

MEMORANDUM

Date: August 26, 2008
To: Justices, Nevada Supreme Court
From: Franny Forsman, Federal Public Defender
Re: ADKT 411-Performance Standards-Mitigation Function in Capital Cases

The minority version of the Performance Standard 2-1 (Version B), suggests that the employment of mitigation specialists in a death penalty case should not be required but rather should be optional and the determination made on a case-by-case basis. The majority version (Version A) provides that the “defense team should: consist of no fewer than two attorneys qualified in accordance with Standard 2-2, an investigator and a mitigation specialist; and contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

The inclusion of a mitigation specialist as provided in the ABA Guidelines is not something that should be determined on a case-by-case basis. I have attached two documents to this Memo to assist in assessing the recommendations with regard to this Standard. The majority version (Version A) of the Performance Standards applicable to death penalty cases is an adoption of the 2003 “ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” I have attached the “Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases” published in 2008. These guidelines “flesh out” the ABA guidelines with regard to the expectations of the mitigation specialist members of the capital defense team.

I have also attached a law review article, “Introduction: Re-stating the Standard of Practice for Death Penalty Counsel: the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.” This article describes the development of the Supplementary Guidelines and explains that the Supplementary Guidelines, just as the ABA Guidelines are not aspirational but “summarize the prevailing professional norms for mitigation investigation, development and presentation by capital defense teams.”

Thank you again for your consideration of these important issues.

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Hofstra Law Review
Spring 2008

Article

Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases

***677 SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES**

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INTRODUCTION

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 revision) assign to lead counsel (at Guideline 10.4(B)) the responsibility for conducting a thorough investigation relating to both guilt and penalty, regardless of any statement by the client opposing such investigation. (Guideline 10.7) To meet this responsibility, lead counsel must assemble a capital defense team consisting of no fewer than two qualified attorneys, an investigator, and a mitigation specialist - with at least one member of that team qualified by training and experience to screen for the presence of mental or psychological disorders or impairments. (Guidelines 4.1 and 10.4 C).

Inherent in the approach to competent capital defense dictated by the Guidelines is the recognition that the mitigation function is multi-faceted and multi-disciplinary, even though ultimate responsibility for the investigation of such issues rests irrevocably with counsel. Because the mitigation function is of utmost importance in the defense of capital cases, and because counsel must rely on the assistance of experts, investigators and mitigation specialists in developing mitigating evidence, these supplementary interdisciplinary performance standards are necessary to ensure that all members of the defense team perform in accordance with prevailing national norms when representing a client who may be facing execution.

These Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases were developed in cooperation with the ABA Death Penalty Representation Project to assist its work and to reflect prevailing professional norms. They are the result of a two-year drafting and review process by experts in the field of death penalty litigation. These Supplementary Guidelines provide comprehensive, up-to-date guidance for all members of the defense *678 team, and will provide useful guidance to judges and defense counsel on selecting, funding and working with mitigation specialists. Following the Guidelines will help ensure effective assistance of counsel for all persons charged with or convicted of capital crimes. These Supplementary Guidelines explain in greater detail the elements of the mitigation function of capital defense teams. Because they are consistent with, elucidate and incorporate by reference the ABA Guidelines, these Supplementary Guidelines follow the same general organizational structure as the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

The skills, abilities, and functions outlined in these Supplementary Guidelines must be present throughout

the defense team, and the responsibility for the development and presentation of mitigation evidence must be incorporated into the defense case at all stages of the proceedings from the moment the client is taken into custody, and extending to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, appeal, post-conviction review, clemency proceedings and any connected litigation. The duty to investigate, develop and pursue avenues relevant to mitigation of the offense or penalty, and to effectively communicate the fruits of those efforts to the decision-makers, rests upon defense counsel.

***679** GUIDELINE 1.1--OBJECTIVE AND SCOPE OF GUIDELINES

A. The objective of these Guidelines is to summarize prevailing professional norms for mitigation investigation, development and presentation by capital defense teams, in order to ensure high quality representation for all persons facing the possible imposition or execution of a death sentence in any jurisdiction. All capital defense teams must be comprised of individuals who, through their experience, training and function, strive to fulfill the constitutional mandate that the sentencer consider all evidence in support of a sentence other than death. Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating factor, positive acts or qualities, responsible conduct in other areas of life (e.g. employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.

B. These Guidelines apply from the moment that counsel is appointed and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, appeal, post-conviction review, competency-to-be-executed proceedings, clemency proceedings and any connected litigation.

Cross-References:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 1.1--Objective and Scope of Guidelines; 4.10--The Defense Team and Supporting Services.

***680** GUIDELINE 4.1--THE CAPITAL DEFENSE TEAM: THE ROLE OF MITIGATION SPECIALISTS

A. In performing the mitigation investigation, counsel has the duty to obtain services of persons independent of the government and the right to select one or more such persons whose qualifications fit the individual needs of the client and the case. Applications to the court for the funding of mitigation services should be conducted ex parte, in camera, and under seal.

