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Introduction

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INTRODUCTION

Eric M. Freedman*

On February 10, 2003, the American Bar Association ("ABA") approved the revised edition of its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which articulate the "national standard of practice for the defense of capital cases." The Guidelines "are not aspirational," but rather distill the combined experiences of numerous individuals working in all parts of the field into a document that embodies "the current consensus about what is required to provide effective defense representation in capital cases."

One element of that consensus is that "the unique characteristics of death penalty law and practice"—including the extreme fluidity of the

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* Professor of Law, Hofstra University School of Law. Reporter, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003) [hereinafter GUIDELINES].
1. The ABA Guidelines are reprinted infra at 31 HOFSTRA L. REV. 913 (2003). They consist of black-letter Guidelines ("Guidelines"), which represent the official position of the ABA, accompanied by a lengthy and heavily-documented commentary, which "serves as useful explanation of the black-letter Guidelines." Id. at 914.
2. GUIDELINES, supra note *, at Guideline 1.1(A).
3. Id. at Guideline 1.1, History of Guideline.
4. See id. at Acknowledgments; Introduction.
5. Id. at Guideline 1.1, History of Guideline. They thus serve as a benchmark for measuring whether the states are meeting their obligations to provide defense services, see id. at Guideline 10.1, text accompanying note 151, as well as whether lawyers are rendering effective assistance in individual cases, see Wiggins v. Smith, 123 S. Ct. 2527, 2536-37 (2003) (relying on non-compliance with the prevailing norms of practice reflected in first edition of Guidelines to support holding of ineffective assistance of counsel). For a general comparison of 1989 and 2003 versions of the Guidelines, see Chris Adams, Death Watch: ABA Revises Guidelines for Counsel in Capital Cases, THE CHAMPION, April 2003, at 12.
law\(^7\) and the potentially fatal consequences of erroneous legal predictions\(^8\)—impose a stringent "duty to assert legal claims"\(^9\) even where "their prospects of immediate success on the merits are at best modest."\(^10\) An effective capital defense lawyer is always testing—and often explicitly challenging—the limits of existing law.\(^11\)

But that is only the beginning of the task. Successful representation requires recognizing the need for and then conducting a factual investigation, often involving highly specialized forensic science, of an intensity and complexity unknown to any other legal field.\(^12\) Even then, counsel will not succeed unless he or she has been resourceful in overcoming ubiquitous obstacles\(^13\) and cultivating a range of human relationships—with the client, to be sure,\(^14\) but also with family members, witnesses, members of the victim’s family, and others.\(^15\)

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7. See id. at Guideline 1.1 n.28.
8. See id. at Guideline 1.1, text accompanying note 28.
9. See id. at Guideline 10.8. Like the Guidelines generally, see id. at Guideline 1.1(B), this duty applies to counsel "at every stage of the case." Id. at Guideline 10.8(A). Thus, post-conviction counsel, too, "should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules." Id. at Guideline 10.15.1(C).
10. See id. at Guideline 10.8, commentary.
11. Indeed, the commentary specifically identifies many areas in which it would be remiss for counsel to accept uncritically the contours of current doctrine. See, e.g., id. at Guideline 1.1 n.28 (death penalty for juveniles); id. at Guideline 1.1 n.47 (right to post-conviction counsel); id. at Guideline 10.8 n.231 (actual innocence); id. at Guideline 10.10.2 n.269 (race-based challenges to capital systems); id. at Guideline 10.11 n.275 (right to argue lingering doubt); id. at Guideline 10.11 n.307 (victim impact statements); id. at Guideline 10.15.1 n.351 (unconstitutionality of extended confinement on death row).
12. See id. at Guideline 10.7 and commentary. As the Guidelines note, see id. at Guideline 10.7, text accompanying notes 197, 209-10, these consequences follow from the bifurcation of capital trials and the vast range of mitigating evidence that counsel is obliged to pursue and present at the penalty phase.
13. See id. at Guideline 10.5, text accompanying note 178:
   Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired." There will also often be significant cultural and/or language barriers between the client and his lawyers.
(citation omitted).
14. See id. at Guideline 10.5 ("Relationship with the Client") and commentary.
15. See, e.g., id. at Guideline 10.7, text accompanying note 213 (in conducting mitigation investigation "[i]t is necessary to locate and interview the client’s family members . . . and virtually
A great deal of unhappy experience teaches that to expect one, or even several, lawyers to have the skills needed to perform well all the tasks that are required to deliver high quality defense representation to a capital defendant is unrealistic. Rather, “the provision of high quality legal representation in capital cases requires a team approach that combines the skills, experience, and perspectives of several disciplines. The team approach enhances the quality of representation by expanding the knowledge base available to prepare and present the case, increases efficiency by allowing attorneys to delegate many time-consuming tasks, . . . improves the relationship with the client and his family by providing more avenues of communication, and provides more support to individual team members.”

