisely because the lawyers are incompetent and can be counted on to move the courts' calendars quickly by entering hasty guilty pleas in virtually all

104. CODE OF CONDUCT FOR UNITED STATES JUDGES (2011) intro., *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

105. *Id.* Canon 2A.

106. *Id.* Canon 3A(4).

107. *Id.* Canon 3A(5) cmt.

108. *Id.* Canon 3B.

cases.¹⁰⁹ In those few cases in which the accused insists on his right to trial by jury, the trials typically move rapidly because the court-appointed lawyers frequently file no motions, conduct no investigations, and do little to impede the speedy disposal of the case from charge, to guilty verdict, to imprisonment.¹¹⁰

For example, an extensive study under the auspices of New York University Law School's Center for Research in Crime and Justice found that New York's court-appointed lawyer system has failed to provide any semblance of effective assistance of counsel to indigent defendants.¹¹¹ The lawyers are paid on the basis of vouchers for the time spent on each case. There is every incentive, therefore, for the lawyers to record faithfully, if not to exaggerate, the time they have spent. Yet the vouchers reveal the following statistics:

- Interviewing and counseling

No time recorded for interviewing and counseling the client in 74.5% of the homicide cases, or in 82% of other felony cases;¹¹²

- Discovery

No time recorded for discovery in 92.1% of the homicide cases or in 93.6% of other felony cases;¹¹³

- Investigation

No time recorded for investigations in 72.8% of the homicide cases or in 87.8% of other felonies;¹¹⁴ and

- Pre-Trial Motions

No time recorded for written pre-trial motions in 74.5% of the homicide cases or in 80.4% of other felonies.¹¹⁵

The NYU Study nevertheless concluded that this system of incompetent, ineffective court-appointed lawyers "must be understood as

109. See Ronald J. Tabak, *Why an Independent Appointing Authority Is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105, 1111-15 (2003); see also Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1352-54 (2004).

110. There are, of course, some court-appointed lawyers who provide highly competent and zealous representation. One example is Abe Fortas, who was appointed by the Supreme Court to represent Clarence Gideon in his appeal. Order No. 1011, 370 U.S. 932 (1962).

111. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 694-95 (1987).

112. *Id.* at 758.

113. *Id.* at 761.

114. *Id.* at 762.

115. *Id.* at 767.

a success from the perspective of those who designed the system and now maintain it.”¹¹⁶ The purpose of the system, which makes it a success, is making the criminal law “a more effective means for securing social control [of indigent defendants] at minimal expense to the state and to the private bar. . . . by compelling guilty pleas and by other non-trial dispositions.”¹¹⁷ That explains—but hardly justifies—the fact that judges are appointing and reappointing defense lawyers who are not dedicated to competent, effective representation, but rather to helping the judges to move their calendars.

The research for the NYU Study was conducted between 1984 and 1985,¹¹⁸ but circumstances have not changed for the better since that time. Indeed, “there is uncontroverted evidence that funding still remains woefully inadequate and is deteriorating in the current economic difficulties that confront the nation.”¹¹⁹

For example, in *Corey Maples’s* case, the Alabama Appellate Court Justices filed an amicus brief with the Supreme Court explaining that no experience with capital cases is required for appointments of counsel and that appointed counsel need only have had “five years prior experience in the active practice of criminal law.”¹²⁰ Moreover, the state neither provides nor requires appointed counsel to gain any capital-case education or training.¹²¹ Accordingly, the trial judge in *Maples* appointed one lawyer who had never before tried a capital case, and another lawyer who had never before tried the penalty phase of a capital case.¹²²

I am aware of no instance of a judge who has been disciplined for knowingly appointing, or even for reappointing, incompetent counsel in a capital case.

116. *Id.* at 876.

117. *Id.* at 877 (footnote omitted).

118. *See id.* at 581 n.**.

119. NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, at xi (2009); *see also* ABA, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS (2006); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 1-8 (2006); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 4-5 (2001); Klein, *supra* note 109, at 1387-88; Tabak, *supra* note 109, at 1111.