B. Counsel has a duty to hire, assign or have appointed competent team members; to investigate the background, training and skills of team members to determine that they are competent; and to supervise and direct the work of all team members. Counsel must conduct such investigation of the background, training and skills of the team members as will determine that they are competent and must ensure on an ongoing basis that their work is of high professional quality.

C. All members of the defense team are agents of defense counsel. They are bound by rules of professional

responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client. The privileges and protections applicable to the work of all defense team members derive from their role as agents of defense counsel. The confidentiality of communication with persons providing services pursuant to court appointment should be protected to the same extent as if such persons were privately retained. Like counsel, non-attorney members of the defense team have a duty to maintain complete and accurate files, including records that may assist successor counsel in documenting attempts to comply with these Guidelines.

D. It is counsel's duty to provide each member of the defense team with the necessary legal knowledge for each individual case, including features unique to the jurisdiction or procedural posture. Counsel must provide mitigation specialists with knowledge of the law affecting their work, including an understanding of the capital charges and *681 available defenses; applicable capital statutes and major state and federal constitutional principles; applicable discovery rules at the various stages of capital litigation; applicable evidentiary rules, procedural bars and "door-opening" doctrines; and rules affecting confidentiality, disclosure, privileges and protections.

Cross- References:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 4.1--The Defense Team and Supporting Services.

ABA Model Rules of Professional Conduct 1.3--Diligence; 1.6-- Confidentiality of Information; 1.7--Conflict of Interest: Current Clients; 1.8--Conflict of Interest: Current Clients: Specific Rules; 1.9--Duties to Former Clients; 1.10--Imputation of Conflicts of Interest: General Rule; 1.11-- Special Conflicts of Interest for Former and Current Government Officers and Employees; 1.14--Client with Diminished Capacity; 2.3--Evaluations for Use by Third Person.

***682 GUIDELINE 5.1--QUALIFICATIONS OF THE DEFENSE TEAM**

A. Capital defense team members should demonstrate a commitment to providing high quality services in the defense of capital cases; should satisfy the training requirements set forth in these Supplementary Guidelines; and should be skilled in the investigation, preparation and presentation of evidence within their areas of expertise.

B. The defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history. Life history includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.

C. Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have

against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures. They must have the ability to advise counsel on appropriate mental health and other expert assistance.

D. Team members must have the training and ability to use the information obtained in the mitigation investigation to ***683** illustrate and illuminate the factors that shaped and influenced the client's behavior and functioning. The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client in order to aid counsel in developing an affirmative case for sparing the defendant's life.

E. At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma. Team members acquire knowledge, experience, and skills in these areas through education, professional training and properly supervised experience.

F. Mitigation specialists must possess the knowledge and skills to obtain all relevant records pertaining to the client and others. They must understand the various methods and mechanisms for requesting records and obtaining the necessary waivers and releases, and the commitment to pursue all means of obtaining records.

Cross- References:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7--Investigation; 4.1--The Defense Team and Supporting Services; 5.1--Qualifications of Defense Counsel.

***684** GUIDELINE 6.1--WORKLOAD

Counsel should ensure that the workload of defense team members 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 supplementary Guidelines and the ABA Guidelines as a whole. In the case of mitigation specialists on the staff of an institutional defender office, the office should implement mechanisms to ensure that their workload is maintained at a level that enables them to provide each client with high quality services and assistance in accordance with these Guidelines.

Cross- Reference:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 6.1--Workload.

***685** GUIDELINE 8.1--TRAINING

A. All capital defense team members should attend and successfully complete, at least once every year, a specialized training program that focuses on the defense of death penalty cases offered by an organization with substantial experience and expertise in the defense of persons facing execution and committed to the national standard of practice embodied in these supplemental Guidelines and the ABA Guidelines as a whole.

B. Funding should be provided for team members to receive effective training and continuing professional education in their respective fields of expertise.

Cross- Reference:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 8.1--Training.

***686** GUIDELINE 9.1--FUNDING AND COMPENSATION

Non-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 to assist counsel with the litigation of death penalty cases. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

Cross- Reference:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 9.1--Funding and Compensation.

***687** GUIDELINE 10.3--OBLIGATIONS OF TEAM MEMBERS RESPECTING WORKLOAD

All members of the defense team 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 supplementary Guidelines and the ABA Guidelines as a whole.

Cross Reference:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.3--Obligations of Counsel Respecting Workload.

***688** GUIDELINE 10.4--THE DEFENSE TEAM: THE ROLE OF COUNSEL WITH RESPECT TO MITIGATION SPECIALISTS

A. Counsel bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case. It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client. It is therefore incumbent upon the defense to interview all relevant persons and obtain all relevant records and documents that enable the defense to develop and implement an effective defense strategy.

