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OVERLOOKED GUIDELINES: USING THE GUIDELINES TO ADDRESS THE DEFENSE NEED FOR TIME AND MONEY

*Meredith Martin Rountree**
*Robert C. Owen***

I. INTRODUCTION

In 2003, Professor Eric M. Freedman, Reporter for the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”), observed that one of the ABA Guidelines’ central virtues was to recognize that the death penalty is expensive.¹ Fairness in the application of the ultimate punishment requires governments to develop systems to allocate essential resources, like compensation for counsel and funds for experts and investigators.² Ten years later, this Article revisits Professor Freedman’s observation by exploring the question of resources and urging counsel to increase their use of the ABA Guidelines in fighting for the irreducible minima of reasonably effective representation: time and money.

II. WHAT IT TAKES TO REPRESENT A CLIENT FACING THE DEATH PENALTY

Recognizing that “death penalty cases have become . . . specialized,”³ the ABA Guidelines emphasize that their

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1. Eric M. Freedman, *Add Resources and Apply Them Systematically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1097 & n.1, 1098, 1100 n.10 (2003).

2. See *id.* at 1102-03.

3. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 1.1 cmt. (rev. ed. 2003), in 31 HOFSTRA L. REV. 913, 923 (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>.

“extraordinary complexity and demands” require from defense counsel a “significantly greater degree of skill and experience.”⁴ Counsel’s work is “uniquely demanding,” because of the extensive skills, wide-ranging knowledge, and informed strategic judgment that counsel must bring to each case.⁵ As Justice Harold Blackmun observed: “The unique, bifurcated nature of capital trials and the special investigation into a defendant’s personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials.”⁶

Trial and post-conviction counsel must investigate the facts of the case exhaustively, informed by a command of the legal implications of, for example, neuropsychological or forensic findings.⁷ Counsel, at all stages, must stay abreast of legal developments and complex procedural rules where a misstep can forfeit a legal claim and doom the client.⁸ Each must establish a “special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress.”⁹ Counsel in clemency proceedings must ensure that clemency provides a meaningful “fail-safe” to correct oversights by the criminal justice system.¹⁰

Not surprisingly, “[s]tudies have consistently found that defending capital cases requires vastly more time and effort by counsel than noncapital matters.”¹¹ Notwithstanding this informed consensus, underfunding of defense services historically has been a chronic problem, leading the ABA Guidelines to emphasize the importance of adequate funding and to identify and condemn certain practices (for example, flat fees and compensation caps) as improper.¹² Moreover, adequate payment for the time spent on the case by defense counsel is not the only concern; resources for investigative and expert assistance are also indispensable to effective representation.¹³

4. *Id.* at 921.

5. *Id.* at 923.

6. *McFarland v. Scott*, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting).

7. ABA GUIDELINES, *supra* note 3, Guideline 1.1 cmt., at 925-26, 930.

8. *See id.* at 931-32.

9. *Id.* at 925-26. The ABA Guidelines also discuss a duty to remain in contact with the client as a bulwark against mental deterioration. *See id.* Guideline 10.15.1 cmt., at 1082-83.

10. *Id.* Guideline 1.1 cmt., at 937.

11. *Id.* Guideline 6.1 cmt., at 967.

12. *Id.* Guideline 9.1(A)-(B), at 981; *id.* Guideline 9.1 cmt., at 984-88.

13. *See id.* Guideline 9.1(C), at 981-82; *see also* SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, *in* 36 HOFSTRA L. REV. 677, 686 (2008).

III. WHAT THE ABA GUIDELINES PROVIDE

In response to these concerns, the ABA Guidelines directly addressed funding and workload. Lawyers should also not be permitted to take on more work than they can handle. “The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.”¹⁴ Further, “[c]ounsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines.”¹⁵

With respect to paying for the defense of capital cases, the ABA Guidelines make clear not only that “the full cost of high quality legal representation” must be funded, but that defense counsel “should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty [cases].”¹⁶ To that end, the ABA Guidelines specifically condemn “[f]lat fees, caps on compensation, and lump-sum contracts” as improper limits on fair and adequate compensation.¹⁷ They further require that appointed counsel “be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction,” that “[p]eriodic billing and payment should be available,” and that no distinction be made between payment for in-court and out-of-court services.¹⁸

Further, “[n]on-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.”¹⁹

14. ABA GUIDELINES, *supra* note 3, Guideline 6.1, at 965.

15. *Id.* Guideline 10.3, at 996. Mark E. Olive and Russell Stetler observed that “[w]orkload issues are so important that both the ABA Guidelines and the Supplementary Guidelines discuss them twice, at Guideline 6.1 and 10.3 (from supervisory and individual perspectives, respectively).” 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, 1083 n.67 (2008).

