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**‘THE GUIDING HAND OF COUNSEL’:**  
**ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES**

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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

* 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

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).
relationships—with the client, to be sure, but also with family members, witnesses, members of the victim’s family, and others.

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

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 everyone else who knew the client and his family’’); id. at Guideline 10.9.1, text accompanying note 249 (“A very difficult but important part of capital plea negotiation is often contact with the family of the victim.”).

16. See id. at Guideline 1.1, text accompanying note 29.

17. See id. at Guideline 10.4, text accompanying notes 168-70 (footnotes omitted).

18. See id. at Guideline 1.1, text accompanying note 9 (“While there is some inevitable overlap, Guidelines 1.1–10.1 contain primarily principles and policies that should guide jurisdictions in creating a system for the delivery of defense services in capital cases, and Guidelines 10.2–10.15.2 contain primarily performance standards defining the duties of counsel handling those cases.”).

19. See id. at Guideline 1.1, text accompanying note 71.
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*, 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.

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.”

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.” Those costs, I suggest, will be borne by someone: appropriately, by the states expending

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20. 287 U.S. 45 (1932).
22. See id.
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.\footnote{24}{See id. at 1103.}

But allocating more resources, although necessary, will not be sufficient: “money alone will not do the job.”\footnote{25}{See id. at 1102.} 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 \textit{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.”\footnote{26}{GUIDELINES, supra note *, at Guideline 3.1(A)(1).} The Guidelines require that this independent agency “and not the judiciary or elected officials . . . select lawyers for specific cases.”\footnote{27}{Id. at Guideline 3.1(B).}

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.”\footnote{28}{Ronald J. Tabak, \textit{Why an Independent Appointing Authority is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases}, 31 \textit{HOFSTRA L. REV.} 1105, 1105 (2003).} 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 . . . .”\footnote{29}{See id. at 1115.}

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:

- 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

30. See GUIDELINES, supra note *, at Guideline 4.1 and commentary, Guideline 10.4(C) and commentary.
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.
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 ‘indispensable member of the defense team throughout all capital proceedings.’”³⁴

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

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).
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

Mr. Stetler’s article illuminates these propositions, explaining what is needed to bring together the “four key players in resolving capital cases: victims’ surviving family members, prosecutors, defendants, and capital defense counsel.”39

To “excel in this highly specialized art” may bring “no glory and little personal satisfaction,”40 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.”41 In light of the icy reality that “[c]apital trials involve a grave risk of death,”42 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.”43 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,44 the Guidelines impose a strict duty on capital defense counsel to litigate “all potential issues at all levels.”45 Professor Freedman supports this “professional obligation to assert at every level of the proceedings what otherwise might be deemed a frivolous claim”46 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.

38. GUIDELINES, supra note *, at Guideline 10.9.1, text accompanying notes 246-48 (citations omitted).
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.
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 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”\(^{47}\) is such that “lawyers in capital cases are virtually guaranteed” to be the subject of claims of ineffective assistance of counsel.\(^{48}\) 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.”\(^{49}\)

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


\(^{48}\) 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).
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,”50 that attorney training include international law subjects,51 and that the pool of defense attorneys in each jurisdiction include those knowledgeable about international law.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.”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.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.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.”56

50. GUIDELINES, supra note *, at Guideline 1.1, text accompanying note 43.
51. See id. at Guideline 8.1(B)(1).
52. See id. at Guideline 5.1(B)(2)(a).
54. See id. at 1203.
55. See id. at 1206-08.
American Bar Association

Guidelines for the Appointment and Performance of
Defense Counsel in Death Penalty Cases

Revised Edition
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Only the text of the black-letter guidelines has been formally approved by
the American Bar Association House of Delegates as official policy. Although it
does not express the formal position of the American Bar Association, the
commentary serves as useful explanation of the black-letter Guidelines. The text of
the commentary published herein is the final version, which was officially released
by the ABA on October 24, 2003. It supersedes all prior drafts which had been
distributed for informational purposes.

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INTRODUCTION

This revised edition of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* is the product of a two-year long drafting effort. In April 2001, the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation jointly sponsored the ABA Death Penalty Guidelines Revision Project to update the Guidelines, which were originally adopted by the ABA House of Delegates in 1989. An Advisory Committee of experts was recruited to review and identify necessary revisions, including representatives from the following ABA and outside entities: ABA Criminal Justice Section; ABA Section of Litigation; ABA Section on Individual Rights and Responsibilities; ABA Standing Committee on Legal Aid and Indigent Defendants; ABA Special Committee on Death Penalty Representation; National Association of Criminal Defense Lawyers; National Legal Aid and Defender Association; Federal Death Penalty Resource Counsel; Habeas Assistance and Training Counsel; and State Capital Defenders Association.

Expert capital litigators were retained as consultants to the ABA Death Penalty Guidelines Revision Project to incorporate the decisions of the Advisory Committee into preliminary drafts of revisions. Drafts were considered by Advisory Committee members during several day-long meetings in Washington, D.C. as well as follow-up discussions. The final working draft of the revisions was approved by the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation. The ABA House of Delegates approved the revised edition of the Guidelines on February 10, 2003.
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GUIDELINE 1.1—OBJECTIVE AND SCOPE OF GUIDELINES

A. The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.

B. These Guidelines apply from the moment the client is taken into custody 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, post-conviction review, clemency proceedings and any connected litigation.

Definitional Notes

Throughout these Guidelines:

1. As in the first edition, “should” is used as a mandatory term.

2. By “jurisdiction” is meant the government under whose legal authority the death sentence is to be imposed. Most commonly, this will be a state (as opposed to, e.g., a county) or the federal government as a whole. The term also includes the military and any other relevant unit of government (e.g., Commonwealth, Territory). Where a federal judicial district or circuit is meant, the commentary will so state.

3. The terms “counsel,” “attorney,” and “lawyer” apply to all attorneys, whether appointed, retained, acting pro bono, or employed by any defender organization (e.g., federal or state public defenders offices, resource centers), who act on behalf of the defendant in a capital case. When modified by “private,” these terms apply to both pro bono and retained attorneys.

5. The term “post-conviction” is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari, (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to 28 U.S.C. § 2255, but including all applications of similar purport, e.g., for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, e.g., applications for original writs of habeas corpus, applications for certificates of probable cause), all applications for interlocutory relief (e.g., stay of execution, appointment of counsel) in connection with any of the foregoing, and (d) all requests, in any form, for pardons, reprieves, commutations, or similar relief made to executive officials, and all applications to administrative or judicial bodies in connection with such requests. If a particular subcategory of post-conviction proceeding is meant, the language of the relevant Guideline or commentary will so state.

6. The terms “defendant,” “petitioner,” “inmate,” “accused,” and “client” are used interchangeably.

7. The terms “capital case” and “death penalty case,” are used interchangeably.

8. The terms “defender organization,” “Independent Authority” and “Responsible Agency” are defined in Guideline 3.1 and accompanying commentary.

9. The term “Legal Representation Plan” is defined in Guideline 2.1.

**History of Guideline**

The commentary to the original edition of this Guideline stated that it was designed to express existing “practice norms and constitutional requirements.” This thought has been moved to the black letter in order to emphasize that these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.
The first edition of this Guideline stated that the objective in providing counsel in death penalty cases should be to ensure the provision of “quality legal representation.” The language has been amended to call for “high quality legal representation” to emphasize that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case.

The Guidelines formerly covered only “defendants eligible for appointment of counsel.” Their scope has been revised for this edition to cover “all persons facing the possible imposition or execution of a death sentence.” The purpose of the change is to make clear that the obligations of these Guidelines are applicable in all capital cases, including those in which counsel is retained or representation is provided on a pro bono basis. The definition of “counsel” reflects this change.

The use of the term “jurisdiction” as now defined has the effect of broadening the range of proceedings covered. In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.

In accordance with the same policy, the words “from the moment the client is taken into custody” have been added to make explicit that these Guidelines also apply to circumstances in which an uncharged prisoner who might face the death penalty is denied access to counsel seeking to act on his or her behalf (e.g., by the federal government invoking national security, or by state authorities exceeding constitutional limitations). This language replaces phraseology in the former Guidelines which made them applicable to “cases in which the death penalty is sought.” The period between an arrest or detention and the prosecutor’s declaration of intent to seek the death penalty is often critically important. In addition to enabling counsel to counsel his or her client and to obtain information regarding guilt that may later become unavailable, effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty. Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought.

These Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought. The case remains subject to these Guidelines until the imposition
of the death penalty is no longer a legal possibility. In addition, as more fully described in the commentary, these Guidelines also recognize that capital defense counsel may be required to pursue related litigation on the client’s behalf.