B. Counsel guides the defense team and, based on consultation with team members and experts, conducts ongoing reviews of the evidence, assessments of potential witnesses, and analyses of the most effective manner in which to convey the mitigating information. Counsel decides how mitigation evidence will be presented.

Cross- References:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.4--The Defense Team. ABA Model Rules of Professional Conduct 5.3--Responsibilities Regarding Nonlawyer Assistant.

***689** GUIDELINE 10.11--THE DEFENSE CASE: REQUISITE MITIGATION FUNCTIONS OF THE DEFENSE TEAM

A. It is the duty of the defense team to aid counsel in coordinating and integrating the case for life with the guilt or innocence phase strategy.

B. The defense team must conduct an ongoing, exhaustive and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death. The investigation into a client's life history must survey a broad set of sources and includes, but is not limited to: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors.

C. Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding.

D. Team members must provide counsel with documentary evidence of the investigation through the use of such methods as genealogies, social history reports, chronologies and reports on relevant subjects including, but not limited to, cultural, socioeconomic, environmental, racial, and *690 religious issues in the client's life. The manner in which information is provided to counsel is determined on a case by case basis, in consultation with counsel, considering jurisdictional practices, discovery rules and policies.

E. It is the duty of the defense team members to aid counsel in the selection and preparation of witnesses who will testify, including but not limited to:

1. Expert witnesses, or witnesses with specialized training or experience in a particular subject matter. Such experts include, but are not limited to:

a. Medical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning.

b. Anthropologists, sociologists and persons with expertise in a particular race, culture, ethnicity, religion.

c. Persons with specialized knowledge of specific communities or expertise in the effect of environments and neighborhoods upon their inhabitants.

d. Persons with specialized knowledge of institutional life, either generally or within a specific institution.

2. Lay witnesses, or witnesses who are familiar with the defendant or his family, including but not limited

to:

***691** a. The client's family, extending at least three generations back, and those familiar with the client;

b. The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family;

c. Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;

d. Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;

e. Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence;

f. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

***692** g. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

F. It is the duty of team members to gather documentation to support the testimony of expert and lay witnesses, including, but not limited to, school, medical, employment, military, and social service records, in order to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state, intellectual capacity, and life history that may explain or diminish the client's culpability for his conduct, demonstrate the absence of aggressive patterns in the client's behavior, show the client's capacity for empathy, depict the client's remorse, illustrate the client's desire to function in the world, give a favorable opinion as to the client's capacity for rehabilitation or adaptation to prison, explain possible treatment programs, rebut or explain evidence presented by the prosecutor, or otherwise support a sentence less than death.

G. It is the duty of the team members to aid counsel in preparing and gathering demonstrative evidence, such as photographs, videotapes and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts and letters of praise or reference.

Cross References:

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 4.1--The Defense Team and Supporting Services; 10.7-- Investigation; 10.10.1--Trial Preparation Overall; 10.11--The Defense Case Concerning Penalty.

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INTRODUCTION:
RE-STATING THE STANDARD OF PRACTICE FOR
DEATH PENALTY COUNSEL: THE
SUPPLEMENTARY GUIDELINES FOR THE
MITIGATION FUNCTION OF DEFENSE TEAMS IN
DEATH PENALTY CASES

*Eric M. Freedman**

I. INTRODUCTION

As the Anglo-American legal world has understood for centuries, if a criminal justice system that includes capital punishment is to be a just one it must at the least insure that the defendant receives truly effective defense representation.¹

Since modern American capital punishment systems were re-configured in 1976, they have seen a strong consensus coalesce around the elements of such representation. That consensus was embodied in guidelines issued by the American Bar Association (“ABA”) in 1989 and 2003 after extended consultation with practitioners and professional groups, and the courts have repeatedly recognized those guidelines as

* Maurice A. Deane Distinguished Professor of Constitutional Law, Hofstra Law School. B.A. 1975, Yale University; M.A. 1977, Victoria University of Wellington (New Zealand); J.D. 1979, Yale University; http://law.hofstra.edu/Directory/Faculty/FullTimeFaculty/ftfac_efreedman.html.

Professor Freedman is the Reporter for the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), *in* 31 HOFSTRA L. REV. 913 (2003). The views expressed herein are his own.

1. *See, e.g.*, An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 29, 1 Stat. 112, 118 (1790). Under the first federal criminal statute, the accused in a capital case may,

make his full defence by counsel learned in the law; and the court before whom such person shall be tried . . . [is] hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom counsel shall have free access at all seasonable hours

Id.

articulating the standard of care that capital defense counsel are to follow.²

A central—indeed, arguably *the* central—duty of counsel in a capital case is to humanize the client in the eyes of those who will decide his fate. Only an advocate who can present as complete a picture of the client as of the crime is in a position to urge effectively that:

- A case that is potentially capital not be prosecuted as such.
- A case that was originally filed capitally be otherwise disposed of.
- A case being tried capitally result in a not-guilty verdict on the capital charges.
- A capital case that reaches the penalty phase result in a sentence of less than death.
- A capital case whose outcome was a death sentence be overturned on direct appeal or—following a full re-evaluation, re-consideration, and re-presentation of the actual picture—at each step of post-conviction review.
- A capital conviction or sentence that has remained intact through all judicial proceedings be the subject of executive clemency.

