Hofstra Law Review

Volume 42 | Issue 2 Article 1

12-31-2012

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INTRODUCTION: THE CONTINUING QUEST FOR HIGH-QUALITY DEFENSE REPRESENTATION IN CAPITAL CASES

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The Articles contained in Part Two of the *Hofstra Law Review* Symposium, marking the tenth anniversary of the publication by the American Bar Association ("ABA") of the revised version of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines" or "Guidelines"),[1] continue the theme of those in Part One.[2] Much progress has been made in improving the quality of capital defense representation, but much progress remains to be made.

Part Two begins with an Article by Judge Mark W. Bennett of the U.S. District Court for the Northern District of Iowa, *Sudden Death: A Federal Trial Judge's Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, a candid and illuminating account of his experiences in presiding over multi-year trial and post-trial proceedings in federal death penalty prosecutions.[3] Judge Bennett notes the importance of the fact that the Guidelines apply at all stages of the proceedings,[4] while emphasizing

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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], *available at* http://www.ambar.org/2003Guidelines.

2. Part One of this Symposium appeared in Volume 41.3 of the *Hofstra Law Review*. The editors anticipate that Part Three will be published in Volume 43.

3. *See generally* Mark W. Bennett, *Sudden Death: A Federal Trial Judge's Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 HOFSTRA L. REV. 391 (2013).

4. *Id.* at 396; *see* Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 HOFSTRA L. REV. 591, 591-92 (2013)

that the most efficient application of resources is to concentrate them on ensuring the quality of trial counsel.[5] Judge Bennett's experiences show that this goal has not been achieved, but that it is a worthy one.[6] A focus on making all possible efforts to secure a high-performing defense team from the very beginning of the proceedings:

> will, in the short-run, increase the cost of death penalty litigation because the trial team will do more. . . . [But] [i]n the long run, greater fidelity to the ABA Guidelines will cause fewer ineffective assistance of counsel claims to be raised—at least, fewer meritorious ones—because this greater fidelity will unquestionably result in significantly improved quality of representation and decreased delays. Thus, the ultimate cost to the taxpayers should be less. Also, finality for the victims' families and loved ones, and the defendants and their families and loved ones, should be achieved in less time.[7]

The result will be "a win-win for everyone involved in capital litigation: the victims' families, defendants and their families, the prosecution team and law enforcement, the defense team, the trial and appellate judges, and the taxpayers who fund this enormous expense."[8]

As the Director of the ABA Death Penalty Representation Project, Robin M. Maher has led the national effort to see the Guidelines implemented by the states.[9] She recounts many of her experiences state-by-state in *Improving State Capital Counsel Systems Through Use of the ABA Guidelines*.[10] A basic theme of the Guidelines is that the constitutional duty to provide effective defense counsel on a consistent basis rests upon the states, a duty that they can only fulfill by systematically creating institutional structures to deliver high-quality representation.[11] "Even a skilled lawyer making best efforts to defend her client competently is probably engaged in a foredoomed project if

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(contrasting "this sound policy" of the Guidelines with the resistance of the Supreme Court to recognize a constitutional right to counsel in capital post-conviction proceedings).

5. Bennett, *supra* note 3, at 396.

6. *See id.* at 415-16.

7. *Id.* at 415; *see* Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1106-07 (2001).

8. Bennett, *supra* note 3, at 415.

9. Robin M. Maher, *Improving State Capital Counsel Systems Through Use of the ABA Guidelines*, 42 HOFSTRA L. REV. 419, 419 n.* (2013).

10. *See generally id.*

11. ABA GUIDELINES, *supra* note 1, Guideline 2.1, at 939; *see id.* Guideline 1.1 cmt., at 937-38 ("Attorney error is often the result of systemic problems, not individual deficiency."); *see also* Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments' Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1103 (2003) [hereinafter Freedman, *Governments' Responsibilities*] (discussing the "mandate for institution-building" that the Guidelines "forcefully" articulate).

she is not part of a system that provides her with the back-up necessary to perform effectively."[12] The state's duties then are "not only identifying and compensating qualified lawyers, but also equipping the defense team with such fundamental resources as investigative, forensic and related services, and continuing professional education."[13] Those duties, however, are mere will-o'-the-wisps unless the plan created by the state is "judicially enforceable in full against the jurisdiction."[14]

This is the background against which Ms. Maher concludes: "We have come a long way since the early days when the Guidelines were dismissed as the defense effort that no state could afford and no capital defendant deserved. But, there is still *no* counsel system that complies fully with the ABA Guidelines."[15] For a state to recognize, as an increasing number do, that the Guidelines articulate that the applicable standard of care is "commendable," but that is only a "flawed" first step unless the state follows through by committing the necessary resources and enforcement mechanisms to ensure that high-quality representation in capital cases is an actual reality at the ground level, day in and day out.[16]

Another basic theme of the Guidelines is that effective capital defense requires a team approach.[17] That approach, like the Guidelines themselves, spans the entire course of the representation "from the moment the client is taken into custody" until his fate is finally determined.[18] These considerations led to the inclusion, in 2003, of a specific Guideline entitled *The Duty to Facilitate the Work of Successor Counsel*: "In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel."[19] Squarely based on pre-existing ethics rules,[20] the "duties contained in this Guideline are of enormous practical significance to the vindication of the client's legal rights,"[21] in light of

12. Freedman, *Governments' Responsibilities*, *supra* note 11, at 1102.

13. *Id.* (footnotes omitted).