16. ABA GUIDELINES, *supra* note 3, Guideline 9.1(A)–(B), at 981.

17. *Id.* Guideline 9.1(B)(1), at 981.

18. *Id.* Guideline 9.1(B)(3), at 981.

19. *Id.* Guideline 9.1(C), at 981–82.

IV. WE KNOW THERE ARE SYSTEMIC DEFICIENCIES

The Death Penalty Moratorium Implementation Project of the American Bar Association (“ABA”), has conducted assessments of whether, among other things, individual states are complying with the ABA Guidelines with respect to funding capital defense. The states assessed thus far—Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, and Tennessee—have not generally fared well.

Where the Assessment Teams had enough information to reach a conclusion, they found that most states—Alabama, Florida, Georgia, Kentucky, Missouri, Ohio, Pennsylvania, and Tennessee—did not adequately fund defense services.²⁰ The Assessment Teams noted instances of precisely the kinds of funding arrangements the ABA Guidelines specifically identified as deficient, including fee caps in Alabama and flat fees in Pennsylvania.²¹ Georgia provided no resources for counsel or expert and investigative services in state post-conviction or clemency.²² Florida lawyers have persistently challenged their state’s compensation schemes as unconstitutional and inadequate.²³

Fees may not cover basic overhead, even as capital cases can monopolize an attorney’s practice.²⁴ Some jurisdictions use lump sum

20. Given this fact, it is likely no coincidence that a list of the “top ten” death penalty states, ranked by number of death row inmates, includes six of these eight states—Tennessee (10), Georgia (9), Ohio (7), Alabama (5), Pennsylvania (4), and Florida (2). *Facts about the Death Penalty*, DEATH PENALTY INFO. CENTER 2 (Feb. 4, 2013), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

21. See AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ALABAMA DEATH PENALTY ASSESSMENT REPORT 124-29 (2006), available at <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf>; AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE PENNSYLVANIA DEATH PENALTY ASSESSMENT REPORT 132-37 (2007), available at <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/pennsylvania/finalreport.authcheckdam.pdf>. Moreover, Alabama is “nearly alone” in the extent to which it continues to defy Guideline 1.1 by failing to provide capital prisoners counsel to assist in the filing of state post-conviction petitions. See *Maples v. Thomas*, 132 S. Ct. 912, 918 (2012); Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1089-90 (2006).

22. AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT 155 (2006), available at <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/georgia/report.authcheckdam.pdf>.

23. See, e.g., *Maas v. Olive*, 992 So. 2d 196, 199, 202-03 (Fla. 2008); David Ovalle, *Law Governing Legal Fees Unconstitutional, Miami-Dade Judge Says*, MIAMI HERALD, Oct. 29, 2012, <http://www.miamiherald.com/2012/10/29/3073244/law-governing-legal-fees-unconstitutional.html>.

24. JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 79-80 (2010) [hereinafter SPENCER REPORT

payments or compensation caps to restrict the amounts paid to counsel and for other necessary services. In Texas, for example, court-appointed post-conviction counsel (of which only one is appointed, contrary to ABA Guideline 4.1) is paid no more than \$25,000 for a capital case, which must cover not only counsel's legal services, but all other costs associated with the representation.²⁵ Assuming the accuracy of a Spangenberg study cited in the ABA Guidelines, which estimated that the average post-conviction case demands over 3300 hours of attorney time,²⁶ counsel in such Texas cases will be paid less than \$8 an hour—and that assumes she obtains no expert services for investigation, mental health investigation and examination, or forensic analysis. The effect of the limited pot is:

to discourage requests for the investigative and expert assistance that is essential to the meaningful litigation of a state habeas case. Once a case's allocated funds have been exhausted, appointed counsel is forced to make the untenable choice between working for free—paying additional investigative costs out of pocket and endangering their law practices—and cutting corners in the cases to which they have been appointed.²⁷