As this list indicates, the task of imagining, collecting, and presenting what is generically called “mitigation” evidence pervades the responsibilities of defense counsel from the moment of detention on potentially capital charges to the instant of execution.

In recognition of this central role of the mitigation function to the duties of capital defense counsel—and hence to the justice of the outcomes that will be achieved in capital cases—a diverse group of experts and organizations like the one assembled by the ABA for its 2003 project subsequently joined to develop *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.³ Their purpose was to help insure the implementation in fact of performance standards whose substance had long been agreed upon.

2. Dozens of state and federal death penalty cases considering the performance of defense counsel cite the ABA Guidelines as authority. *See, e.g.,* *Rompilla v. Beard*, 545 U.S. 374, 387 & n.7 (2005). *See* ABA, *Cases that Cite to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, available at http://www.abanet.org/deathpenalty/resources/docs/List_of_Cases_that_cite_to_GL_MAR_2008.doc (last visited June 1, 2008).

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

The *Hofstra Law Review* is honored to have been chosen as the site for the next step in this important project. This special issue publishes the Supplementary Guidelines together with articles elaborating the standards of practice they embody.

The highly experienced authors of these articles occupy various professional roles, are trained in a number of disciplines inside and outside the law, and speak from diverse perspectives. Yet they sound a common theme: The criminal justice system cannot function effectively to serve any of its varied constituencies in capital cases unless defense counsel have and use the needed tools to give all concerned the fullest possible understanding of the human being whose fate is to be decided. The immediate beneficiary of effective defense representation is the capital defendant, but the intended third-party beneficiary is the entire justice system. Indeed,

[t]he 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.⁴

As their articles reveal, the contributions of our distinguished authors to this special issue are contributions to justice.

II. THE SUPPLEMENTARY GUIDELINES PROJECT

The issue begins with an article by Sean D. O'Brien, Coordinator for the Supplementary Guidelines, entitled, *When Life Depends On It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.⁵ The author, who has recently become a law professor at the University of Missouri-Kansas City after accumulating decades of experience in all aspects of capital litigation, including service as Chief Public Defender in Kansas City, is, along with the other Coordinator, Russell Stetler, primarily responsible for bringing the Supplementary Guidelines into existence.

Professor O'Brien's article explains in detail the consultative and empirical process by which the Supplementary Guidelines were created. Just as the ABA Guidelines "are not aspirational" but rather "embody

4. 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).

5. Sean D. O'Brien, *When Life Depends On It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693 (2008).

the current consensus about what is required to provide effective defense representation in capital cases,”⁶ so too the Supplementary Guidelines which explicate the ABA Guidelines “summarize prevailing professional norms for mitigation investigation, development and presentation by capital defense teams.”⁷ The Supplementary Guidelines accordingly articulate duties that rest upon defense counsel throughout the duration of the representation, and that counsel must discharge by making full use of the multi-disciplinary team that the ABA Guidelines require.⁸ As Professor O’Brien describes, this requires an ongoing process of creative theorizing, effective investigation, and imaginative presentation so that all those making decisions in capital cases will be in a position to do so on a fully-informed basis.

In *The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*,⁹ Robin M. Maher, the Director of the ABA Death Penalty Representation Project, places the Supplementary Guidelines in the context of the ABA’s work in the death penalty field. As she details, the ABA does not oppose capital punishment but does favor justice. Accordingly the organization has long insisted that any jurisdiction desiring to retain execution as a criminal sanction provide high quality defense representation. Of course, that includes compliance with the ABA Guidelines and their mandate that the defense team include at least one mitigation specialist.¹⁰ The Supplementary Guidelines “spell out important features of the existing standards of practice that enable mitigation specialists and defense attorneys to work together . . . [and] help defense counsel understand how to supervise the development of mitigation evidence and direct a key member of the defense team.”¹¹ As such, the “Supplementary Guidelines join the ABA Guidelines as important tools for all those who seek to ensure justice for the men and women on death row.”¹²

6. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 1.1, commentary (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA GUIDELINES are also available online at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf>.

7. SUPPLEMENTARY GUIDELINES, *supra* note 3, at Guideline 1.1(A).

8. See ABA GUIDELINES, *supra* note 6, at Guideline 4.1 & commentary; *id.* at Guideline 10.4 & commentary.

9. 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 (2008).

10. See ABA GUIDELINES, *supra* note 6, at Guideline 4.1(A)(1).

11. Maher, *supra* note 9, at 770.

12. *Id.* at 774.