14. ABA GUIDELINES, *supra* note 1, Guideline 2.1 cmt., at 941.

15. Maher, *supra* note 9, at 419-20 (footnote omitted).

16. *Id.* at 423-24.

17. ABA GUIDELINES, *supra* note 1, Guideline 4.1, at 952. As noted in the history of guideline 4.1, Guideline 8.1(A) was added to articulate this thought. *Id.* Guideline 4.1 history of guideline, at 953; *see also id.* Guideline 4.1 cmt., at 955-57 (discussing the "Team Approach to Capital Defense"); *id.* Guideline 8.1, at 976-77.

18. *See id.* Guideline 1.1(B), at 919.

19. *Id.* Guideline 10.13, at 1074.

20. *See* Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1184-85 (2003).

21. ABA GUIDELINES, *supra* note 1, Guideline 10.13 cmt., at 1075.

the near certainty that, in a capital case, successor counsel will allege that prior counsel performed ineffectively.[22]

Professor David M. Siegel, whose scholarship formed part of the support for the Guidelines,[23] reviews its past and future in *The Continuing Duty Then and Now*.[24] After a historical review of cases running back into the 1800s, in which the duty had been recognized, he turns to the post-2003 efforts of ethics bodies to guide trial lawyers in its discharge.[25] In particular, trial counsel should not be cooperating with prosecutors in seeking to rebut claims of ineffective assistance, but should rather be advancing the interests of the client as articulated by successor counsel.[26] That means keeping disclosure to the government regarding the representation to the minimum required by the evidentiary rules.[27] Hence, as Professor Siegel describes, the ABA, in a 2010 Formal Opinion, concluded that such disclosure should take place only under judicial supervision,[28] a conclusion that several state bars have rejected,[29] but a number of court cases have accepted.[30]

No one doubts that the ability of successor counsel to represent the client effectively depends on the degree to which prior counsel abide by their continuing duty of loyalty.[31] But decision-making bodies are still not fully educated about the important practical need for effective mechanisms to make sure that prior counsel do so.[32]

One effort at such education is to be found in Professor Tigran W. Eldred's Article, *Motivation Matters: Guideline 10.13 and Other Mechanisms for Preventing Lawyers from Surrendering to Self-Interest in Responding to Allegations of Ineffective Assistance in Death Penalty Cases*.[33] In support of the intuitively plausible belief that prior counsel is unlikely to be in a position to be an objective judge of the extent of her

22. David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85, 90-91 (1999).

23. ABA GUIDELINES, *supra* note 1, Guideline 10.13 cmt., at 1075 nn.324-27.

24. *See generally* David Siegel, *The Continuing Duty Then and Now*, 42 HOFSTRA L. REV. 447 (2013) [hereinafter Siegel, *Continuing Duty*].

25. *Id.* at 451-58.

26. *Id.* at 458-62.

27. *Id.*

28. *Id.* at 461-62; *see* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010).

29. Siegel, *Continuing Duty*, *supra* note 24, at 462-64.

30. *Id.* at 466.

31. *See id.* at 460.

32. *See id.*

33. Tigran W. Eldred, *Motivation Matters: Guideline 10.13 and Other Mechanisms for Preventing Lawyers from Surrendering to Self-Interest in Responding to Allegations of Ineffective Assistance in Death Penalty Cases*, 42 HOFSTRA L. REV. 473 (2013).

continuing duty,[34] Professor Eldred brings to bear the teachings of cognitive psychology.[35] Regardless of prior counsel's subjective desire to behave ethically, "motivated reasoning can be expected to influence compliance with the duties under Guideline 10.13 and related authority."[36] This means that the dearth of hard evidence about how trial lawyers accused of ineffectiveness are actually behaving is troublesome; the probabilities are that most are behaving badly rather than well.[37]

Professor Eldred puts forward a number of ameliorative proposals.[38] His recommendations:

> includ[e] explicit acknowledgment by courts of the importance of reading Guideline 10.13 with an unwavering focus on its client-centered purpose; encouraging judicial supervision of disclosures made by predecessor counsel in ineffectiveness cases; encouraging judges in post-conviction cases to account for motivated reasoning when making credibility assessments of predecessor counsel; and encouraging successor counsel to learn about strategies that can help reduce implicit bias.[39]

The next Article, by Dr. Kathleen Wayland, who has long employed her training as a clinical psychologist in assisting capital defense teams to integrate mental health themes into mitigation narratives, and Professor Sean O'Brien, an experienced capital litigator who was a leader in creating the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases ("Supplementary Guidelines"),[40] also addresses the problem of removing

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34. *See* Fox, *supra* note 20, at 1185-86.