(2010 Update)], available at <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx>; Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, 780-83 (2008); William P. Redick, Jr. et al., *Pretend Justice—Defense Representation in Tennessee Death Penalty Cases*, 38 U. MEM. L. REV. 303, 334 (2008). The Spencer report provided that:

Another judge said he had to let a lawyer withdraw from a case because he was unable to bear the financial cost of shutting down the rest of his practice indefinitely. Defending one of these cases requires "complete commitment," said another judge. They are enormous and long-term and it is "almost impossible to know when the commitment will end, making it hard to plan for the future."

SPENCER REPORT (2010 Update), *supra*, at 79.

25. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 2A(a) (West 2005). Fortunately, and in an example of positive systemic change, the Texas Legislature—in part to address widespread complaints about the persistently low quality of post-conviction legal representation in Texas death penalty cases—recently created the Office of Capital Writs ("OCW") to replace the former *ad hoc* appointment scheme. See Brandi Grissom, *Trying to Restore Integrity to Death Row Defense*, TEX. TRIB., July 6, 2010, <http://www.texastribune.org/2010/07/06/trying-to-restore-integrity-to-death-row-defense>. In the future, the OCW will represent most condemned Texas prisoners in state post-conviction proceedings; its ability to improve Texas' death penalty system will depend on whether it is adequately funded. In the meantime, the payment provisions of the former scheme continue to govern in the dozens of pending state post-conviction cases that were filed before the OCW was created.

26. ABA GUIDELINES, *supra* note 3, Guideline 6.1 cmt., at 969.

27. Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 AM. J. CRIM. L. 207, 236-37 (2007) (footnote omitted).

As the Kansas Supreme Court recently observed in *State v. Cheatham*,²⁸ such practices create a substantial risk that the client will be denied adequate representation.²⁹ The court stated that, “the Guidelines unequivocally disapprove of flat fees in death penalty cases precisely because such fee arrangements pit the client’s interests against the lawyer’s interest in doing no ‘more than what is minimally necessary to qualify for the flat payment.’”³⁰

The consequences of such efforts to administer the death penalty “on the cheap” are easy to predict. The 2010 findings of the *Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (“Spencer Report (2010 Update)”) make clear that money matters:

[I]ndividuals whose defense cost less than \$320,000 in combined attorney and expert assistance – the lowest one-third of federal capital trials – had a 44 percent chance of being sentenced to death at trial. Individuals whose total representation costs were above that amount – the remaining two-thirds of defendants – had a 19 percent chance of being sentenced to death. Defendants in the low-cost group thus were more than twice as likely to be sentenced to death.³¹

The question of workload is intimately related to funding issues. A lawyer facing financial concerns may undertake additional cases. The demands of those cases, in turn, may result in her spending less time with her capital client, as the *Cheatham* court makes clear:

[Trial counsel], a solo practitioner with a “high volume” law practice requiring near daily court appearances, would have little financial incentive to invest the significant time commitment a capital case requires. On the contrary, his incentive would have been to pay attention to those cases whose billable hours were more likely to produce actual income. [Trial counsel] even concedes this point by testifying that he told Cheatham he was not going to be concentrating full-time on [Cheatham’s] case because “[he] had to earn a living.”³²

The case of condemned Texas prisoner Anthony Medina and his court-appointed trial counsel (Mr. Guerinot) provides a painful, yet

28. 292 P.3d 318 (Kan. 2013).

