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## Introduction: System Perspectives on the Guidelines

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## INTRODUCTION: SYSTEM PERSPECTIVES ON THE *GUIDELINES*

*Eric M. Freedman\**

The Articles in Part Two of the *Hofstra Law Review* symposium marking the fifteenth anniversary of the publication of the *ABA Guidelines*<sup>1</sup> offer a valuable reminder. Effective capital defense representation is designed to achieve “the basic goal of a system of justice: justice.”<sup>2</sup>

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 possible 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.<sup>3</sup>

This Part begins with an Article by Matthew Redle, who has been a prosecutor in Wyoming for some forty years and is dedicated to the vision of the prosecutor as an officer whose ultimate commitment is to

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1. Part One of this Symposium appeared in Volume 46, Issue 4 of the *Hofstra Law Review*. It is available online at <https://www.hofstralawreview.org/archive/volume-46-issue-4-summer-2018>.

2. 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).

3. *Id.*; see also Eric M. Freedman, *Symposium Introduction*, 46 HOFSTRA L. REV. 1097, 1102-03 (2018) (observing that this central feature of the *Guidelines* explains why they “received the unanimous approval of the House of Delegates, whose members represent many diverse constituencies, including state and federal prosecutors, judges, and government officials of all sorts”).

justice.<sup>4</sup> His Article is entitled, “A View of the ABA Death Penalty Defense Representation *Guidelines* From the Prosecution’s Table.”<sup>5</sup>

The *ABA Guidelines* consciously chose to embody standards that were “not aspirational” but rather expressed the existing consensus about the requirements of effective defense representation in capital cases.<sup>6</sup> This codification of “a national standard of practice”<sup>7</sup> was, as Mr. Redle suggests, “an intentional effort to avoid localized norms from watering down the quality of representation appropriate for the task at hand.”<sup>8</sup>

The project was empirically based, founded on the collective experience and expertise of effective capital litigators, “the teachings of research studies conducted by academics, government agencies and private consulting organizations, the practice standards of professional legal organizations, and extensive caselaw addressing the effective assistance of counsel.”<sup>9</sup>

The *ABA Guidelines* recognize—although legislatures frequently do not<sup>10</sup>—that achieving high quality representation on the ground “requires that government provide funds necessary to support the full cost.”<sup>11</sup> Mr. Redle observes that legislatures’ failure “to provide this level of funding—which given the nature of the capital sanction, even the most rudimentary notions of justice would seem to demand—undermines the

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4. See American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2 (b) (4th ed. 2015), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment . . . The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.”).

5. Matthew Redle, *A View of the ABA Death Penalty Defense Representation Guidelines from the Prosecution’s Table*, 47 HOFSTRA L. REV. 127 (2018).

6. See *id.* at 131-32; see also *ABA Guidelines*, *supra* star note, at 920 (History of Guideline 1.1).

7. *ABA Guidelines*, *supra* star note, at 919 (Guideline 1.1.A).

8. Redle, *supra* note 5, at 132 n. 25; see Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 635-36 (2013).

9. Freedman, *supra* note 3, at 1103-04 (footnotes omitted). Encouragingly, outside investigation of the efficacy of the precepts of the *ABA Guidelines* has found them to be “on firm empirical ground.” See John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1036 (2008).

10. See Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1099-1100 (2003).

11. Redle, *supra* note 5, at 132.

legitimacy of the death sentence far more than a legion of dedicated defense teams could achieve.”<sup>12</sup>

Less abstractly, there are long-recognized practical consequences when governments fail to abide by the *ABA Guidelines*<sup>13</sup>: long delays in the adjudication of capital cases<sup>14</sup> and the vulnerability of state capital convictions to invalidation on federal habeas corpus review.<sup>15</sup>

Ultimately, Mr. Redle concludes:

Regardless of one’s views on capital punishment, if such a penalty exists, it should be carried out with all of the dignity, respect, and equity which our system of laws can muster. Excellence in defense representation is the yardstick by which dignity, respect, and equity may be measured.<sup>16</sup>