120. *Maples v. Thomas*, 132 S. Ct. 912, 917 (2012).

121. *Id.*

122. *Id.* at 918.

Rule 3.1(B) of the Guidelines recommends that appointments of counsel in capital cases be made by a “Responsible Agency” that is “independent of the judiciary” and of elected officials.¹²³ One reason that such an independent agency is necessary is the frequency with which judges appoint inadequate counsel in capital cases.¹²⁴ Another is the political pressures on judges who are subject to reelection, and upon elected officials to appear tough on crime.¹²⁵ A third reason is the judges’ conflict of interest when they are called upon in habeas proceedings to assess the competence of the lawyers whom they have been responsible for appointing.

VI. PREVENTING PUNISHMENT OF COMPETENT DEFENDERS

I have been asked also to draft rules to protect good capital defenders from discipline, or from being punished for cooperating with efforts to establish ineffective representation at trial (which may be for reasons other than incompetence). As discussed above, lawyers who demonstrate gross incompetence in capital cases are not subjected to sanctions or may receive, at most, private letters of reprimand or a censure. Nevertheless, competent lawyers have been subjected to punishment.

For example, in *In re Jim Marcus and Richard Burr*,¹²⁶ two highly competent lawyers were held in contempt for zealously and competently representing a client facing execution.¹²⁷ The asserted ground was that the lawyers violated a rule providing for contempt proceedings against a capital defender who files a pleading within seven days preceding an applicant’s execution.¹²⁸

Pursuant to a safe-harbor provision in the rule, Marcus and Burr filed a statement with the court explaining in detail why it was

123. ABA GUIDELINES, *supra* note 8, Guideline 3.1(B), at 944.

124. Tabak, *supra* note 109, at 1111-15; *see* Klein, *supra* note 109, at 1365-66.

125. Tabak, *supra* note 109, at 1106-08.

126. *In re Marcus*, No. WR-66,977-02 (Tex. Crim. App., Nov. 23, 2011) (Justia, Tex. Case Law).

127. *See id.*; Case # WR-66,977-02, TEX. CT. CRIM. APPEALS, <http://www.cca.courts.state.tx.us/opinions/Case.asp?FilingID=284143> (last visited July 18, 2013) (noting that a contempt fine was received).

128. *In re Marcus* (Justia, Tex. Case Law). The Rule explains that if execution is scheduled for a Wednesday at 6:00 p.m. and an application is filed on the preceding Wednesday at 8:00 a.m., the Rule will have been violated. TEX. CT. CRIM. APP. MISC. R. 11-003.

impossible to file a timely pleading.¹²⁹ In their statement, the lawyers explained that they had entered the case having learned belatedly that a death row inmate no longer had habeas counsel, and that they had then learned further that the previous lawyers had been incompetent.¹³⁰ Without giving any reason for finding the explanation insufficient, the court held the lawyers in contempt and fined each of them \$500.¹³¹ Ironically, the court took no action against court-appointed chief trial counsel and court-appointed state habeas counsel in the case, both of whom clearly had been incompetent.¹³²

In any event, no guidelines could prevent a state from holding lawyers in contempt for violating a state filing rule, no matter how arbitrarily the rule might be applied. The same is true with regard to a state rule sanctioning a lawyer for cooperating with successor counsel in making a claim of ineffective representation. Similarly, no guideline would prevent a state from otherwise wrongfully disciplining a competent capital defender.

VII. CONCLUSION

Judges knowingly appoint and reappoint incompetent lawyers in capital cases, and disciplinary authorities fail to impose sanctions on judges and lawyers who violate ethical rules that have existed for substantial periods of time. It is therefore pointless to draft additional rules for the same purpose.

129. *In re Marcus* (Justia, Tex. Case Law).

130. *See ex parte Garcia*, No. WR 66,977-02 (Tex. Crim. App. Oct. 27, 2011) (Price, J., dissenting).

131. *In re Marcus* (Justia, Tex. Case Law). The fine was suspended on condition that the lawyers not thereafter violate the filing rule.

132. *See id.* (only requiring the appearance of attorneys Marcus and Burr).