But these teams—and the resources to support them—will not appear from nowhere. Death penalty jurisdictions must create institutions whose structure results in the effective delivery of capital defense services on the ground. For this reason, many of the Guidelines are addressed not to defense counsel but to the government officials whose responsibility it is to provide those services.

It follows from what has been said so far that success in the daunting enterprise of ensuring that high quality defense representation in capital cases “is achieved in fact” will require a pervasive spirit of brainstorming among lawyers, non-lawyer defense professionals, and public servants.

It is in this spirit that—in conjunction with a conference held by the ABA at Hofstra Law School on October 24, 2003 to urge all death penalty jurisdictions to implement the revised Guidelines—the Hofstra Law Review is publishing this Symposium. The purpose is not just to make the Guidelines and commentary widely available, but also to encourage creative thinking about their implications. The ideas of the distinguished commentators whose articles are included in this volume
exemplify the inventiveness that experience has shown to be the sine qua non of successful capital defense representation.

In ‘The Guiding Hand of Counsel’ and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Robin M. Maher, the Director of the ABA’s Death Penalty Representation Project eloquently introduces the Symposium by evoking Powell v. Alabama,20 the case of the Scottsboro Boys, which recognized a constitutional right to counsel following a capital trial in a courtroom filled with demons—including ineffective representation, racism, and mentally challenged defendants wrongfully convicted and sentenced to death—that still hound us. And, Ms. Maher suggests, they will continue to do until all stakeholders “work together to bring about badly needed reform of our capital defender systems” by building institutions based on the blueprints that the Guidelines provide.21

Difficult as the effort may be, it represents no more than the long-overdue implementation of a principle stated in Powell, endorsed by the ABA, but still largely unrealized in practice today: “Jurisdictions that choose to have the death penalty must accept the concomitant obligation to implement meaningful safeguards intended to insure due process and minimize the risk of the execution of the innocent.”22

The next two articles address aspects of the institution-building necessary to make this principle a reality.

My Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines, begins with an ineluctable fact: “The death penalty is expensive. . . . [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.”23 Those costs, I suggest, will be borne by someone: appropriately, by the states expending money; less appropriately by pro bono lawyers subsidizing the states; or, least appropriately but all too frequently, by defendants paying the costs in the coin of injustice. The Guidelines forcefully re-endorse the fundamental principle that only the first alternative is acceptable.24

20. 287 U.S. 45 (1932).
22. See id.
24. See id. at 1103.
But allocating more resources, although necessary, will not be sufficient: “money alone will not do the job.”25 In a welcome and constructive contribution, the Guidelines also provide a guide for how to spend that money effectively, so that achieving high quality capital defense representation becomes not a visionary goal but a daily fact. Responsible government decisionmakers will follow that guide.

In particular, they will implement a mandate of the revised Guidelines that is the subject of the next article, by Ronald J. Tabak, who chairs the Death Penalty Committee of the ABA’s Section on Individual Rights and Responsibilities. In Why an Independent Appointing Authority is Necessary to Choose Counsel for Indigent Defendants in Capital Punishment Cases, Mr. Tabak highlights the obligation of creating an agency “independent of the judiciary” to be responsible for “ensuring that each capital defendant in the jurisdiction receives high quality legal representation.”26 The Guidelines require that this independent agency “and not the judiciary or elected officials ... select lawyers for specific cases.”27

As Mr. Tabak details, this mandate responds to two realities that have become overwhelmingly clear since the promulgation of the original edition of the Guidelines: “(1) judges—whether initially elected, subject to retention elections, or appointed—are subject to political pressures in connection with capital punishment cases; and (2) lawyers whom judges have appointed in capital punishment cases have frequently been of far lower quality than they could have selected.”28 Implementing this aspect of the Guidelines (which will cost the states nothing but political will) is, as Mr. Tabak demonstrates, “one necessary, albeit hardly sufficient, ingredient of any solution to the problem of ineffective defense representation in death penalty cases . . . .”29

Our authors turn next to one of the Guidelines’ central teachings: that the standard of practice requires deploying a multi-disciplinary team to defend the capital client.30 Jill Miller, a social worker with a great deal of experience as a capital mitigation specialist was an active participant in drafting the Guidelines, which now require that, at every stage of the case, the client must be represented by a defense team consisting of:

25. See id. at 1102.
27. Id. at Guideline 3.1(B).
29. See id. at 1115.
30. See GUIDELINES, supra note *, at Guideline 4.1 and commentary, Guideline 10.4(C) and commentary.
• one lead counsel and one or more associate counsel; and
• at least one investigator; and
• at least one mitigation specialist; and
• at least one person (who may be one of the foregoing) "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments"; and
• "any other members needed to provide high quality legal representation." 31

She contributes The Defense Team in Capital Cases, which—by connecting the duties which defense counsel must perform to the resources that they must have to perform them—explains why these standards reflect "the accepted 'standard of care' in the capital defense community." 32

Pamela Blume Leonard, the Chief Death Penalty Mitigation Specialist and Chief Investigator at the Multi-County Public Defender Office in Atlanta, Georgia, focuses her article on one of the defense team's key members: the mitigation specialist. In A New Profession for an Old Need—Why a Mitigation Specialist Must be Included on the Capital Defense Team, she details a stark lesson that three decades of experience has taught—whether or not there is a mitigation specialist on the capital defense team often makes the difference between life or death for the client.

For an example one need look no farther than last Term's decision in Wiggins v. Smith, where a key element in persuading the Supreme Court that trial counsel had performed inadequately at the mitigation phase was the presentation on state post-conviction of "an elaborate social history report" by an expert social worker. His "detailed" and "graphic" testimony—buttressed by "state social services, medical, and school records, as well as interviews with petitioner and numerous family members"—"chronicled petitioner's bleak life history" and powerfully demonstrated the case that trial counsel had failed to make. 33

As Ms. Leonard shows, the Guidelines are on very solid legal and factual ground in recognizing "the mitigation specialist as an

31. See id. at Guideline 10.4 ("The Defense Team"). This last provision covers lawyers as well as non-lawyers. "The team described in the foregoing paragraph is the minimum. In most cases, at least as trial approaches, the provision of high quality representation will require at least some contributions by additional lawyers—for example, a specialist to assist with motions practice and record preservation, or an attorney who is particularly knowledgeable about an area of scientific evidence." Id. at Guideline 10.4, text accompanying note 174.
The final group of articles in the Symposium directly addresses the defense lawyer, and illuminates some of the ways in which "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."35

Russell Stetler, director of investigation at New York’s Capital Defender Office, who has spent decades in the field and was an active contributor to the Guidelines, provides Commentary on Counsel’s Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1).

Viewing realistically the positions in which many capital clients find themselves, the Guidelines place heavy stress on the obligation of counsel at every stage of the case "to take all steps that may be appropriate in the exercise of professional judgment ... to achieve an agreed-upon disposition."36 Indeed, counsel’s obligation to pursue an appropriate settlement is just as strong as her obligation to mount an appropriate defense.

But, particularly in light of the characteristics of much of the client population and the nature of the death row environment,37 achieving a consensual resolution requires a very special set of skills. As the Guidelines say,

in the area of plea negotiations, as in so many others, death penalty cases are sui generis. Many bases for bargaining in non-capital cases are irrelevant or have little practical significance in a capital case, and some uniquely restrictive legal principles apply. Emotional and political pressures, including ones from the victim’s family or the media, are especially likely to limit the government’s willingness to bargain. On the other hand, the complexity, expense, legal risks, and length of the capital trial and appellate process may make an agreement particularly desirable for the prosecution.38

35. GUIDELINES, supra note *, at Guideline 1.1, commentary.
36. Id. at Guideline 10.9.1. Guideline 10.9.1, which explicates this obligation, fills some four pages of black-letter.
37. Russell Stetler, Commentary on Counsel’s Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1), 31 Hofstra L. Rev. 1157, 1163-64 (2003).
38. GUIDELINES, supra note *, at Guideline 10.9.1, text accompanying notes 246-48 (citations omitted).
Mr. Stetler’s article illuminates these propositions, explaining what is needed to bring together the “four key players in resolving capital cases: victims’s surviving family members, prosecutors, defendants, and capital defense counsel.”

To “excel in this highly specialized art” may bring “no glory and little personal satisfaction,” but there is a good reason why the Guidelines consider “seeking and negotiating dispositions in capital cases [to be] a core component of effective representation in matters of life and death.” In light of the icy reality that “[c]apital trials involve a grave risk of death,” for counsel to neglect this duty is simply irresponsible.