**Related Standards**


ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.1 (3d ed. 1992) ("Objective").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.2 cmt. (3d ed. 1992) ("Systems for Legal Representation").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.1 (3d ed. 1992) ("Initial Provision of Counsel").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.2 (3d ed. 1992) ("Duration of Representation").

ABA House of Delegates Resolution 8C (adopted Feb. 5, 2002).

**Commentary**

**Introduction**

In 1932, Mr. Justice Sutherland, writing for the United States Supreme Court in *Powell v. Alabama*, a death penalty case, acknowledged that a person facing criminal charges “requires the guiding hand of counsel at every step in the proceedings against him.”

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1. 287 U.S. 45 (1932).
2. Id. at 69.
More than seventy years later, death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.3

The quality of counsel’s “guiding hand” in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence. Today, it is universally accepted that 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. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns. Counsel must be able to develop and implement advocacy strategies applying existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment.

As one writer has explained:

Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.4

Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make “extraordinary efforts on behalf of the accused.”5 As discussed infra in the text accompanying notes 230-31, these efforts may need to include litigation or administrative advocacy outside the confines of the capital case itself.


5. See ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, Standard 4-1.2(c), in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).
(e.g., pursuit of information through a state open records law,6 administrative proceedings to obtain or correct a military record, a collateral attack to invalidate a predicate conviction,7 litigation of a systemic challenge to the jury selection procedures of a jurisdiction or district,8 or to a jurisdiction’s clemency process).9

Structure of the Guidelines

This commentary provides a general overview of the areas in which counsel must be prepared to perform effectively and be given appropriate governmental support in doing so. These areas are addressed more specifically in subsequent Guidelines and commentaries. While there is some inevitable overlap, Guidelines 1.1–10.1 contain primarily principles and policies that should guide jurisdictions in creating a system for the delivery of defense services in capital cases, and Guidelines 10.2-10.15.2 contain primarily performance standards defining the duties of counsel handling those cases.

Representation at Trial

Trial attorneys in death penalty cases must be able to apply sophisticated jury selection techniques, including rehabilitation of venire members who initially state opposition to the death penalty and demonstration of bias on the part of prospective jurors who will automatically vote to impose the death penalty if the defendant is convicted on the capital charge.10 Counsel must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution’s evidence and experts through effective cross-examination.11


7. For example, the defendant prevailed in Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (disallowing use of prior conviction used in aggravation) only after the same pro bono counsel successfully litigated People v. Johnson, 506 N.E. 1177, 1178 (N.Y. 1987) (vacating that conviction). See infra text accompanying note 22.


10. See infra Guideline 10.10.2.

11. See infra Guideline 5.1.
An attorney representing the accused in a death penalty case must fully investigate the relevant facts. Because counsel faces what are effectively two different trials—one regarding whether the defendant is guilty of a capital crime, and the other concerning whether the defendant should be sentenced to death—providing quality representation in capital cases requires counsel to undertake correspondingly broad investigation and preparation. Investigation and planning for both phases must begin immediately upon counsel’s entry into the case, even before the prosecution has affirmatively indicated that it will seek the death penalty. Counsel must promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate to the case.

Comprehensive pretrial investigation is a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence, to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty. At the same time, counsel must

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[For a lawyer], taking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must endure the draining emotional effects of one’s personal responsibility for the outcome.

Id.

13. See infra text accompanying notes 160-65; see also Wiggins v. Smith, 123 S. Ct. 2572 (2003) (holding counsel ineffective on basis of inadequate mitigation investigation; although counsel did arrange psychological testing for client and obtain some government records they thereby “acquired only rudimentary knowledge of his history from a narrow set of sources”); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (notwithstanding fact that trial counsel “competently handled the guilt phase of the trial,” counsel’s failure to begin to prepare for sentencing phase until a week before trial fell below professional standards, and counsel “did not fulfill their obligation to conduct a thorough investigation of the defendant’s background”); id. at 415 (O’Connor, J., concurring) (“counsel’s failure to conduct the requisite, diligent investigation into his client’s troubling background and unique personal circumstances’ amounted to ineffective assistance of counsel); ABA STANDARDS FOR CRIMINAL JUSTICE: Standard 4-4.1(a), in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) (“Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.”)

14. See infra Guideline 10.4(C)(2) and accompanying commentary.

15. See infra Guidelines 10.9.1, 10.9.2.

consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress.  

With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime and all evidence—whether testimonial, forensic, or otherwise—purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. As more fully described infra in the text accompanying notes 195-204, the defense lawyer’s obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution’s version of events, and subjecting all forensic evidence to rigorous independent scrutiny. Further, notwithstanding the prosecution’s burden of proof on the capital charge, defense counsel may need to investigate possible affirmative defenses—ranging from absolute defenses to liability (e.g., self-defense or insanity) to partial defenses that might bar a death sentence (e.g., guilt of a lesser-included offense). In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (e.g., inculpatory statements or items recovered in searches of the accused’s home).

Moreover, trial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase.  

At that phase, defense counsel must both rebut the prosecution’s case in favor of the death penalty and affirmatively present the best possible case in favor of a sentence other than death.

If the defendant has any prior criminal history, the prosecution can be expected to attempt to offer it in support of a death sentence. Defense counsel accordingly must comprehensively investigate—together with the defense investigator, a mitigation specialist, and other members of the defense team—the defendant’s behavior and the circumstances of the

17. See infra Guideline 10.5 and accompanying commentary.
18. See infra Guideline 10.10.1 and accompanying commentary; see also Stephen B. Bright, Developing Themes in Closing Argument and Elsewhere: Lessons from Capital Cases, LITIG., Fall 2000, at 40; Lyon, supra note 3, at 708-11; Mary Ann Tally, Integrating Theories for Capital Trials: Developing the Theory of Life, THE CHAMPION, Nov. 1998, at 34.
19. See infra Guideline 10.11 and accompanying commentary.
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conviction. Only then can counsel protect the accused’s Fourteenth Amendment right to deny or rebut factual allegations made by the prosecution in support of a death sentence, and the client’s Eighth Amendment right not to be sentenced to death based on prior convictions obtained in violation of his constitutional rights.

If uncharged prior misconduct is arguably admissible, defense counsel must assume that the prosecution will attempt to introduce it, and accordingly must thoroughly investigate it as an integral part of preparing for the penalty phase.

Along with preparing to counter the prosecution’s case for the death penalty, defense counsel must develop an affirmative case for sparing the defendant’s life. A capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death. This Eighth Amendment right to offer mitigating evidence “does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration of those ‘compassionate or mitigating factors stemming from the diverse frailties of humankind.’”

Nor will the presentation be persuasive unless it (a) is consistent with that made by the defense at the guilt phase and (b) links the evidence offered in mitigation to the specific circumstances of the client.

Finally, trial counsel, like counsel throughout the process, must raise every legal claim that may ultimately prove meritorious, lest default doctrines later bar its assertion.

The courts have shown a remarkable lack of solicitude for prisoners—including ones executed as a result—whose attorneys

20. See infra text accompanying notes 222, 301-02.
22. See Johnson v. Mississippi, 486 U.S. 578, 587-88 (1988). Counsel’s obligation to prevent the prosecution from using unconstitutionally obtained prior convictions in support of a death sentence, noted infra in the text accompanying note 222, may well require counsel to litigate collateral challenges to such prior convictions in the jurisdictions or districts where those convictions were obtained. See, e.g., Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 402-04 (2001).
23. See infra text accompanying notes 223, 300.
27. See infra Guideline 10.11 and accompanying commentary.
through no fault of the prisoners were not sufficiently versed in the law to . . . consider the possibility that a claim long rejected by local, state, and federal courts nonetheless might succeed in the future or in a higher court.  

The commentary to the first edition of this Guideline noted that “many indigent capital defendants are not receiving the assistance of a lawyer sufficiently skilled in practice to render quality assistance” and supported the statement with numerous examples. The situation is no better today. Indeed, problems with the quality of defense representation in death penalty cases have been so profound and pervasive that several Supreme Court Justices have openly expressed concern. Justice Ginsburg told a public audience that she had “yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented.

28. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2(a), at 482 (4th ed. 2001). Thus, for example, within a single week in the spring of 2002, the Supreme Court rendered two major rulings favorable to capital defendants. See Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Constitution bars execution of mentally retarded individuals); Ring v. Arizona, 536 U.S. 584, 608 (2002) (applying Apprendi v. New Jersey, 530 U.S. 466 (2000), to capital cases). In both cases, the Court squarely overruled governing precedent. See Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that the Constitution does not bar the execution of mentally retarded individuals); Walton v. Arizona, 497 U.S. 639, 649-51 (1990) (upholding same statute later invalidated in Ring against same challenge); Apprendi v. New Jersey, 530 U.S. 466, 496 (2000) (stating that Walton remained good law). It would have been appropriate (and indeed, some Justices might believe, required on pain of forfeiture) for capital counsel to assert these claims at every stage in the proceedings, even though they were then plainly at odds with the governing law. See infra Guideline 10.8 and accompanying commentary. One current example is the potential categorical unconstitutionality of the execution of juveniles. In light of a growing body of scientific evidence regarding the diminished culpability of juveniles, Eighth Amendment considerations, and international laws and treaties forbidding the execution for crimes committed while under the age of eighteen, four current Justices have suggested that the Court should absolutely bar the execution of such offenders. See In re Stanford, 123 S. Ct. 472, 475 (2002) (Stevens, Souter, Breyer, Ginsburg, JJ., dissenting). Counsel would be remiss not to assert the claim, notwithstanding that the Court has previously rejected it. See Stanford v. Kentucky, 492 U.S. 361, 380 (1989); Simmons v. Roper, 2003 Mo. LEXIS 123, at *2-4 (Mo., Aug. 26, 2003) (vacating death sentence of defendant who was seventeen at the time of crime on the basis that “the Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments”). Similar examples are discussed infra at notes 231, 276, 307, 352).

at trial” and that “people who are well represented at trial do not get the death penalty.”\textsuperscript{30} Similarly, Justice O’Connor expressed concern that the system “may well be allowing some innocent defendants to be executed” and suggested that “[p]erhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”\textsuperscript{31} As Justice Breyer has said, “the inadequacy of representation in capital cases” is “a fact that aggravates the other failings” of the death penalty system as a whole.\textsuperscript{32}

In the past, post-conviction review has often been relied upon to identify and correct untrustworthy verdicts.\textsuperscript{33} However, legal changes in the habeas corpus regime,\textsuperscript{34} combined with Congress’ defunding of post-conviction defender organizations (“PCDOs”) in 1995,\textsuperscript{35} make it less

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  \item \textsuperscript{30} Anne Gearan, \textit{Supreme Court Justice Supports Death Penalty Moratorium}, \textit{ASSOCIATED PRESS}, Apr. 10, 2001.
  \item \textsuperscript{32} \textit{See Ring}, 536 U.S. at 618 (Breyer, J., concurring). The “failings” to which Justice Breyer refers are many of the same ones that led the ABA to call for a moratorium on the imposition of the death penalty. \textit{See ABA, REPORT ACCOMPANYING RECOMMENDATION 107, 3 (1997), available at www.abanet.org/moratorium/resolution.html (“Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.”)}.
  \item \textsuperscript{33} \textit{See ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY} 147-48 (2001) (listing numerous modern examples of injustices in capital cases redressed on federal habeas corpus); \textit{Hertz & Liebman, supra note 28, § 11.2(c) (same)}.
  \item \textsuperscript{34} In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (“the AEDPA”), which imposed substantial restrictions on the availability of federal habeas corpus for state prisoners. The AEDPA established strict deadlines for the filing of a federal habeas petition, limits on the scope of review of state court decisions, restrictions on the availability of evidentiary hearings to develop facts in support of constitutional claims, and placed stringent constraints on federal courts’ consideration of additional applications for review by the petitioner. \textit{See generally 28 U.S.C. §§ 2244-2255, 2261-2264 (2000). There is significant cause for concern that these provisions may “greatly diminish the reliability of the capital system’s review process and of the capital verdicts that the system produces.” James S. Liebman, \textit{An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases}, 67 BROOK. L. REV. 411, 427 (2001); see also ABA Panel Discussion, \textit{Dead Man Walking Without Due Process? A Discussion of the Anti-Terrorism and Effective Death Penalty Act of 1996}, 23 N.Y.U. REV. L. & SOC. CHANGE 163, 168-86 (1997); Marshall J. Hartman & Jeanette Nyden, \textit{Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996}, 30 J. MARSHALL L. REV. 337, 387 (1997); Larry W. Yackle, \textit{A Primer on the New Habeas Corpus Statute}, 44 BUFF. L. REV. 381, 386-93 (1996). One reason for this concern is that portions of the legislation seemed to reduce the level of scrutiny that the federal courts could give to state capital convictions. See § 2254 (d)-(e) (providing that writ may not be granted unless state proceedings resulted in a decision that “was contrary to, or involved an unreasonable application of, clearly established Federal law,” or “was based on an unreasonable determination of the facts”).
  \item \textsuperscript{35} \textit{See Crisis in Capital Representation}, supra note 29, at 200-05 (presenting state-by-state analysis of impact of defunding of PCDOs); Roscoe C. Howard, Jr., \textit{The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel}, 98 W. VA. L. REV. 863, 865
\end{itemize}
likely that such traditional “fail safes” will continue to operate properly in the future. Under the standards set out by the Supreme Court for reviewing claims of ineffective assistance of counsel,\(^{36}\) even seriously deficient performance all too rarely leads to reversal.\(^{37}\) Hence, jurisdictions that continue to impose the death penalty must commit the substantial resources necessary to ensure effective representation at the trial stage.\(^{38}\) In mandating the provision of high quality legal representation at the trial level of a capital case, this Guideline recognizes the simple truth that any other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.

**Post-conviction Review**

Ensuring high quality legal representation in capital trials, however, does not diminish the need for equally effective representation on appeal, in state and federal post-conviction proceedings, and in applications for executive clemency. Because each of those proceedings has a unique role to play in the capital process, because both legal and social norms commonly evolve over the course of a case, and because of

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(1996) (emphasizing the important role that the former PCDOs played in assuring fairness in habeas corpus review of capital convictions); see also Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 540-43 (1996).


37. See *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (“Ten years after the articulation of [the *Strickland*] standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant’s right to be represented by something more than ‘a person who happens to be a lawyer.’”) (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)); Kim Taylor-Thompson, *Tuning Up Gideon’s Trumpet*, 71 FORDHAM L. REV. 1461, 1465 (2003) (“[T]he ruling has proved disabling to the right to effective assistance of counsel in practice.”); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 346 (2002) (“[A]ll who have seriously considered the question agree that *Strickland* has not worked either to prevent miscarriages of justice or to improve attorney performance.”); William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995) (“*Strickland* has been roundly and properly criticized for fostering tolerance of abysmal lawyering.”); *Legislative Modification*, supra note 12 at 862 n.28 (criticizing “the strong presumptions of attorney effectiveness mandated by *Strickland*” as applied to capital cases, and urging that “[w]hatever benefits counter-factual presumptions may have in other areas of the law, they are certainly out of place when a human life hangs in the balance”); *infra* note 155.

38. *See, e.g., REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT* 177, 179 (Apr. 15, 2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission-report/index.html (recommending that the Illinois legislature “significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases,” including the full funding of the defense, which “should significantly improve the quality of defense representation of capital defendants”).
“the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings,” jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines, as outlined in Subsection B, “at all stages of the case.” Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. In addition, death penalty cases at the post-conviction stage may be subject to rules that provide less time for preparation than is available in noncapital cases. Substantive pleadings may have to be prepared simultaneously with, or even be delayed for, pleadings to stay the client’s execution. For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers.

A. Representation on Direct Appeal

The Constitution guarantees effective assistance of counsel on an appeal as of right. The “guiding hand of counsel” must lead the condemned client through direct review. Appellate counsel must be intimately familiar with technical rules of issue preservation and presentation, as well as the substantive state, federal, and 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. Counsel must also be capable of


41. See infra text accompanying notes 333-38.


making complex strategic decisions that maximize the client’s chances of ultimate success in the event that the direct appeal is resolved unfavorably.\textsuperscript{44}

B. Collateral Review Proceedings

Habeas corpus and other procedures for seeking collateral relief are especially important in capital cases.\textsuperscript{45} Quality representation in both state and federal court is essential if legally flawed convictions and sentences are to be corrected.\textsuperscript{46}

1. State Collateral Review Proceedings

Counsel’s obligations in state collateral review proceedings are demanding.\textsuperscript{47} Counsel must be prepared to thoroughly reinvestigate the

Virginia capital case had waived a legal issue by not raising it at an earlier stage of appeal; the novelty of the issue in Virginia was no excuse because it had been raised, though unsuccessfully, in an intermediate appellate court of another state).

\textsuperscript{44} See infra text accompanying notes 342-47.

\textsuperscript{45} See McFarland v. Scott, 512 U.S. 849, 855 (1994) (“[Q]uality legal representation is necessary in capital habeas corpus proceedings in light of ‘the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.’”) (citation omitted); see generally Hertz & Liebman, supra note 28, § 2.6.