The second Article in this Part of the symposium is “The *ABA Guidelines: The Arizona Experience*,” by long-time collaborators Larry Hammond and Robin M. Maher.<sup>17</sup>

Mr. Hammond, a senior criminal defense lawyer in Phoenix with a varied career in private litigation and public service,<sup>18</sup> has been concerned with the adequacy of public defense systems at least since his clerkship for Justice Hugo Black in 1971.<sup>19</sup> In Arizona, he has worked tirelessly for decades in a variety of official and unofficial capacities to improve the quality of capital defense representation at all stages of the process. His resulting high reputation among all sectors of the Arizona bar and bench was a unique advantage in persuading institutional actors that reform was in the interests of all constituencies.<sup>20</sup> Ms. Maher was Executive Director of the ABA Death Penalty Representation Project at the time the *Guidelines* were adopted.<sup>21</sup> She oversaw their formulation

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12. *Id.* at 133.

13. *Id.* at 137.

14. See Eric M. Freedman, *Earl Washington’s Ordeal*, 29 HOFSTRA L. REV. 1089, 1106-07 (2001); see also James S. Liebman, *The Overproduction of Death*, 100 COLUMBIA L. REV. 2030, 2147 (2000).

15. See Freedman, *supra* note 2, at 188-93.

16. Redle, *supra* note 5, at 137.

17. Larry Hammond & Robin M. Maher, *The ABA Guidelines: The Arizona Experience*, 47 HOFSTRA L. REV. 137 (2018).

18. See Larry A. Hammond, OSBORN MALEDON, <http://www.omlaw.com/attorneys/bio/larry-a-hammond> (last visited Nov. 10, 2018).

19. See Larry Hammond, *Why Gideon Mattered to Hugo Black*, 27 THE CHAMPION, Jan./Feb. 2003, at 19.

20. See Hammond & Maher, *supra* note 17, at 137 n.4.

21. See Robin M. Maher, *‘The Guiding Hand of Counsel’ and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 1091, 1093 (2013).

and helped guide them through the House of Delegates.<sup>22</sup> She then worked throughout the country to see them implemented, both case-by-case,<sup>23</sup> and in death penalty jurisdictions—including as Mr. Hammond’s partner in the Arizona effort.<sup>24</sup>

Fascinatingly, the account by this team demonstrates how closely the concerns of the *ABA Guidelines* that Mr. Redle’s Article highlights match the real-world realities.

Notwithstanding the recommendations of both prosecutors and defense lawyers, the Arizona legislature in the years prior to the *ABA Guidelines* simply refused to provide adequate resources for capital defense representation and deploy them in an effective way.<sup>25</sup> Even when the Arizona Supreme Court moved in the direction of upgrading the quality of defense counsel, its efforts were ineffectual when resisted by lower court judges who asserted that the *ABA Guidelines* were “aspirational.”<sup>26</sup> The inadequacies of the resulting system were highlighted in a 354-page “fact-based, empirically sound” research report that the ABA commissioned from a panel of highly-respected experts.<sup>27</sup>

The effect of this was some progress in the quality of trial level representation while, at the same time, Arizona continued to see notably high levels of appellate and post-conviction reversals based on ineffective assistance of counsel.<sup>28</sup>

Too many of Arizona’s capital defendants have benefitted from the performance standards of the *ABA Guidelines* only after decades of delay, and some frightening number will be precluded by procedural default doctrines from benefitting at all.<sup>29</sup>

In short, the *ABA Guidelines* work when they are implemented. That is a tribute to them. But they can’t work unless they are implemented. That is a challenge to all of us, because every person in this country is a stakeholder in its system of justice.

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22. See Robin M. Maher, *Improving State Capital Counsel Systems Through the Use of the ABA Guidelines*, 42 HOFSTRA L. REV. 419, 421 n.8 (2013).

23. See Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 763, 770-73 (2008).

24. See Maher, *supra* note 21, at 424-26.

25. See Hammond & Maher, *supra* note 17, at 143.

26. See *id.* at 144.

27. See *id.* at 145.

28. See *id.* at 138, 145-46.

29. See *id.* at 137, 152.