The next piece is *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities* by Lawrence J. Fox,¹³ a nationally prominent expert in legal ethics who in his capacity as Chair of the ABA Death Penalty Representation Project in 2003 moved the adoption of the ABA Guidelines by the House of Delegates. The ABA Guidelines¹⁴ and the Supplementary Guidelines¹⁵ both emphasize that it is counsel—and not any non-lawyer member of the team—who “bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case.”¹⁶ Fox describes the many respects in which counsel’s specific obligations under these codes are either direct implementations of or logical corollaries to deeply-rooted provisions of the Model Rules of Professional Conduct that would bind counsel in any event. Correspondingly, the ABA Guidelines and Supplementary Guidelines illuminate the requirements of the Model Rules in the particular context of capital representation. So, to take just one of his numerous examples of mutually-reinforcing professional responsibilities deriving from these separate sources, counsel not only have “an obligation to insist upon making requests [for needed resources] *ex parte* and *in camera*”¹⁷ flowing from the ABA Guidelines and Supplementary Guidelines, but also “as a matter of the highest ethical imperative . . . have a duty under [Model Rule 1.6] to go to the limit to defend the confidentiality of the legal and factual investigative work of the defense team.”¹⁸

III. THE IMPORTANCE OF MITIGATION TO THE JUDICIAL SYSTEM

In *A Former Alabama Appellate Judge’s Perspective on the Mitigation Function in Capital Cases*,¹⁹ William M. Bowen, Jr., who sat on the Alabama Court of Criminal Appeals for eighteen years, stresses the importance of the collection and presentation of mitigation evidence in accordance with the ABA Guidelines and Supplementary Guidelines in enabling “appellate courts to make reliable decisions in capital

13. Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775 (2008).

14. See ABA GUIDELINES, *supra* note 6, at Guideline 10.4(B).

15. See SUPPLEMENTARY GUIDELINES, *supra* note 3, at Guideline 10.4.

16. *Id.* at Guideline 10.4(A).

17. ABA GUIDELINES, *supra* note 6, at Guideline 10.4, commentary; see also *id.* at Guideline 4.1(B)(2); SUPPLEMENTARY GUIDELINES, *supra* note 3, at Guideline 4.1(A).

18. Fox, *supra* note 13, at 801.

19. William M. Bowen, Jr., *A Former Alabama Appellate Judge’s Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805 (2008).

cases.”²⁰ Chillingly, Judge Bowen sat on the court that affirmed the death sentence of Walter McMillian, which had been imposed by a trial judge who overrode the recommendation of the jury for a sentence of life imprisonment. “At the time, I felt absolutely certain that he was guilty of the crime. Later, however, thanks to the investigation conducted by Bryan Stevenson of the Equal Justice Initiative”—who was operating completely pro bono since, in violation of the ABA Guidelines,²¹ Alabama does not provide counsel for state post-conviction representation²²—

evidence was presented proving that McMillian was completely innocent and could not have committed the crime. . . . McMillian’s trial lawyers did little if any investigation into the facts of the case, so all I had before me was the government’s evidence and the government’s theory of the case. . . . I am now as certain of his innocence as I had earlier been of his guilt. . . . I do not rest easy knowing that in every case in which I, as an appellate judge, affirmed a sentence of death, I had the same level of certainty about guilt as I had when I affirmed McMillian’s conviction and sentence.²³

Writing from the perspective of a federal trial judge, Honorable Helen G. Berrigan, Chief Judge of the United States District Court for the Eastern District of Louisiana, contributes *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*.²⁴ She describes “the crucial importance of mitigation development in the trial of a capital case”²⁵ in accordance with the ABA Guidelines and Supplementary Guidelines and the concomitant need for judges to fully fund the needed investigations from the outset. The “early appointment of a mitigation specialist” is “a judicious, wise, and cost-effective way” of assuring “that defendants in capital cases will be competently represented.”²⁶ The numerous beneficial effects include increased accuracy and justice in charging and sentencing decisions; reductions in overall cost, both because work is performed by the team members able to do it most effectively and because the fruits of the investigation may show the defendant to be ineligible for the death

20. *Id.* at 812.

21. See ABA GUIDELINES, *supra* note 6, at Guideline 1.1(B).

22. See Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Post-Conviction Proceedings*, 91 CORNELL L. REV. 1079, 1089-91 (2006).

23. Bowen, *supra* note 19, at 811.

24. Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819 (2008).

25. *Id.* at 821.

26. *Id.* at 833.

penalty and/or lead to a negotiated disposition; and the avoidance of reversible error.

IV. IMAGINING MITIGATION

At every stage of the proceedings creating a resonant mitigation case requires constructive imagination. One might accurately describe the same person as “a mentally retarded individual,” or “the boy who never had a chance because his parents were convinced he had been born on an inauspicious day,” or “the youth whose life spiraled out of control after he learned that his enemies had placed a voodoo curse on him,” or “the man who never recovered from accidentally shooting his best friend.” One of counsel’s most important duties is to give visionary consideration to the array of mitigation theories that will emerge from any fully-investigated life.