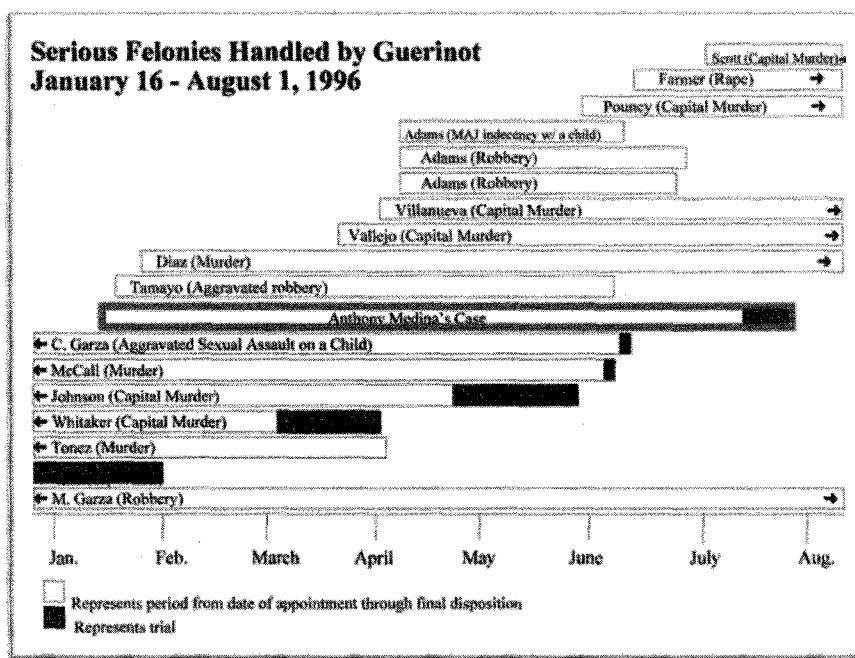
29. *See id.* at 341.

30. *Id.* at 340; *see also* Fox, *supra* note 24, at 780-81 (discussing the constitutional problems and ethical hazards posed by fee caps).

31. SPENCER REPORT (2010 Update), *supra* note 24, at 44.

32. *Cheatham*, 292 P.3d at 340-41 (last alteration in original); *see also* Fox, *supra* note 24, at 781 (explaining that caps can lead to “volume practices”).

useful example. Mr. Medina's post-conviction counsel tracked Mr. Guerinot's case commitments from the time he was appointed to Mr. Medina's case through the trial. In addition to his part-time job as City Attorney in the Houston suburb of Humble, Mr. Guerinot maintained an active felony defense practice.³³ Mr. Medina was Mr. Guerinot's fourth client in six months to receive the death penalty, and was just one of Mr. Guerinot's 174 clients during the six and a half months he spent representing Mr. Medina.³⁴ Indeed, Mr. Guerinot was actively *in trial* on other felony cases for more than half the time he nominally represented Mr. Medina.³⁵ The following chart demonstrates graphically Mr. Medina's long odds against getting his lawyer's attention.³⁶



Another noteworthy aspect of Mr. Guerinot's eye-popping workload is that all 174 felony cases and each of the four capital cases he tried during this six and a half month period were from a single county. Plainly, Harris County, Texas—home to Houston, the nation's fourth-largest city by population and a longtime hotbed of death penalty litigation—had no "effectual mechanisms to ensure" that Mr. Guerinot's

33. Amended Petition for a Writ of Habeas Corpus at 28, *Medina v. Thaler*, No. H-09-CV-3223 (S.D. Tex. May 31, 2011).

34. *Id.* at 28-29.

35. *Id.* at 28.

36. *Id.*

workload would “enable[] [him] to provide each client with high quality legal representation in accordance with these Guidelines.”³⁷ The Spencer Report (2010 Update) finding that “the more hours [that are] dedicated to a case, the lower the risk of a death sentence” reminds us that time, in addition to money, is an essential resource for counsel.³⁸

V. GUIDELINES REGARDING THESE CRUCIAL RESOURCES APPEAR UNDERUTILIZED

Without a doubt, indigent defenders have waged heroic battles to obtain resources for their unpopular clients. Despite the centrality of questions of time and money, however, the ABA Guidelines’ unequivocal insistence that these resources be made available to counsel has not featured prominently in judicial opinions in death penalty cases.³⁹ As of January 28, 2013, ABA Guideline 6.1 has been cited in four court opinions, Guideline 10.3 in one, and Guideline 9.1 in three.⁴⁰ By contrast, as of January 8, 2013, ABA Guideline 10.11 (“The Defense Case Concerning Penalty”) has been cited twenty-seven times and ABA Guideline 10.7 (“Investigation”) has been cited fifty-four times.⁴¹ To be sure, ABA Guidelines 10.7 and 10.11 are essential to explaining deficiencies in capital defense that are all too common. Even the *Cheatham* court acknowledged that although it was “obvious” that Cheatham’s trial counsel had spent little time preparing the defense, such deficient performance constituted “ineffective assistance” only if it could be “tied to specific trial errors” rather than considered on its own.⁴² At the same time, *Cheatham*’s discussion of the ABA Guidelines’ workload requirements provided the court with the important opportunity to contextualize those demands and thereby make deficient attorney performance more understandable.