\textsuperscript{46} A recent comprehensive study finds that of every one hundred death sentences imposed, forty-seven are reversed at the state level, on direct appeal or collateral review. An additional twenty-one are overturned on federal habeas corpus. See James S. Liebman et al., A Broken System: Error Rates in Capital Cases, 1973-1995, pt. I, app. A, at 5-6 (2000). These statistics indicate the importance of providing qualified counsel for both state and federal proceedings.

\textsuperscript{47} Some states provide attorneys at public expense to death-sentenced prisoners seeking state post-conviction relief, but others do not. See Andrew Hammel, Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas, 39 Am. Crim. L. Rev. 1, 83-99 (2002) (providing state-by-state list); Jennifer N. Ide, The Case of Exzavious Lee Gibson: A Georgia Court’s (Constitutional?) Denial of a Federal Right, 47 Emory L.J. 1079, 1099-1110 (1998); Clive A. Stafford Smith & Rémy Voisin Starns, Folly By Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings, 45 Loy. L. Rev. 55, 56 (1999). Moreover, even in those states that nominally do provide counsel for collateral review, the intertwined realities of chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment, see The Spangenberg Group, ABA Postconviction Death Penalty Representation Project, An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Postconviction Death Penalty Cases (1996) [hereinafter Right to Compensation and Expenses], have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance. See, e.g., Tex. Defender Serv., A State of Denial: Texas Justice and the Death Penalty, ch. 7 (2002), available at http://www.texasdefender.org/publications.htm (reporting that a review of 103 post-conviction petitions filed by court-appointed counsel in Texas death penalty cases between 1995 and 2000 indicated that 17.5 percent of the petitions were fifteen pages long or less, and that counsel offered no evidence outside the trial record in 42.7 percent of the cases reviewed). Counsel should
entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law. This means that counsel must obtain and read the entire record of the trial, including all transcripts and motions, as well as proceedings (such as bench conferences) that may have been recorded but not transcribed. In many cases, the record is voluminous, often amounting to many thousands of pages. Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, again scrutinizing them for what is missing as well as what is present.

Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel’s obligation to make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the decisionmaker at trial made a fully informed resolution of the issues of both guilt and punishment.

Since the reinstatement of the death penalty in 1976, there have been more than 110 known wrongful convictions in capital cases in the United States. As further described infra in the text accompanying accordingly be alert to the development of both state and federal law respecting the right to the effective assistance of counsel on state post-conviction review. See infra notes 74, 204 (citing cases recognizing right); see also Celestine Richards McConville, The Right to the Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel, 2003 WISC. L. REV. 31, 84-98 (arguing that once a jurisdiction creates a statutory right to post-conviction counsel, the Constitution requires it to provide effective counsel); Leonard Post, A Fight Over Limits on Pay, Hours: Florida Faces a Suit From a Death Penalty Lawyer, NAT’L L.J., Mar. 31, 2003, at A1 (describing litigation challenging Florida statutory cap on number of hours for which post-conviction lawyers may be compensated).

In particular, counsel should continue to test the boundaries of Murray v. Giarratano, 492 U.S. 1 (1989). Although a plurality of Justices there rejected the constitutional claim of a capital defendant to the appointment of counsel in state post-conviction proceedings, the controlling opinion of Justice Kennedy emphasized that it was based “[o]n the facts and records of this case,” in which “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia’s prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief.” Id. at 14-15 (Kennedy, J., concurring); cf. infra note 334 (citing cases in which states have failed to provide capital prisoners this level of resources).


49. See DEATH PENALTY INFORMATION CENTER: Innocence and the Death Penalty, at http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (stating that, “[s]ince 1973, 111 people in 25 states have been released from death row with evidence of their innocence”) (latest release July 28, 2003); see also C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT 62-82 (1996); see generally BARRY SHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (updated ed. 2001); EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); Ken Armstrong & Steve Mills, “Until I Can be Sure”: How the
notes 198-204, these resulted from a variety of causes, including the
testimony of unreliable jailhouse informants,50 the use of dubious or
fraudulent forensic scientific methods,51 prosecutorial misconduct, and

“insidious reliability problems” as basis for imposing major procedural restrictions on use of
jailhouse informants); Province of Manitoba, Manitoba Justice, The Inquiry Regarding Thomas
Sophonow, Manitoba Guidelines Respecting the Use of Jailhouse Informants (Nov. 5, 2001),
into wrongful conviction of Thomas Sophonow, which found jailhouse informants to be “the most
deceitful and deceptive group of witnesses known to frequent the courts” (Province of Manitoba
Manitoba Justice, The Inquiry Regarding Thomas Sophonow, Jailhouse Informant, Their
Unreliability and the Importance of Complete Crown Disclosure Pertaining to Them, available at
http://www.gov/mb.ca/justice/sophonow/jailhouse), Province bars their use except in limited
circumstances and subject to tight safeguards); CONSTITUTION PROJECT, MANDATORY JUSTICE:
EIGHTEEN REFORMS TO THE DEATH PENALTY 52 (2001) (noting that a “category of evidence that
has a particularly high chance of being an outright lie, exaggerated, or otherwise erroneous is the
testimony of jailhouse informants. Their confinement provides evidence of their questionable
character, motivates them to lie in order to improve the conditions of their confinement or even
secure their release, and often affords access to information that can be used to manufacture credible
testimony.”); Robert M. Bloom, Jailhouse Informants, CRIM. JUST., Spring 2003, at 20 (discussing
studies regarding the unreliability of jailhouse informants and the use of their testimony in capital
cases); Ted Rohrlich, Jail House Informant Owns Up to Perjury in a Dozen Cases, L.A. TIMES, Jan.
4, 1990, at A1 (detailing perjuries committed by Leslie White, an inmate at the Los Angeles County
jail who demonstrated to authorities and reporters how he concocted false confessions, and noting
confession of another informant, Stephen Jesse Cisneros, to perjury in five murder cases).

51. See generally Brief of Amici Curiae Five Innocent Former Death Row Inmates &
unscrupulous practices by investigators and prosecutors that can lead to false convictions); Paul
Duggan, Oklahoma Reviews 3,000 Convictions, WASH. POST, May 9, 2001, at A2 (discussing
Oklahoma review of three thousand convictions based on work of Joyce Gilchrist, an Oklahoma
City police chemist, who went far beyond what was scientifically knowable in conducting forensic
investigations of local crime); Davidson Goldin, 5th Trooper Pleads Guilty in Scandal, N.Y. TIMES,
Apr. 8, 1995, at A29 (describing scandal in which New York state troopers transferred fingerprints
of potential suspects to crime scenes to enhance their cases); Mark Hansen, Out of the Blue, 82
A.B.A. J., Feb. 1996 (describing dentist, widely discredited by his peers, who claimed to be able to
match bite marks to the teeth that made them); Adam Liptak, 2 States to Review Lab Work of Expert
approximately one hundred cases based on questionable forensic testimony of Arnold Melnikoff);
Armando Villafranca, Bradford City’s HDP Lab Flap, Urges Hold for 7 on Death Row, HOU. CHRON.,
Mar. 7, 2003 (reporting legislative testimony of Houston Police Chief urging that no
execution dates be set for seven death row inmates whose cases may have been affected by shoddy
work of Houston police crime laboratory, which was found in a state audit to have had numerous
shortcomings in preservation and testing of DNA evidence); Edna Buchanan, Did FBI Wrongly Aid
Death Row Conviction?, MIAMI HERALD, May 31, 2003, at 1A (although internal review of FBI
crime laboratory has identified about three thousand cases of shoddy forensic work, agency has only
notified about 150 defendants of problems; suspect cases include those involving hair and fiber
incompetence of defense counsel at trial. Because state collateral proceedings may present the last opportunity to present new evidence to challenge the conviction, it is imperative that counsel conduct a searching inquiry to assess whether any mistake may have been made.