Craig Haney, as a Professor of Psychology at the University of California, Santa Cruz, has been a pioneer in “the study of lives.” Building on an impressive body of empirical research by social scientists from various disciplines, he and others have persuasively constructed a “new framework [that] conceptualizes the roots of violent behavior as extending beyond the personality or character structure of those people who perform it, and connecting historically to the brutalizing experiences they have commonly shared as well as the immediately precipitating situations in which their violence transpires.”²⁷

His article, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*,²⁸ explains how to translate these insights into the collection and presentation of mitigation evidence in capital cases. He describes in detail the various factors in a person’s social and physical environment that are demonstrably likely to lead to criminal behavior, and how, in the context of an adversary system, these general findings can be persuasively woven into the mitigation case to be made on behalf of a particular client to an audience whose predisposition is to be unreceptive if not outright hostile. A capital defense team that is performing effectively in accordance with the ABA Guidelines and Supplementary Guidelines will engage in a continuous iterative process between “the construction of a psychologically oriented

27. Craig Haney, *Mitigation and the Study of Lives: On the Roots of Violent Criminality and the Nature of Capital Justice*, in AMERICAN’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 469, 479 (James Acker et al., eds., 2d ed. 2003).

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

social history [in which] key developmental stages and relevant family and social experiences are analyzed together” and the construction of “a mitigating counter-narrative that incorporates a capital defendant’s social history and immediate life circumstances.”²⁹ If properly conceived and supported, this narrative will provide a more satisfying account than the one the prosecution is certain to offer—an account confined to the defendant’s crime, which is presented as “entirely the product of his free and autonomous choice-making” and constitutes both “the full measure of [the defendant’s] life and the primary justification for ending it.”³⁰

In the dynamic process of investigating and constructing a counter-narrative, the defense team needs to draw not only on the insights of social psychology but also on those of cultural anthropology. This is the subject of *Cultural Competency in Capital Mitigation*.³¹ The authors are Scharlette Holdman, one of the handful of dedicated non-lawyers who more than thirty years ago perceived what needed to be done to save clients’ lives through mitigation and simply began to do it (thereby becoming a mitigation specialist long before the term was invented, as well as teacher and mentor to generations of capital litigators) and Christopher Seeds, currently a Visiting Fellow at the Cornell Death Penalty Project.

Cultural factors so pervasively influence the interactions of the client with other people—including all of those with whom he comes into contact at significant times in his life (for example in educational, medical, and correctional institutions), those surrounding him in the community in which he develops, and, critically, the members of the defense team—that it is imperative for the defense team to have the talents necessary to conduct a mitigation investigation that is culturally competent.³² The investigation must recognize and surmount an array of barriers, overt and subtle, to obtaining information from people of variegated backgrounds. As the courts have long recognized, “[i]n the context of mitigation, culturally competent investigation is more than an admirable and desirable skill. It is a standard of performance.”³³

Equally important, counsel must use the information obtained to construct a narrative of the client’s life course that emerges authentically

29. *Id.* at 844.

30. *Id.* at 842, 843.

31. Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883 (2008).

32. See SUPPLEMENTARY GUIDELINES, *supra* note 3, at Guideline 5.1(B)-(C).

33. Holdman & Seeds, *supra* note 31, at 896.

from his culture. Counsel must comprehend the world from the client's viewpoint and be able to present his life story from the inside out.

Kathy Wayland provides yet another vital perspective in *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*.³⁴ A Ph.D. in Psychology, Dr. Wayland formerly served on the faculty of Duke University Medical Center, where her primary emphasis was on traumatic stress syndromes and the psychological consequences of chronic exposure to interpersonal violence. For the last fifteen years, as a staff member first at the California Appellate Project and now at the Habeas Corpus Resource Center in San Francisco, her specialties have included the integration of mental health themes into mitigation narratives. Presenting the current state of scientific knowledge about trauma, her article treats the subject from these dual perspectives.

On the one hand, the inevitable existence of trauma among all of those affected by a murder—including the client, his family members, survivors, and witnesses being interviewed about the crime or the client—is a critical factor that the defense team must recognize as it investigates. On the other hand, the almost equally invariable presence of traumatic factors in the client's background frequently provides powerfully mitigating material. The defense team must accordingly gather and use this material effectively. Indeed, as Dr. Wayland observes, in both *Wiggins v. Smith*³⁵ and *Williams v. Taylor*,³⁶ the Supreme Court granted federal habeas corpus relief on ineffective assistance grounds because counsel had failed to collect and present the client's trauma history.

V. OBTAINING MITIGATION

Of course, no mitigation case is better than the facts in support of it, which is why the ABA Guidelines, the Supplementary Guidelines, and the decided cases place such heavy emphasis on counsel's duty to investigate.³⁷

34. Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923 (2008).

35. 539 U.S. 510, 534-35 (2003).

36. 529 U.S. 362, 395 (2000).