Using the ABA Guidelines to explain poor attorney performance is useful retrospectively, for example, in raising an ineffective assistance of counsel claim. But it is also essential for making a record throughout a

37. ABA GUIDELINES, *supra* note 3, Guideline 6.1, at 965.

38. SPENCER REPORT (2010 Update), *supra* note 24, at 48.

39. Of course, litigants may be using the ABA Guidelines in their pleadings but, for whatever reason, courts are not incorporating those arguments into their rulings.

40. This result was obtained by searching Westlaw for “American Bar Association” and “death penalty” and “[6.1 or 9.1 or 10.3]” in both the “Allstates” and “Allfeds” databases.

41. See *Summary of Cases Citing 2003 ABA Guidelines*, AM. BAR ASS’N 26-55, http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003summary.authcheckdam.pdf (last updated Jan. 8, 2013) (listing and describing the fifty-four cases in which Guideline 10.7 is cited); see also *id.* at 66-78 (listing and describing the twenty-seven cases in which Guideline 10.11 is cited).

42. *State v. Cheatham*, 292 P.3d 318, 330 (Kan. 2013).

capital proceeding of what resources counsel needs in order to perform effectively—not merely for instrumental purposes, but for the sake of holding public institutions accountable in a particular case. When an attorney refuses to proceed without adequate resources and cites the ABA Guidelines, she puts the court on notice of the real demands of a capital trial and signals that this case must be understood within a larger institutional framework.⁴³ Defense counsel in New Mexico used ABA Guideline 9.1 (among other authorities) in precisely that fashion to win a stay of a death penalty prosecution where reasonable resources had not been forthcoming.⁴⁴ The court found that:

Because of the extraordinary demands on capital defense attorneys, the American Bar Association has condemned flat fees, caps on compensation, and lump-sum contracts in death penalty cases. Rather than a flat fee or a capped rate, the *ABA Guidelines* stress that “[c]ounsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.”

The New Mexico Task Force reached a similar conclusion, stating that “Defense counsel in capital cases should receive . . . compensation[] commensurate with their expertise and the burden of the work and without caps. New Mexico should eliminate flat fee arrangements in capital cases.” The Task Force further noted that flat fees and caps are “an attempt to hide the true costs of capital litigation at the expense of contract counsel and, ultimately, his or her client.”

Although we are not prepared to condemn a flat fee structure or cap in all capital cases, we cannot overemphasize that the case before us is unusually protracted because of its extraordinary complexity. We have found that the attorneys for the defendants are not receiving adequate compensation, thus giving rise to a presumption of ineffective assistance of counsel.⁴⁵

Confronted with a well-developed factual record, the New Mexico Supreme Court was compelled to acknowledge what Professor Freedman took care to emphasize in 2003: these ABA Guidelines

43. In a recent Texas capital case, lead defense counsel was forced to withdraw, along with his lead investigator and mitigation specialist, because of a disagreement with the trial court concerning “the application of the American Bar Association guidelines of representation in capital cases;” another attorney familiar with the matter confirmed that the struggle between defense counsel and the court involved “funding for the defense.” See Jazmine Ulloa, *New Defense Attorney Named*, AUSTIN AM.-STATESMAN, Dec. 11, 2012, at B1.

44. *State v. Young*, 172 P.3d 138, 142 (N.M. 2007).