Reinvestigation of the case will require counsel to interview most, if not all, of the critical witnesses for the prosecution and investigate their backgrounds. Counsel must determine if the witness’s testimony bears scrutiny or whether motives for fabrication or bias were left uncovered at the time of trial. Counsel must also assess all of the non-testimonial evidence and consider such issues as whether forensic testing must now be performed, either because some technology, such as DNA, was unavailable at the time of trial or because trial counsel failed to ensure that necessary testing took place.52

Counsel must conduct a similarly comprehensive reevaluation of the punishment phase to verify or undermine the accuracy of all evidence presented by the prosecution, and to determine whether the decisionmaker was properly informed of all relevant evidence,53 able to give appropriate weight to that evidence,54 and provided with a clear and legally accurate set of instructions for communicating its conclusion.55

52. See, e.g., Eric M. Freedman, Earl Washington’s Ordeal, 29 HOUSTON L. REV. 1089, 1098-99 (2001) (describing how pro bono counsel in state post-conviction proceeding discovered exculpatory semen stain evidence, which “having been appropriately turned over by the government, lay unappreciated in the files of former defense counsel”); Gwen Filosa, N.O. Man Cleared in ’84 Murder, NEW ORLEANS TIMES-PICAYUNE, May 9, 2003, at 1 (describing case of John Thompson, who was deterred from taking the stand at his original murder trial by a prior conviction for armed robbery, which, as a defense investigator discovered weeks before the execution date, had been tainted by government suppression of an exculpatory blood test; when retried on the murder charge, Thompson, who had always maintained his innocence, was acquitted).


54. See infra Guideline 10.10.2(B) and accompanying commentary.

2. Federal Habeas Corpus

In addition to requiring counsel to undertake all the tasks just described in Subsection B(1), federal collateral proceedings present another set of obstacles—ones that highlight the importance of quality representation. From 1973 to 1995, capital habeas corpus petitioners obtained relief at many times the rate of nonecapital ones and they should continue to do so in the future. But federal habeas corpus actions are governed by a complex set of procedural rules. Counsel must master these thoroughly. Moreover, restrictions on the availability of federal habeas relief for state prisoners imposed by the AEDPA will continue to raise numerous novel legal issues.

C. Executive Clemency

Executive clemency plays a particularly important role in death penalty cases, as it “provides the [government] with a final, deliberative opportunity to reassess this irrevocable punishment.” Because post-judgment proceedings have traditionally provided very limited opportunity for review of questions of guilt or innocence, clemency is

56. See James S. Liebman et al., Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 TEX. L. REV. 1839, 1844, 1849 (2000) (federal habeas relief was granted in forty percent of 599 cases between 1973 and 1995 in which the judgment remained intact after direct appeal and state post-conviction review); cf. Eric M. Freedman, Federal Habeas Corpus in Capital Cases, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 427 (James Acker et al. eds. 1998) (“By the most generous estimates, the rate in non-capital cases does not exceed seven percent, and, if the appropriate statistical methodology is applied, the actual number is less than one percent.”).


58. See Legislative Modification, supra note 12, at 854 (“The post-conviction handling of capital cases is a legal specialty requiring mastery of an intricate body of fast-changing substantive and procedural law.”). The failure of counsel to fulfill these obligations may entitle the client to relief under federal constitutional or statutory law. See Cooey v. Bradshaw, 216 F.R.D. 408 (N.D. Ohio 2003) (granting stay of execution on claim of ineffective assistance by prior counsel appointed under 21 U.S.C. § 848), motion to vacate stay denied, No. 03-4001 (6th Cir. July 24, 2003), motion to vacate stay denied, No. 03-5472 (U.S. July 24, 2003).

“the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” As the Supreme Court has recognized, “history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.” Recent advances in the use of DNA technologies, combined with restrictions on the availability of post-conviction review, have elevated the important role that clemency has played as the “fail-safe” of the criminal justice system, and increased the demands on counsel. Moreover, wholly apart from questions of guilt or innocence, executive clemency has been granted in death penalty cases for a broad range of humanitarian reasons.

Recognizing these considerations, the Supreme Court has begun to apply due process protection to clemency proceedings. Thus, in addition to assembling the most persuasive possible record for the decisionmaker, counsel must carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process.

The Imperative of a Systemic Approach

General statements of expectations about what lawyers should do will not themselves ensure high quality legal representation. Indeed, Guidelines confined to such statements would be ones “that palter with us in a double sense; that keep the word of promise to our ear, and break it to our hope.” Attorney error is often the result of systemic problems,
not individual deficiency. The provision of counsel for indigent capital defendants is too frequently made through ad hoc appointment, a system inimical to effective representation. Although defender offices generally have the experience and dedication to provide high quality legal representation in capital cases, they are commonly overworked and inadequately funded. And private counsel often discover too late that they have taken on a task for which they are unqualified or lack sufficient resources. The Guidelines that follow, therefore, not only detail the elements of quality representation, but mandate the systematic provision of resources to ensure that such representation is achieved in fact, whether counsel is individually assigned, employed by a defender office, or privately retained with or without compensation.

Conclusion

Unless legal representation at each stage of a capital case reflects current standards of practice, there is an unacceptable “risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” Accordingly, any jurisdiction wishing to impose a death sentence must at minimum provide representation that comports with these Guidelines.

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68. See Liebman, supra note 29, at 2108; Goodpaster, supra note 3, at 356-59.
69. See infra Guideline 2.1(C) and accompanying commentary.
70. See, e.g., Washington v. Murray, 952 F.2d 1472, 1475, 1476 (4th Cir. 1991) (vacating district court’s summary dismissal of ineffective assistance of counsel claim based on failure of retained counsel to appreciate exculpatory significance of scientific evidence produced by prosecution).
71. See infra Guidelines 4.1, 8.1, & 9.1 and accompanying commentary; see generally Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980) (noting that guarantee of Sixth Amendment applies equally whether counsel is retained or appointed).
73. Cf. Legislative Modification, supra note 12, at 848 (“For so long as the death penalty continues to exist in this country, capital inmates are entitled to procedures—including ones for the provision of competent counsel—that result in the full and fair review of their convictions and sentences. Correlatively, any state which chooses to impose death sentences must accept the obligation of providing mechanisms for assuring that those sentences are legally and factually correct at the time of their execution.”) (citation omitted).
GUIDELINE 2.1—ADOPTION AND IMPLEMENTATION OF A PLAN TO PROVIDE HIGH QUALITY LEGAL REPRESENTATION IN DEATH PENALTY CASES

A. Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines (the “Legal Representation Plan”).

B. The Legal Representation Plan should set forth how the jurisdiction will conform to each of these Guidelines.

C. All elements of the Legal Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.

History of Guideline

The obligation to create a formal “Legal Representation Plan” for provision of representation in death penalty cases was contained in Guideline 3.1 of the original edition. Subsection B is new and is designed to make it easier for jurisdictions to determine the necessary contents of a Plan. Subsection C is drawn from several sections of the original edition.

Related Standards


ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.6 (3d ed. 1992) (“Funding”).


Commentary

Each jurisdiction should take effective measures to formalize the process by which high quality legal representation will be provided in capital cases. This may be done by statute, court order, regulation or otherwise. The critical element is that the plan be judicially enforceable in full against the jurisdiction.74

The Legal Representation Plan should provide standards and procedures that apply to capital cases on a jurisdiction-wide basis. National professional groups concerned with criminal justice issues have for decades advocated that defender services be organized on a statewide basis.75 Specifically, the ABA Standards for Criminal Justice endorse state-wide organization “as the best means for service provision.”76 Jurisdiction-wide organization and funding can best ameliorate local disparities in resources and quality of representation,

74. See, e.g., Iovieno v. Comm’r, 699 A.2d 1003 (Conn. 1997) (recognizing claim that statutorily-mandated state post-conviction counsel was ineffective since “it would be absurd to have the right to appointed counsel who is not required to be competent”) (quoting Lozada v. Warden, 613 A.2d 818, 821 (Conn. 1992)); Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988) (holding that under statute creating office for post-conviction capital representation, “each defendant . . . is entitled, as a statutory right, to effective legal representation” and may enforce that right in post-conviction proceedings); People v. Johnson, 609 N.E.2d 304, 311 (Ill. 1993) (granting relief where, contrary to court rule, appointed post-conviction counsel “made no effort to investigate the claims raised in the defendant’s post-conviction petition or to obtain affidavits from any of the witnesses specifically identified in the defendant’s pro se petition”); see also supra note 47 (noting possible federal constitutional implications of state’s decision to grant post-conviction counsel); see generally infra note 204.

75. See, e.g., Nat’l Legal Aid & Defender Ass’n, Nat’l Study Commission on Defense Servs., Guidelines for Legal Defense Systems in the United States Final Report (1976) (calling for a state-wide organization with a centralized administration to “ensure uniformity and equality of legal representation and supporting services and to guarantee professional independence for individual defenders”); Nat’l Conf. of Comm’rs on Unif. State Laws, Prefatory Note to Uniform Law Comm’rs Model Public Defender Act, in Handbook of the Nat’l Conference of Comm’rs on Uniform State Laws 267-268 (1970) (approving recommendation of National Defenders Conference that every state establish a state-wide public defender system “to assure better coordination and consistency of approach throughout the state, [provide] better consultation with the several branches of state government, . . . reduce the administrative burden on court personnel and provide more efficient and more experienced defense counsel services to needy persons accused of crime”); Task Force on the Admin. of Justice, President’s Comm’n on Law Enforcement & Admin. of Justice, Task Force Report: The Courts 52-53 (1967) (recommending that “each State should finance assigned counsel and defender systems on a regular and statewide basis”).