At the same time, the “existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.” Those obligations are the subject of The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases by Professor Monroe H. Freedman, the Lichtenstein Distinguished Professor of Legal Ethics at Hofstra, who has been involved in the defense of criminal cases throughout his career.

As noted above, the Guidelines impose a strict duty on capital defense counsel to litigate “all potential issues at all levels.” Professor Freedman supports this “professional obligation to assert at every level of the proceedings what otherwise might be deemed a frivolous claim” both by reference to the special context of capital cases and by showing that it is only a surprisingly small step beyond the duty already recognized in criminal cases generally.

Lawrence J. Fox, who, as Chair of the ABA’s Death Penalty Representation Project, moved the adoption of the revised Guidelines before the House of Delegates, focuses on another ethical duty of capital defense counsel in Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant. His subject is Guideline 10.13, which provides, “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

39. Stetler, supra note 37, at 1158.
40. Id. at 1165.
41. Id. at 1157.
42. Id. at 1164.
43. GUIDELINES, supra note *, at Guideline 10.9.1(G).
44. See supra text accompanying notes 6-10.
45. GUIDELINES, supra note *, at Guideline 10.8, text accompanying note 234.
cooperate fully with successor counsel [including] cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel."

The practicalities giving rise to the Guideline are straightforward. The law that governs the current "jurisprudential maze known as habeas corpus" is such that "lawyers in capital cases are virtually guaranteed" to be the subject of claims of ineffective assistance of counsel. To cooperate with successor counsel asserting the claim is to give the client a viable chance of success; to fail to co-operate or, worse, to assist the government in resisting it, is to inflict severe damage on the client's prospects.

Although the provision of the Guidelines articulating the duty to co-operate is new to the current edition, Mr. Fox demonstrates that the duty itself is one of long-standing under the rules of legal ethics, "not merely a hortatory goal, but a firm obligation." The final contribution to the symposium is International Law Issues in Death Penalty Defense by Professor Richard J. Wilson, who directs the International Human Rights Law clinic at American University. Although the only extended treatment of international law issues is in Guideline 10.6, which deals with the obligation of defense counsel representing foreign nationals to assert their rights under the Vienna Convention on Consular Relations, counsel's duty under the Guidelines to pursue claims based on international law clearly sweeps far more broadly than this.

The Guidelines require that counsel be familiar with "international law governing death penalty cases, including issues which are 'percolating' in the lower courts but have not yet been authoritatively resolved by the Supreme Court," that attorney training include international law subjects, and that the pool of defense attorneys in

47. Lawrence J. Fox, Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant, 31 HOFSTRA L. REV. 1181, 1185 (2003).
48. 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) ("While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims."). cited in GUIDELINES, supra note *, at Guideline 10.13, text accompanying note 324.
49. Fox, supra note 47, at 1193; see GUIDELINES, supra note *, at Guideline 10.13, text accompanying notes 326-27 ("The duties contained in this Guideline are of enormous practical significance to the vindication of the client's legal rights," and to violate them "is professionally unethical.") (footnote omitted).
50. GUIDELINES, supra note *, at Guideline 1.1, text accompanying note 43.
51. See id. at Guideline 8.1(B)(1).
each jurisdiction include those knowledgeable about international law.\textsuperscript{52} Of course, as already discussed, the Guidelines also mandate that defense lawyers aggressively assert cutting-edge legal claims.

These observations take on significance in light of Professor Wilson’s demonstration that “defense counsel can make international law arguments, regardless of the client’s nationality.”\textsuperscript{53} He shows that international law on some subjects, such as the execution of juveniles, is so clear that “every capital lawyer with a juvenile client” should raise the issue.\textsuperscript{54} More generally, he calls attention to “the rich body of decisions on due process and fair trial” that exists in international law, as well as rulings of international tribunals specifically directed to the death penalty practices of the United States.\textsuperscript{55} Plainly, these issues are now “percolating,” and counsel would be remiss to ignore them.

I close with one observation to set in context the pages that follow. The revised 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. This was symbolic of the philosophy that has animated the project since its inception in the 1980s, and that I as the current Reporter hope will continue to guide the future evolution of the field as a whole: “All actors in the system share an interest in the effective performance of [capital defense] counsel; such performance vindicates the rights of defendants, enables judges to have confidence in their work, and assures the states that their death sentences are justly imposed.”\textsuperscript{56}

\textsuperscript{52} See id. at Guideline 5.1(B)(2)(a).
\textsuperscript{54} See id. at 1203.
\textsuperscript{55} See id. at 1206-08.