45. *Id.* (second alteration in original) (citations omitted).

articulate what the *system* must provide to administer real justice.⁴⁶ Every lawyer who explicitly advises a court of the state's failure to meet the ABA Guidelines with respect to resources and workload bears witness to systemic deficiencies. In some cases, these deficiencies may contribute to disparities that reveal the existing death penalty system as illegitimate. For example, the Spencer Report (2010 Update) noted an unsettling association between low-cost federal capital trials and geography:

A state's per capita execution rate was highly predictive of the defense cost of federal capital trials brought in that state. Although there were some exceptions, in general defense resources spent on federal capital trials were lowest in those states that had the highest per capita execution rates. Just six percent of low cost trials were brought in states without the death penalty, whereas 28 percent of all other federal capital trials occurred in states without the death penalty.⁴⁷

As the Spencer Report (2010 Update) notes, Circuit policies regarding compensation can contribute to geographic disparities. For example, both the Fourth and Fifth Circuits enforce a policy that presumes that attorney fees over \$100,000 in a federal capital trial are excessive—where the Spencer Report (2010 Update) found that \$353,000 was the median for counsel costs where a case proceeds to trial.⁴⁸ Similarly, the Fifth Circuit imposes a presumptive per-case fee cap of \$35,000 on district court proceedings in capital cases brought under 28 U.S.C. § 2254,⁴⁹ and has even elected to cut defense counsel's compensation where, for example, counsel is employed by a non-profit organization, even though that organization is supported in part by court

46. See Freedman, *supra* note 1, at 1102-03 (observing that effective capital representation, which the states are constitutionally obligated to provide, "is the result of a system for its provision . . . that provides [counsel] with the back-up necessary to perform effectively," and that "the revised Guidelines state the point especially forcefully").

47. SPENCER REPORT (2010 Update), *supra* note 24, at 53 (footnote omitted).

48. *Id.* at 55 & n.64; see also THE JUDICIAL COUNCIL OF THE FOURTH CIRCUIT, SPECIAL PROCEDURES FOR REVIEWING ATTORNEY COMPENSATION REQUESTS IN DEATH PENALTY CASES (2012) [hereinafter FOURTH CIRCUIT SPECIAL PROCEDURES], available at <http://www.ca4.uscourts.gov/pdf/noticeofresolutionattorneycompensationcapitalcases.pdf>; THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT, SPECIAL PROCEDURES FOR REVIEWING ATTORNEY COMPENSATION REQUEST IN DEATH PENALTY CASES (2010) [hereinafter FIFTH CIRCUIT SPECIAL PROCEDURES], available at <http://www.txnd.uscourts.gov/pdf/cja5th.pdf>. The Fifth Circuit's funding cap dates back to 1998. The President of the ABA has criticized this as a fee cap prohibited by Guideline 9.1. Letter from William T. Robinson III, Pres., Am. Bar Ass'n, to Samuel W. Phillips, Circuit Exec. (Jan. 30, 2012), available at http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012jan30_attycompensationdeathpenalty.authcheckdam.pdf.

49. FIFTH CIRCUIT SPECIAL PROCEDURES, *supra* note 48. Thus, in § 2254 cases where the district court appoints two defense counsel, as ABA Guideline 4.1 requires, each attorney faces a fee cap of \$17,500. See ABA GUIDELINES, *supra* note 3, Guideline 4.1, at 952.

fees.⁵⁰ Judge Edith H. Jones, who as Chief Judge of the Fifth Circuit reviewed attorney fees for death penalty cases in that jurisdiction until recently, recommended in 2011 that judges contain costs by, among other things, not authorizing multiple types of experts (for example, “three psychiatric/psychologist/neurologist-type experts in pursuit of various *Atkins* and mitigation claims” or “experts in Mexican culture, tattoos, and jury consultants”).⁵¹ By contrast, the Ninth Circuit anticipates individualized case budgeting in district court, a mechanism recommended by the Spencer Report (2010 Update).⁵² In that Circuit, supplemental approval is required only if the over-budget compensation exceeds \$15,000 (more than a third of the total anticipated expenditure in the Fifth Circuit for district court proceedings) or more than ten percent of the original budget.⁵³

VI. CONCLUSION

Even the most cursory review of Supreme Court cases within the past ten years reveals the indisputably salutary impact of the ABA

50. Letter from Joseph L.S. St. Amant, Senior Conference Attorney, Court of Appeals for the Fifth Circuit, to Naomi Terr, Tex. Defender Serv. (Mar. 31, 2011) (on file with authors). By contrast, the Fourth Circuit presumes excessive requests for compensation in excess of \$50,000 *per attorney* at the district court level or \$30,000 *per attorney* on appeal. FOURTH CIRCUIT SPECIAL PROCEDURES, *supra* note 48.

