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INTRODUCTION: THE PAST, PRESENT, AND FUTURE OF EFFECTIVE DEFENSE REPRESENTATION IN CAPITAL CASES

*Eric M. Freedman**

The Articles in Part Three of the *Hofstra Law Review* Symposium marking the tenth anniversary of the publication by the American Bar Association (“ABA”) of a revised version of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“Guidelines”)¹ build on the experience of the past to teach lessons about the present and anticipate progress to be made in the future.

Part Three begins with a contribution by Russell Stetler, a long-time capital defender who serves as the National Mitigation Coordinator for the federal death penalty project, and Aurélie Tabuteau, who is pursuing graduate studies in criminal justice issues. Their Article, *The ABA Guidelines: A Historical Perspective*,² begins by addressing “the occasional inaccurate suggestion that the Guidelines are the work of elite high paid professionals, or the musings of academics with no grounding in actual practice,”³ and represent the wish-list of an unrepresentative group of visionaries rather than articulating—as they say they do—standards that “are not aspirational [but rather] embody the

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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>. Part One of this Symposium appeared in Volume 41.3 of the *Hofstra Law Review*. Part Two appeared in Volume 42.2 of the *Hofstra Law Review*.

2. Russell Stetler & Aurélie Tabuteau, *The ABA Guidelines: A Historical Perspective*, 43 HOFSTRA L. REV. 731 (2015).

3. *Id.* at 732.

current consensus about what is required to provide effective defense representation in capital cases.”⁴

In fact, the “Guidelines embody not a ‘Cadillac defense,’ but the minimum standards developed by successful capital defenders throughout the modern era.”⁵

As the authors carefully recount, the Guidelines: (1) were created and revised by a broadly consultative methodology involving a variety of groups and practitioners, including prosecutors, both inside and outside the ABA;⁶ (2) relied upon numerous professional sources, including practice guides for capital defense lawyers, academic articles and treatises, governmental and private studies, and judicial opinions;⁷ and (3) were squarely based on the practices of real-world lawyers with heavy caseloads.⁸

In establishing the standard of care based on such sources,⁹ the U.S. Supreme Court has simply applied the same methodology to the field of capital representation as would be applied to any other specialized area of knowledge, whether it be medicine or aviation safety.¹⁰

Just as in those fields, one expects—indeed one hopes—to see continuing evolution in the applicable standards, as the accumulating experience of the past provides insight to the future. The fact that “[f]uture practitioners may be found ineffective for employing techniques and strategies that would have been state-of-the-art at a prior time”¹¹ is a practical embodiment of a bedrock ethical aspiration of the profession: “A lawyer should strive to attain the highest level of skill, to

4. ABA GUIDELINES, *supra* note 1, Guideline 1.1, at 920.

5. Stetler & Tabuteau, *supra* note 2, at 743. Of course, a minimally adequate defense in a capital case will be far more expensive than in a non-capital case, but that reflects no more than the uncontroversial fact that “because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case.” ABA GUIDELINES, *supra* note 1, Guideline 1.1, at 921; see Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1097-1100 (2003) (detailing reasons that “a state’s decision to have a criminal justice system in which death is available as a sanction necessarily entails substantially higher costs than the contrary decision does”).

6. See ABA GUIDELINES, *supra* note 1, Guideline 1.1, at 914-16; Stetler & Tabuteau, *supra* note 2, at 745; see also Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 912 (2003) (noting that the 2003 Guidelines “came to the floor of the House of Delegates with the co-sponsorship of a broad spectrum of ABA entities and passed without a single dissenting vote”).

7. See Stetler & Tabuteau, *supra* note 2, at 745-47.

8. See *id.* at 744-45; see also *id.* at 742 & nn.64-69, 743-44, 745 & nn.84-110, 746 nn.112-24.

9. See *id.* at 746, 747 & nn.134-36.

10. See Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 665-70 (2013).

11. Stetler & Tabuteau, *supra* note 2, at 749 n.139.

improve the law and the legal profession and to exemplify the legal profession's ideals of public service."¹²

The next Article in Part Three, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*,¹³ exemplifies the process at work. The authors are Professor Sean D. 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,¹⁴ and 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.

In Part Two of this Symposium, O'Brien and Wayland detailed the scientific, logical, and legal flaws in the common prosecutorial tactic of branding the capital client "a psychopath," irremediably driven by his Antisocial Personality Disorder to a life of evil.¹⁵ In their current contribution, the authors review a series of successful and unsuccessful capital defense representations, and, integrating this empirical evidence with the latest findings from cognitive psychology and the Capital Jury Project, set forth an affirmative approach to countering the government's use of prejudicial psychiatric labels.¹⁶

Whenever the mitigation phase of a capital case litigation winds up "focusing on diagnostic labels and psychometric testing," the defendant is severely—often fatally—disadvantaged, even if his case is "built upon accepted principles of forensic mental health testimony" and his adversary's is not.¹⁷ Even if the jurors accept the mental health diagnosis proffered by the defense (and they probably will not),¹⁸ the information will, in all likelihood, "not produce an empathetic response."¹⁹

12. *Model Rules of Professional Conduct: Preamble & Scope*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html (last visited Apr. 12, 2015).