37. See ABA GUIDELINES, *supra* note 6, at Guideline 10.7 & commentary (citing cases); SUPPLEMENTARY GUIDELINES, *supra* note 3, at Guideline 10.11.

Among the many aspects of this duty are the obligation to select appropriate non-legal team members³⁸ and to provide them with strategic direction.³⁹ The next article, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*,⁴⁰ addresses those topics. The authors are Dr. Richard G. Dudley, Jr., a private psychiatrist with a clinical and forensic practice who also teaches at New York University School of Law and at the City University of New York Medical School, and Pamela Blume Leonard, a long-time mitigation specialist now working with homicide victims' surviving family and friends through the Georgia Council for Restorative Justice at Georgia State University School of Social Work in Atlanta.

They make a fundamental but too-frequently-ignored point: It is simply ineffective assistance for counsel to permit a mental health assessment of the client to occur before having made a reasoned decision about the purpose of the examination and having provided the examiner with the data necessary to reach a professionally competent conclusion respecting the question presented.⁴¹ This process must then be sustained. As the expert requests more data or the team independently unearths facts or records relevant to the expert's conclusion, the new information must be incorporated effectively into the defense presentation. Only "[w]hen the fruits of an accurate and reliable life history investigation are married with the knowledge and skill of competent mental health experts" will "defense counsel [be] equipped to present an effective case in mitigation and defend it against attacks from the prosecution."⁴²

The next article focuses on an issue that the ABA Guidelines explicitly called to professional attention.⁴³ Many capital defendants are foreign nationals; their representation both presents special challenges and offers special opportunities. Competent counsel must handle both effectively.

Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client provides a detailed primer on accomplishing

38. See SUPPLEMENTARY GUIDELINES, *supra* note 3, at Guideline 4.1(B); ABA GUIDELINES, *supra* note 6, at Guideline 10.4(C)(2).

39. See SUPPLEMENTARY GUIDELINES, *supra* note 3, at Guideline 10.4(B).

40. 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 (2008).

41. See ABA GUIDELINES, *supra* note 6, at Guideline 4.1, commentary.

42. Dudley & Leonard, *supra* note 40, at 988.

43. See ABA GUIDELINES, *supra* note 6, at Guideline 10.6.

this.⁴⁴ The authors are Gregory J. Kuykendall, Alicia Amezcua-Rodriguez, and Mark Warren, who are associated with the Capital Legal Assistance Program created by the government of Mexico for the benefit of its nationals facing capital charges in this country.

The process they describe begins with a recognition that a foreign country may acknowledge a person as a national on a basis that is not intuitively obvious to American counsel.⁴⁵ If so, the person may be entitled to rights under both bilateral and multilateral treaties.⁴⁶ In any event, conducting a mitigation investigation abroad will surely pose unique logistical difficulties. But it may benefit from the unique resources that foreign governments will provide⁴⁷ if—but only if—counsel discharge the established duty of identifying and exploiting those resources.⁴⁸ Having done so, counsel need to integrate the results of the investigation into a narrative that enables decision-makers to comprehend the impact of the client's foreign background on the course of his life.

Only some capital cases involve foreign nationals, but they all involve survivors of the tragedy. Dealing with this fact creatively is the subject of *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*⁴⁹ written by two trailblazers in the area, Mickell Branham, the National Victim Outreach Coordinator of the federal Capital Resource Counsel Project, and Richard Burr, who, in a variety of institutional settings, has been a fulltime capital defense lawyer since 1979 and currently acts as a federal death penalty resource counsel. Their message to the defense bar is that effective lawyers must embrace, not suppress, human empathy.

In particular, a defense team that demonstrates genuine compassion for the survivors—reaching out “to get to know them, to listen to their stories, and to discern the interests the survivors hope to have met in the judicial proceedings”—increases “the possibility that the proceedings will end with compassion for their client.”⁵⁰ As a practical matter, this

44. Gregory J. Kuykendall, Alicia Amezcua-Rodriguez & Mark Warren, *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989 (2008).

45. See ABA GUIDELINES, *supra* note 6, at Guideline 10.6(A) & commentary.

46. See *id.* at Guideline 10.6(A), commentary.

47. Of course, as the authors point out, “[w]hether or not consular resources are available does not change the ineluctable responsibility of the charging jurisdiction to provide the resources necessary for a full defense.” Kuykendall, Amezcua-Rodriguez & Warren, *supra* note 44, at 1017.

48. See ABA GUIDELINES, *supra* note 6, at Guideline 10.6(A), commentary.

49. Mickell Branham & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019 (2008).

50. *Id.* at 1021.

may well occur through some sort of agreed-upon resolution crafted to accommodate the needs of all concerned.⁵¹ Among the numerous tangible and intangible benefits of such an outcome, of course, will be a direct cost-saving to the judicial system. Hence, those in charge of providing resources to the defense should deem the investment in bringing it about to be a wise one.