35. Eldred, *supra* note 33, at 492-98.

36. *Id.* at 478.

37. *Id.* at 486-87.

38. *Id.* at 512-16.

39. *Id.* at 512. With respect to the last point, Guideline 10.7(B)(1) provides: "Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel." ABA GUIDELINES, *supra* note 1, Guideline 10.7(B)(1), at 1015.

Knowing of the importance of the continuing duty, and the spotty record of prior counsel in adhering to it, effective successor counsel—who, after all, controls the timing of the filing of the claim of ineffective assistance—should reach out to prior counsel beforehand in order to encourage her to perceive herself as an ongoing member of the defense team, and if possible, to gain her assistance in framing the post-conviction claims in a mutually acceptable manner, as Professor Eldred suggests. Eldred, *supra* note 33, at 516. Under most circumstances, there is little justification for a scenario in which prior counsel hears of the ineffectiveness allegations for the first time when the prosecutor reads her inflammatory excerpts over the telephone—a scenario strongly calculated to provoke exactly the set of counter-productive reactions that successor counsel should be seeking to avoid.

40. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN

cognitive blinders.[41] In *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, they take on the prosecutorial tactic of labeling the client a "psychopath," a hall-of-mirrors description (not a recognized psychiatric diagnosis) that not only de-humanizes him, but also conveniently finds support in whatever characteristics he may happen to show, from "hot-tempered" to "icily cold."[42] That makes it easy for the government to portray the client as the recognizable stock figure at the heart of the master narrative of crimes and criminality that jurors bring with them into the courtroom; "a heinous crime has been committed by an essentially bad or evil person who should pay the ultimate penalty."[43] Even if the prosecutors confine their presentation to attempting to establish that the defendant meets the criteria for the (wrongly) recognized diagnosis of antisocial personality disorder ("ASPD"), the results are highly likely to be fatal for the client.[44]

Far too often this is an entirely avoidable miscarriage of justice.[45] As the authors show in detail, even the objective characteristics that the government may rely upon are far more likely to be explicable by "data and context that refutes the diagnosis of ASPD and enables the jury to interpret the defendant's past behavior in the context of his life circumstances and impairments."[46] Defense teams acting in accordance with the Guidelines and the Supplementary Guidelines will, in the first instance, conduct a comprehensive investigation of the client's life.[47] Then, and only then, will they construct a mitigation narrative consistent with, but not dominated by, alternative diagnostic terminology, which more accurately resonates with the realities of the defendant's life course than the prosecutor's one-size-fits-all account.[48]

The accumulated experiences of the criminal justice system that underlie the Guidelines and the Supplementary Guidelines have taught many lessons, often painfully. Jie Yang, the Program Manager for

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DEATH PENALTY CASES, *in* 36 HOFSTRA L. REV. 677 (2008).

41. Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFSTRA L. REV. 519, 521 (2013).

42. *Id.* at 525.

43. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 842 (2008).

44. Wayland & O'Brien, *supra* note 41, at 566-70.

45. *Id.* at 569-70.

46. *Id.* at 530-31.

47. Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 964-67 (2008).

48. *Id.* at 974-75.

Criminal Justice Projects of the ABA Rule of Law Initiative China Program, has sought to assist the courageous lawyers in China who want to learn some of these lessons, as she recounts in *The Development of China's Death Penalty Representation Guidelines: A Learning Model Based on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.[49] Spurred on by several dramatic cases in which defendants were convicted of murdering victims who later turned up alive, the Criminal Law Committee of the All China Lawyers' Association sought the assistance of the ABA in developing capital defense representation guidelines.[50] Although political forces prevented this effort from reaching completion,[51] and the structural conditions under which defense lawyers work are daunting to say the least,[52] three provincial lawyers' associations took up the challenge, and in 2010 published guidelines addressing the appointment and material support of qualified counsel; the duty of defense counsel to collect and present mitigating evidence; counsel's obligation to present claims of the client's mistreatment while imprisoned; counsel's role in reaching an agreed-upon disposition; and the duty to facilitate the work of successor counsel.[53] Although questions of implementation persist and there is much further work to be done, this is quite a solid list of specific provisions.

Yet, Ms. Yang reports that the "most critical lesson that the provincial lawyers' associations learned from their examination of the development of the ABA Guidelines was the importance of soliciting input from different stakeholders,"[54] including the police, prosecutors, and judges. This suggests that the Guidelines have succeeded in communicating abroad a central message that all actors in the American criminal justice system should continue to heed: the ultimate beneficiary of efforts to improve capital defense representation is the criminal justice system itself.[55]

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49. Jie Yang, *The Development of China's Death Penalty Representation Guidelines: A Learning Model Based on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 HOFSTRA L. REV. 589, 589 & n.2, 597-98 (2013).

50. *Id.* at 597.

51. *Id.* at 597-98.

52. *See id.* at 598-99.

53. *Id.* at 599-603.

54. *Id.* at 604.

55. *Id.*; *see* Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 912 (2003).

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