76. ABA Standards for Criminal Justice: Providing Defense Services Standard 5-1.2(c) and cmt. (3d ed. 1992, black letter approved 1990, commentary completed 1992).
and insulate the administration of defense services from local political pressures.\(^{77}\)

This last item is, of course, of critical concern.

It is essential that both full-time defenders and assigned counsel be fully independent, free to act on behalf of their clients as dictated by their best professional judgment. A system that does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can afford to retain.\(^{78}\)

Therefore, as Guideline 2.1(C) mandates, any acceptable Legal Representation Plan must assure that individual lawyers are not subject to formal or informal sanctions (e.g., through the denial of future appointments, reductions in fee awards, or withholding of promotions in institutional offices) for engaging in effective representation. The same principle applies to the overall architecture of the system. Thus, for example, the head of a public defender office must be subject to judicial supervision only in the same manner and to the same extent as a lawyer in private practice—and not be subject to institutional arrangements that

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\(^{77}\) Mississippi, for example, has recently moved from a county-based to a state-based system for the provision of capital defense services. See Julie Goodman, Inmates on Death Row Given Last Hope, CLARION-LEDGER (Jackson, Miss.), May 13, 2002, at B1 (discussing post-conviction defense office); Emily Wagster, Capital Defense Job Filled, State Office to Provide Lawyers for Indigent, SUN HERALD (Biloxi, Miss.), July 7, 2001, at A2 (discussing trial defense office). Similarly, California has adopted state-wide qualifications for appointed trial counsel in capital cases effective January 1, 2003. See CAL. R. CT. 4.117; see generally Ashley Rapp, Note, Death Penalty Prosecutorial Changing Decisions and County Budgeting Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?, 71 FORDHAM L. REV. 2735 (2003) (arguing that inter-county funding disparities may render state capital systems vulnerable to challenges under Furman v. Georgia, 408 U.S. 238 (1972)).

\(^{78}\) ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.3 cmt. (3d ed. 1992); see also Taylor-Thompson, supra note 37, at 1508; ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 and cmt. (2002).

The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.
might enable his or her re-appointment to be blocked by judges irked at the zealous advocacy conducted by his or her office.\textsuperscript{79}

Moreover, the system must be structured so as to assure that each client receives defense services “in accordance with professional standards,” as noted in Subsection C. For example, it is predictable that there will be conflicts of interest among various actors in the criminal justice system (e.g., co-defendants, co-operating witnesses), who may play different roles in different cases, and the plan must provide a mechanism to assure conflict-free representation.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{79} In North Carolina, for example, the Indigent Defense Services Commission, which consists of ten members appointed by, but independent of, the state Bar, the Governor, the Chief Justice, and the legislature, plus three members chosen collectively by those ten, and appoints a Capital Defender who is responsible only to it. See Commission on Indigent Services, Minutes of the Meeting of Apr. 19, 2002, available at http://www.ncids.org. The Capital Defender supervises a staff of attorneys and also oversees the representation provided by a roster of private lawyers and public defenders who have been certified to provide representation in capital cases. See Commission on Indigent Services, Minutes of the Meeting of June 15, 2001, available at http://www.ncids.org. Cf. Retarding Due Process, ST. PETERSBURG TIMES, Apr. 22, 2002, at A10 (editorial criticizing Florida legislation permanently barring any appointed capital defense attorney seeking compensation in excess of fee schedule from another appointment).
\item \textsuperscript{80} For instance, although it may not violate the Sixth Amendment for defense counsel to have previously represented the victim, see Mickens v. Taylor, 535 U.S. 162, 164, 173-74 (2002), such a situation most certainly violates ethical norms, see Brief of Legal Ethicists and the Stein Center for Law and Ethics as Amici Curiae in Support of Petitioner, Mickens v. Taylor, 535 U.S. 162 (2002), and would not be permitted by any acceptable plan for capital representation. Cf. Ex parte McCormick, 645 S.W.2d 801, 806 (Tex. Crim. App. 1983) (en banc) (reversing two capital convictions because same counsel represented both co-defendants); Wm. C. Turner Herbert, Recent Development, Off the Beaten Path: An Analysis of the Supreme Court’s Surprising Decision in Mickens v. Taylor, 81 N.C. L. Rev. 1268 (2003) (criticizing Mickens).
\end{itemize}
GUIDELINE 3.1—DESIGNATION OF A RESPONSIBLE AGENCY

A. The Legal Representation Plan should designate one or more agencies to be responsible, in accordance with the standards provided in these Guidelines, for:

1. ensuring that each capital defendant in the jurisdiction receives high quality legal representation, and

2. performing all the duties listed in Subsection E (the “Responsible Agency”).

B. The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.

C. The Responsible Agency for each stage of the proceeding in a particular case should be one of the following:

Defender Organization

1. A “defender organization,” that is, either:

   a. a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

   b. a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or
Independent Authority

2. An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

D. Conflict of Interest:

1. In any circumstance in which the performance by a defender organization of a duty listed in Subsection E would result in a conflict of interest, the relevant duty should be performed by the Independent Authority. The jurisdiction should implement an effectual system to identify and resolve such conflicts.

2. When the Independent Authority is the Responsible Agency, attorneys who hold formal roles in the Independent Authority should be ineligible to represent defendants in capital cases within the jurisdiction during their term of service.

E. The Responsible Agency should, in accordance with the provisions of these Guidelines, perform the following duties:

1. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

2. draft and periodically publish rosters of certified attorneys;

3. draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

4. assign the attorneys who will represent the defendant at each stage of every case, except to
the extent that the defendant has private attorneys;

5. monitor the performance of all attorneys providing representation in capital proceedings;

6. periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;

7. conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

8. investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

History of Guideline

The obligation of the Legal Representation Plan to designate a “Responsible Agency” for the appointment of counsel in death penalty cases was contained in Guideline 3.1 of the first edition. Subsection B makes it clear that the Responsible Agency should be an independent entity, and that lawyer selection should not be performed by the judiciary or elected officials. Subsection C is new and describes the acceptable kinds of Responsible Agencies. Subsection D is new and specifies the obligations of the Responsible Agency in the event of a conflict of interest. Lastly, part of Subsection E is new and details the other duties of the Responsible Agency, including the duty to ensure that qualified attorneys are available to represent defendants in death penalty cases, the duty to promptly investigate complaints about the performance of attorneys, and the duty to take corrective action without delay.
Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.2 (3d ed. 1992) ("Systems for Legal Representation").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.3 (3d ed. 1992) ("Professional Independence").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-4.1 (3d ed. 1992) ("Chief Defender and Staff").


NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.10 (1976) ("The Defender Commission").

NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.11 (1976) ("Functions of the Defender Commission").

NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.12 (1976) ("Qualifications of the Defender Director and Conditions of Employment").

NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.13 (1976) ("The Governing Body for Assigned Counsel Programs").

NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.18 (1976) ("Administration of Defense System Funds").
Commentary

As indicated in Guideline 2.1(C) and the accompanying commentary, the Legal Representation Plan must ensure that the capital defense function remains free from political influence. One important mechanism for accomplishing this goal is granting the authority for training, assigning, and monitoring capital defense lawyers to one or more entities independent of the judiciary and wholly devoted to fostering high quality legal defense representation.

This Guideline, based on accumulated experience, contemplates two structures that jurisdictions might employ.

1. In the first structure, the jurisdiction has created (a) a jurisdiction-wide capital trial organization, relying on staff attorneys,
and, optionally, members of the private bar, and/or (b) a jurisdiction-wide capital appellate and/or post-conviction defender organization, relying on staff attorneys, and, optionally, members of the private bar (collectively, “defender organizations”).

In this structure, the defender organizations may both provide representation and perform all the functions listed in Subsection E as appropriate to their portion of the system, with one key exception. No defender organization may perform any function that would involve it in a conflict of interest, e.g., monitoring its own performance under Guideline 7.1(A), investigating or disposing of a complaint pursuant to Guideline 7.1(B) against one of its staff lawyers, or making the appointment of counsel in a situation in which there exists a professional conflict. Thus, for example, if two defendants with antagonistic defenses were charged with a capital crime, the agency could assign itself to defend one of them but could play no role in the assignment of counsel to the other. Similarly, as noted in Subsection E(5), a defender organization could not monitor the quality of its own performance (Subsection E(5)).