13. Sean D. O'Brien & Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 HOFSTRA L. REV. 751 (2015).

14. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, in 36 HOFSTRA L. REV. 677 (2008).

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

16. See generally *id.*

17. O'Brien & Wayland, *supra* note 13, at 752.

18. *Id.*

19. *Id.* at 753; see *id.* at 769-70.

The most basic way in which people understand the world is through stories.²⁰ The successful mitigation presentation in a capital case accordingly narrates the story of the client's life in a way that will "reveal his innate human qualities, his flaws as well as his strengths, and enable decision makers to see him or her as like themselves."²¹ Mental health assessments are of use not for their independent persuasive force, but for their role in helping communicate the client's life story to the jury.²² O'Brien and Wayland continue by noting: "Diagnoses, psychometric test scores and brain scans are not narratives. These tools persuade only when accompanied by compelling stories that reveal the client's intrinsic humanity."²³

What works, in short, is "a thoroughly investigated, truthful narrative of the [client's] life"²⁴ that sparks the jurors' imagination and enables them to see the individual before them as a unique human being with "hopes, dreams, beliefs, and values,"²⁵ whose trajectory might, under different circumstances, have been theirs.

The final Article in Part Three, *Trying to Get It Right—Ohio, from the Eighties to the Teens*,²⁶ by Margery M. Koosed, describes the evolution of capital defense standards from the viewpoint of system-building.²⁷ The Guidelines "set high performance standards not just for lawyers, but for death penalty jurisdictions," as well.²⁸ As a legal matter, it is the government that bears the Constitutional obligation to provide effective assistance of counsel.²⁹ As a practical matter, that obligation cannot effectively be discharged piecemeal, but requires the creation of institutional structures that "function well in the present and evolve effectively over time."³⁰

20. *Id.* at 770-71.

21. *Id.* at 775.

22. *Id.* at 773-75.

23. *Id.* at 774.

24. *Id.* at 753.

25. *Id.* at 769.

26. Margery M. Koosed, *Trying to Get It Right—Ohio, from the Eighties to the Teens*, 43 HOFSTRA L. REV. 783 (2015).

27. *See generally id.*

28. Freedman, *supra* note 5, at 1103 (footnote omitted); *see* ABA GUIDELINES, *supra* note 1, Commentary to Guideline 1.1, at 924 ("Guidelines 1.1-10.1 contain primarily principles and policies that should guide jurisdictions in creating a system for the delivery of defense services in capital cases, and Guidelines 10.1-10.1.2 contain primarily performance standards defining the duties of counsel handling those cases.")

29. *See Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980). That is why the Guidelines "not only detail the elements of quality representation but mandate the systematic provision of resources to ensure that such representation is achieved in fact." ABA GUIDELINES, *supra* note 1, Commentary to Guideline 1.1, at 938 & n.71 (citing *Cuyler*, 446 U.S. at 344-45).

30. Freedman, *supra* note 5, at 1103.

In her Article, Koosed, who has played multiple roles in the efforts she describes, recounts the instructive history of one jurisdiction's ongoing decades-long efforts to create such structures.³¹ The fabric of those structures, it turns out, are woven from just the same materials as are used to create a standard of care for the performance of individual lawyers. The Ohio capital defense system is the evolving product of: the lessons learned and taught by state and national practitioners;³² studies by state and national governmental and private bodies;³³ academic research;³⁴ court decisions;³⁵ administrative mandates;³⁶ and diverse groups and officials motivated to ameliorate particular injustices.³⁷ Progress has come about through the synergistic efforts of these constituencies, and the way forward depends on bringing additional stakeholders on board.³⁸

The Ohio experience, thus, reinforces a basic predicate of the Guidelines: efforts to improve capital defense representation have, as their ultimate beneficiary, the criminal justice system itself—a system in which every person in the country is a stakeholder.³⁹

31. See generally Koosed, *supra* note 26.

32. See, e.g., *id.* at 786-89.

33. See, e.g., *id.* at 790-91, 793-97, 807-14.

34. See, e.g., *id.* at 790-91, 794.

35. See, e.g., *id.* at 784-86, 793, 798-00.

36. See, e.g., *id.* at 791-92, 797, 802-03, 806-07, 814-16.

37. See, e.g., *id.* at 800, 813.

38. See *id.* at 822-23.

39. See Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases*, 4 OHIO ST. J. CRIM. L. 183, 193 (2006). It has been noted that:

The interest in insuring that the decision of the government to execute a person in the name of its citizens is based upon the most complete factual and legal picture belongs not just to each individual actor in the legal system—including judges and victims as well as defendants and prosecuting and defense attorneys—but to society as a whole.

Id.