51. Memorandum from Edith H. Jones to All Chief Circuit Judges, All Circuit Execs., & Gary Bowden 2-4 (Mar. 11, 2011) (on file with authors). *But see* ABA GUIDELINES, *supra* note 3, Guideline 4.1 cmt., at 956. The ABA Guidelines state that:

[I]t might well be appropriate for counsel to retain an expert from an out-of-state university familiar with the cultural context by which the defendant was shaped While resources are not unlimited, of course, jurisdictions should also be mindful that sufficient funding early in a case may well result in significant savings to the system as a whole.

Id. at 957 (footnote omitted). Furthermore, the ABA Guidelines commonsensically assume that experts specializing in various subjects may be needed on the same case. *Id.* at 958-59; *see, e.g.*, *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) (holding that, although counsel consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, they were ineffective in failing to consult a neurologist or toxicologist who could have explained the neurological effects of defendant’s extensive exposure to pesticides); *see also* Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325, 341 (2003) (“By definition, a lawyer cannot know what an investigation will turn up until the investigation is done—that is precisely why one investigates.”).

The then-Chief Judge also warned against having “close relatives as paid members of the defense team.” Memorandum from Edith H. Jones to All Chief Circuit Judges, All Circuit Executives, & Gary Bowden, *supra*, at 2. This has generally been understood as a criticism of having death penalty specialists who happen to be married to each other working together on cases, though certainly husband-wife law firms, like parent-child ones, are not unusual in legal practice.

52. SPENCER REPORT (2010 Update), *supra* note 24, at 115-18.

53. *Guide to Case Management and Budgeting in Capital Habeas Cases*, U.S. DISTRICT CT., N. DISTRICT CAL., <http://www.cand.uscourts.gov/caphabbudgeting> (last visited July 18, 2013).

Guidelines on the quality of capital defense, especially with respect to the importance of a thorough investigation at both phases of trial and a team approach to the litigation.⁵⁴ While courts may not always grant the ABA Guidelines, the deference we believe they are due as an expression of the existing national standard of practice in death penalty cases, judges nonetheless have acknowledged the existence and importance of these standards. We must progressively expand our use of the ABA Guidelines to confront, as explicitly as we can, the systemic failures that deny justice in capital cases, including those discussed here—compensation and workload. Governments and courts around the country have had to contend with the fiscal challenges of the Great Recession in deciding on compensation and workloads, but as Professor Freedman and others have emphasized, ignoring the extraordinary costs of a death penalty prosecution does not make them go away. It merely shifts them onto capital defendants and their already outmanned attorneys.⁵⁵ As one lawyer put it, explaining why the defense team did not travel from Wyoming to Nebraska to investigate their client's background:

[W]e were at the cap. I mean, I -- my wife and I have talked a lot about this and worried through it about why we didn't go to Nebraska and, frankly, I think now that we should have spent our own money and went to Nebraska, although I don't know how we could have done that. It would have cost us 10, 15,000 bucks by the time it was over with. I really didn't have the money.

I did have financial problems and for me to take 10 or \$15,000 and spend it on -- I don't know that that was even possible, but that should have been done⁵⁶

Relying on individuals to shoulder personally the financial cost of the death penalty that rightly belongs to society at large, creates an undeniable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."⁵⁷ Until adequate time and money for defending such cases are guaranteed, this will not be a system that provides equal justice under the law.

54. See, e.g., *Sears v. Upton*, 130 S. Ct. 3259, 3266-67 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003).

55. Freedman, *supra* note 1, at 1101.

56. Order Granting, in Part, Petitioner's Writ of Habeas Corpus on Condition that the State Provide a New Trial Within a Reasonable Time at 45, *Harlow v. Murphy*, No. 05-CV-039-B (D. Wyo. Feb. 15, 2008).

57. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).