Accordingly, this structure also contemplates the existence of an “Independent Authority,” which will at minimum deal with conflicts such as these.

2. In the second structure, an “Independent Authority,” an entity run by defense attorneys with demonstrated knowledge and expertise in the representation of persons facing the possible imposition or execution of a death sentence, performs all the functions listed in Subsection E but does not itself provide representation.

While serving the organization in a formal role, whether paid or unpaid (e.g., officers, directors, staff members), attorneys should not be eligible for appointment to death penalty cases. The idea is that attorneys should not be appointed by an entity in whose operations they are playing a material role. Thus, this provision does not extend to persons who are simply providing occasional advice to the entity.

81. For example, in 1995, New York enacted a comprehensive legislative plan for a “capital defender office” (“CDO”) to provide representation and legal assistance in capital cases. N.Y. JUD. LAW § 35-b(3) (McKinney 2001). The CDO is authorized to represent capital defendants and also to advise and assist other appointed counsel in such cases. See id. The office assists in determining qualification standards and presents training programs for attorneys seeking to become certified to accept appointments. See id. As described supra note 79, North Carolina has also adopted this model. Other states have similar programs for providing representation in post-conviction proceedings. See, e.g., CAL. GOV’T CODE § 68661 (West Supp. 2003) (creating California Habeas Corpus Resource Center, which is authorized to provide representation and serve as a resource in state and federal post-conviction proceedings).
The agency performing the function in the particular case, whether a defender organization or the Independent Authority, is referred to as “the Responsible Agency.”

The Responsible Agency must assess the qualifications of attorneys who wish to represent capital defendants, conducting a meaningful review of each request for inclusion on the roster of qualified counsel in light of the criteria listed in Guideline 5.1. In order to make informed decisions on eligibility, the Responsible Agency should have sufficient flexibility to gather as much relevant information as possible to secure a fair picture of the applicant’s ability and experience. The Responsible Agency should utilize whatever sources of information it deems appropriate, including in-court observations, writing samples, and information-gathering from the applicant, from judges before whom the applicant has appeared, and from attorneys, supervisors, and former clients who are familiar with the applicant’s professional abilities. The performance standards established pursuant to Guidelines 10.1 et seq. should also be used to evaluate the prior performance in capital cases of attorneys seeking to establish eligibility for renewal placement on the roster of qualified counsel.

In assigning attorneys to capital cases, the overriding consideration must always be to provide high quality legal representation to the person facing a possible death sentence. Adherence to a “strict rotation” system for assigning counsel in the interest of fairness to attorneys should never take precedence over the interests of the capital defendant in receiving the best possible representation. Rather, in making assignments of counsel to a particular capital case, the Responsible Agency should give careful consideration to counsel’s qualifications, skills, and experience; any aspects of the case that make assignment of a lawyer with specific qualifications or skills necessary or particularly appropriate (e.g., counsel’s ability to speak the client’s native language); and the relative onerousness of prospective lawyers’ existing caseloads. It is also appropriate to give consideration to maintaining continuity of counsel where the defendant has previously been represented by a qualified lawyer at an earlier stage of the proceedings, provided that (a) counsel is also deemed qualified to represent the client at the subsequent stage of the proceedings and (b) counsel’s representation of the client at successive stages of the proceedings does not present a conflict of interest.82 Given the extraordinary demands and pressures placed on

82. Of course, any applicable statutory provisions, e.g., 28 U.S.C. § 2261(d), must also be observed.
counsel in a capital case, the Responsible Agency should, in accordance with Guideline 4.1(A)(1), ensure that at every stage of the proceedings the defendant is represented by counsel who are in a position to provide high quality legal representation. This may require the agency to furnish resources, in the form of additional counsel or otherwise, to private counsel.

The remaining elements of this Guideline reflect the longstanding view of the ABA that “[i]jurisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases.” Several of these functions are described in greater detail in subsequent Guidelines. The common theme, however, is that the provision of consistently high quality legal representation requires that the duties given to the Responsible Agency by this Guideline be performed by an entity with the authority and resources to discharge them vigorously.

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83. See supra Guideline 1.1 and accompanying commentary.
84. See infra Guideline 4.1 and accompanying commentary.
85. Specifically, the Responsible Agency should in every capital case determine whether retained or pro bono counsel meets the qualification standards set forth in Guideline 5.1 infra and, if not, provide as many additional qualified attorneys as are appropriate under the circumstances of the case. In accordance with Guideline 4.1(B), the Responsible Agency must also assure that counsel have the necessary support services.
87. See, e.g., infra Guideline 7.1 (removal of attorneys from roster); Guideline 8.1 (training programs).
GUIDELINE 4.1—THE DEFENSE TEAM AND SUPPORTING SERVICES

A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.

2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

1. Counsel should have the right to have such services provided by persons independent of the government.

2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.
History of Guideline

This Guideline is based on Guideline 8.1 of the original edition. In keeping with the team approach described in the commentary, Subsection A has been added to provide for the assembly of a “defense team.” The first sentence of Subsection B is based on the original version of the Guideline and has been revised to emphasize that the purpose of providing adequate support services is to further the overall goal of providing “high quality legal representation,” not merely “an effective defense.” The second sentence is taken from Standard 5-1.4 of the ABA Standards for Criminal Justice: Providing Defense Services. Subsections B(1) and B(2) are new and reflect the decision to include private attorneys in these Guidelines.

Related Standards

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 (1986) (“Roles of Mental Health and Mental Retardation Professionals in the Criminal Process”).


Commentary

Introduction

In a capital case reaffirming that fundamental fairness entitles indigent defendants to the “basic tools of an adequate defense,” the United States Supreme Court stated:

We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and
that a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.88

It is critically important, therefore, that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence.89

The Team Approach to Capital Defense

National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate “supporting services [including] secretaries[,] investigators[,] and . . . expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencing.”90

This need is particularly acute in death penalty cases. The prosecution commits vast resources to its effort to prove the defendant guilty of capital murder. The defense must both subject the prosecution’s evidence to searching scrutiny and build an affirmative case of its own.91 Yet investigating a homicide is uniquely complex and often involves evidence of many different types. Analyzing and interpreting such evidence is impossible without consulting experts—whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others.92

89. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. (3d ed. 1992).
90. Id.
91. See Subcomm. on Federal Death Penalty Cases, Comm. on Defender Services, Judicial Conference of the United States, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (1998) [hereinafter Federal Death Penalty Cases] (discussing federal death penalty cases), available at http://www.uscourts.gov/dpenalty/1COVER.htm (reporting that “both the prosecution and the defense rely more extensively on experts in death penalty cases than in other [] criminal cases”).
92. See, e.g., Alec Wilkinson, A Night at the Beast House, THE NEW YORKER, Feb. 13, 1995, at 68 (discussing how counsel used an expert to show that victim was not killed in the prosecuting jurisdiction but dragged to the crime scene after her death; client eventually exonerated and released).
In particular, mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row.93 Evidence concerning the defendant’s mental status is relevant to numerous issues that arise at various junctures during the proceedings, including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend Miranda warnings, and competency to waive constitutional rights. The Constitution forbids the execution of persons with mental retardation,94 making this a necessary area of inquiry in every case. Further, the defendant’s psychological and social history and his emotional and mental health are often of vital importance to the jury’s decision at the punishment phase.95 Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.96 Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.97

Counsel’s own observations of the client’s mental status, while necessary,98 can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation)

95. See Goodpaster, supra note 3, at 323-24.
98. See infra Guidelines 10.5 and 10.15.1(E)(2) and accompanying commentary. Effective representation requires ongoing interactive contact with the client—in person, by mail, on the telephone, and in other ways—both by counsel and, as discussed in the remainder of this commentary, by the other members of the defense team. To the extent that jurisdictions impede such contact—whether by charging excessive fees for telephone calls, limiting mailings, failing to provide convenient and confidential arrangements for visits, restricting the access of non-attorney defense team members to clients, or otherwise—they jeopardize the provision of high quality legal representation in accordance with these Guidelines.
that could be of critical importance. Accordingly, Subsection A(2) mandates that at least one member of the defense team (whether one of the four individuals constituting the smallest allowable team or an additional team member) be a person qualified by experience and training to screen for mental or psychological disorders or defects and recommend such further investigation of the subject as may seem appropriate.