As the article documents, accumulated experience has shown the wisdom of the suggestion in the ABA Guidelines⁵² that outreach to the survivors works best when facilitated by a well-qualified intermediary who is specifically engaged as an expert for that particular purpose and is not otherwise a member of the defense team. Indeed, because of such intermediaries' unique ability to provide a service that could not be as well-performed by any other method, "[r]etaining victim liaisons . . . is becoming a necessary part of the practice of defending clients in capital cases."⁵³

VI. PRESENTING MITIGATION

Capital defense counsel have a duty "at every stage of the case" to "take advantage of all appropriate opportunities to argue why death is not a suitable punishment for their particular client."⁵⁴ Of course that duty can hardly be discharged effectively if the arguments are made in ignorance of available information concerning how persuasive they are likely to be to their audience.

That simple proposition underlies *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation* by Professors John H. Blume and Sheri Lynn Johnson of Cornell Law School and Professor Scott E. Sundby of Washington and Lee Law School.⁵⁵ The article is based on the invaluable work of the Capital Jury Project, an ongoing empirical research effort built upon extended interviews with people who have actually sat on capital juries. The authors report that the standards for mitigation investigations contained in the ABA Guidelines and the Supplementary Guidelines "are on firm empirical ground,"⁵⁶ both in

51. See ABA GUIDELINES, *supra* note 6, at Guideline 10.9.1.

52. *Id.* at Guideline 10.7, commentary; Guideline 10.9.1, commentary.

53. Branham & Burr, *supra* note 49, at 1024.

54. ABA GUIDELINES, *supra* note 6, at Guideline 10.11(L).

55. 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 (2008).

56. *Id.* at 1036.

their specific aspects and in their overall approach of encouraging counsel to be “creative and, to an extent, visionary”⁵⁷ in building a coherent mitigation theory that is advanced consistently throughout the proceedings.⁵⁸

The authors then describe particular defense themes and approaches that Project data show are likely to resonate favorably with jurors as well as the most potent prosecution arguments for death and the best lines of rebuttal. They conclude by describing the current research findings on the demographic and attitudinal characteristics of those jurors most likely to vote for life, and offering pointers on how to best ameliorate the scandalous but well-documented reality that many jurors simply do not understand the task they are being called upon to perform.

Should the trial end in a death sentence, numerous post-conviction judicial steps will lie ahead. As the ABA Guidelines emphasize, their success, particularly beyond direct appeal, will depend not just on the quality of the legal arguments counsel advance but, probably more critically, on counsel’s skill at:

changing the picture that has previously been presented. The old facts and legal arguments – those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal – are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system. [Hence,] an appreciable part of the task of post-conviction counsel is to change the overall picture of the case.⁵⁹

Fittingly, then, we conclude with *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*,⁶⁰ by Mark E. Olive, a veteran capital litigator now in private practice in Florida, and Russell Stetler, the Mitigation Coordinator for the federal death penalty projects, who, along with Professor O’Brien, served as Coordinator for the Supplementary Guidelines. The authors describe a series of cases in which post-conviction legal claims succeeded because of aggressive re-investigations of the facts that simply obliterated the incomplete and less realistic picture that had been presented at trial. These successes represented the effective execution by collateral counsel of their duties

57. *Id.* at 1042.

58. See ABA GUIDELINES, *supra* note 6, at Guideline 10.10.1 & commentary.

59. ABA GUIDELINES, *supra* note 6, at Guideline 10.15, commentary (footnote omitted).

60. 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 (2008).

under the ABA Guidelines and Supplementary Guidelines: reviewing de novo the work of prior counsel⁶¹ and the completeness of official files,⁶² as well as the accuracy of the factual premises underlying the adverse determinations in the client's case to date;⁶³ re-thinking their prior theories and devising new ones in light of changed circumstances;⁶⁴ and seizing openings to reach agreed-upon dispositions.⁶⁵

But "[l]awyers cannot do it alone."⁶⁶ They need the unique contributions that come from the non-legal members of fully-resourced defense teams. And they need funds.⁶⁷ Only then is it realistic to expect them to assemble an additional supply of factual threads and weave them into a new narrative tapestry.

But this project, just like those the other articles in this special issue have described, is well worth supporting. After all, long before our own justice system came into existence, civilized societies recognized that to save a single individual unjustly threatened with execution is to save the whole world.⁶⁸

61. See ABA GUIDELINES, *supra* note 6, at Guideline 10.7(B)(1).

62. See *id.* at Guideline 10.7(B)(2).

63. See *id.* at Guideline 10.7(A).

64. See *id.* at Guideline 10.15.1(E)(3).

65. See *id.* at Guideline 10.9.1(A), commentary.

66. Olive & Stetler, *supra* note 60, at 1076.

67. See 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, 342 (2003).

68. This thought has ancient religious origins. See QUR'AN, *Sura* 5:32 (describing substantive legal rule in murder cases); TALMUD, *Mishnah, Sanhedrin* 4:5 (describing judicial procedure in capital cases).