Although mental health issues are so ubiquitous in capital defense representation that the provision of resources in that area should be routine, it bears emphasis that every situation will also have its own unique needs. The demands of each case—and each stage of the same case—will differ. Jurisdictions must therefore construe this Guideline broadly, keeping in mind the superior opportunity of defense counsel to determine what assistance is needed to provide high quality legal representation under the particular circumstances at hand and counsel’s need to explore the potential of a variety of possible theories. For example, it might well be appropriate for counsel to retain an expert from an out-of-state university familiar with the cultural context by which the defendant was shaped or a professional who is skilled at retrieving elusive paper or electronic records. While resources are not unlimited, of course, jurisdictions should also be mindful that sufficient funding early in a case may well result in significant savings to the system as a whole.99

Effective Assistance of Experts

Subsections B(1) and B(2) are aimed at insuring that the fact of public funding does not diminish the quality of the assistance that counsel is able to obtain from experts. Thus, unless counsel agrees otherwise, the defendant is entitled to experts independent of the government; the jurisdiction may not meet its obligations by relegating

99. For example, in light of the constitutional prohibition on the execution of the mentally retarded, significant resources spent at the pretrial phase in investigating and presenting the defendant’s retardation status will be amply repaid in future cost savings since the most likely outcomes are (a) the case is taken off the capital track entirely, very possibly by agreement with the prosecution or (b) the issue is decided against the defendant, thus minimizing the likelihood of it being raised later. See, e.g., Dan Barry, Ashcroft Says Retarded Man No Longer Faces Death Penalty, N.Y. Times, Mar. 20, 2003, at B1. Similarly, it is not only expensive, but also extremely unjust for exculpatory evidence about which trial counsel should have learned from an expert to lie undiscovered until post-conviction proceedings many years later—years during which an innocent person is incarcerated. See Freedman, supra note 52, at 1094-95, 1098-99.
him to the state mental hospital or the state crime laboratory. Similarly, doctrines of privilege, work product, and the like should protect the communications between counsel and the experts just as they would if the experts were being paid with private funds. Any procedures for the auditing of public funds should be structured so as to preserve this confidentiality.

The Core Defense Team

In addition to employing the particular nonlegal resources that high quality legal representation requires in each individual case, the standard of practice demands that counsel have certain specific forms of assistance in every case. This Guideline accordingly requires that those resources be provided.

A. The Investigator

The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings. Although some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel, the prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation. Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness. As a result, an investigator should be part of the defense team at every stage of a capital proceeding.

100. Of course, non-lawyer professionals on the staff of defender organizations are, even if on the public payroll, “independent of the government” for this purpose.

101. This Guideline contemplates that defense counsel will be primarily responsible for selection of the remaining members of the defense team. Guideline 10.4 discusses in greater detail the division of this responsibility among the attorneys on the team. The Responsible Agency should, however, be prepared to provide assistance in finding qualified individuals to fill these roles.

102. See infra Guideline 10.7 and accompanying commentary.
B. The Mitigation Specialist

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant’s development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client’s life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.  


104. See Vivian Berger, The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 250 (1991) (noting that many attorneys make no preparations whatsoever for the sentencing phase; because they believe that a lawyer should try to win rather than plan to lose, they “are devastated when the client is convicted and afterward just throw in the towel”); infra Guideline 10.10.1 and accompanying commentary; text accompanying notes 273-76; see also Head v. Thomason, 578 S.E.2d 426, 430 (Ga. 2003) (finding in state post-conviction proceeding that trial counsel were ineffective at penalty phase; due to their unwarrantedly optimistic belief that the sentencere would not impose death, they were less diligent than they should have been in obtaining mitigation evidence, and failed “to make use of the mitigating evidence and the experts they had”).

105. See generally Russell Stetler, Why Capital Cases Require Mitigation Specialists, at http://www.nlada.org/DMS/Documents/998934720.005/Why%20Capital%20Cases%20Require%2...
The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.106

For all of these reasons the use of mitigation specialists has become “part of the existing ‘standard of care’” in capital cases, ensuring “high quality investigation and preparation of the penalty phase.”107

Counsel Not Compensated by Public Funds

Finally, in the relatively rare case in which a capital defendant retains counsel, jurisdictions must ensure that the defendant has access to necessary investigative and expert services if the defendant cannot afford them.

Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses. The converse does not follow, however. Just because a defendant is able to afford retained counsel does not mean that sufficient finances are available for essential services. . . . [S]upporting services [should] be made available to the clients of retained counsel who are unable to afford the required assistance.108

Of course, the same observations apply where counsel is serving pro bono or, although originally retained, has simply run out of money.

0Mitigation%20Specialists.doc (last visited July 26, 2003) (discussing the role and required skills of the mitigation specialist); TEXAS DEFENDER SERVICE CAPITAL TRIAL PROJECT, DEATH PENALTY MITIGATION MANUAL FOR TRIAL ATTORNEYS ch. 2 (2001) (“The Mitigation Specialist and the Team Approach”) [hereinafter TEXAS DEATH PENALTY MITIGATION MANUAL].
106. See infra text accompanying note 178.
107. See Federal Death Penalty Cases, supra note 91. Numerous death penalty jurisdictions, by state statute, court rule, or case law, routinely authorize the payment of funds for mitigation experts pursuant to defense motion. See, e.g., GA. CODE ANN. § 17-12-90 to 97 (1997); 725 ILL. COMP. STAT. 124/10(c) (West 2002); KY. REV. STAT. ANN. § 31.110(1)(b) (Michie 2002); S.C. CODE ANN. § 16-3-26(C)(1) (Law Co-op. 2001); TENN. CODE. ANN. § 40-14-207(b) (1997); TENN. C.T. R. 13 § 5; State v. Bailey, 424 S.E.2d 503, 507 (S.C. 1992) (interpreting § 16-3-26(C)(1) as applied to capital cases, stating that “in today’s capital trial, the defendant is entitled to produce evidence concerning his childhood and family background in mitigation of his criminal conduct, so that the jury may impose life imprisonment as an alternative to the death sentence. In preparing this evidence, the attorney must employ investigators in the course of thoroughly researching the defendant’s entire life”). In federal capital trials, mitigation experts are routinely appointed and compensated under 21 U.S.C. § 848(q) (2000).
GUIDELINE 5.1—QUALIFICATIONS OF DEFENSE COUNSEL

A. The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

B. In formulating qualification standards, the Responsible Agency should insure:

1. That every attorney representing a capital defendant has:

   a. obtained a license or permission to practice in the jurisdiction;

   b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and

   c. satisfied the training requirements set forth in Guideline 8.1.

2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:

   a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
b. skill in the management and conduct of complex negotiations and litigation;

c. skill in legal research, analysis, and the drafting of litigation documents;

d. skill in oral advocacy;

e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

History of Guideline

This Guideline has been substantially reorganized for this edition. In the original edition, it emphasized quantitative measures of attorney experience—such as years of litigation experience and number of jury trials—as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised edition, the inquiry focuses on counsel’s ability to provide high quality legal representation.

Related Standards


**Commentary**

Under Guideline 3.1, it is the duty of the Responsible Agency to provide capital defendants with attorneys who will give them high quality legal representation. This Guideline amplifies that duty. It is designed to be outcome-focused and to leave the Responsible Agency maximum flexibility. The Guideline sets forth the necessary qualifications for all attorneys (Subsection B(1)), and also requires that “the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation.” (Subsection B(2)). The qualification standards set by the Responsible Agency must be such as to bring about this result. This functional approach is new to this edition.

As described in the commentary to Guideline 1.1, the abilities that death penalty defense counsel must possess in order to provide high
quality legal representation differ from those required in any other area of law. Accordingly, quantitative measures of experience are not a sufficient basis to determine an attorney’s qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.109

There are also attorneys who do not possess substantial prior experience yet who will provide high quality legal representation in death penalty cases.110 Such attorneys may have specialized training and experience in the field (e.g., as law professors), may previously have been prosecutors, or may have had substantial experience in civil practice.111 These attorneys should receive appointments if the Responsible Agency is satisfied that the client will be provided with high quality legal representation by the defense team as a whole.

In order to make maximum use of the available resources in the legal community overall, the Responsible Agency needs to devise qualification standards that build upon the contribution that each lawyer can make to the defense team, while ensuring that the team is of such a size and aggregate level of experience as to be able to function effectively.

109. See Bright, supra note 29, at 1871 n.209 (“Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.”).

110. Because, as the second sentence of Subsection A emphasizes, the overriding goal is to provide high quality legal representation to the client in the individual case, it may also be appropriate for the appointing authority to certify an attorney for a limited purpose, such as to represent a particular client with whom he or she has a special relationship.

111. Superior post-conviction death penalty defense representation has often been provided by members of the private bar who did not have prior experience in the field but who did have a commitment to excellence. See, e.g., Kelly Choi, Against All Odds, AM. LAW., Dec. 2000, at 98; Death-Row Rescue, STAR TRIB., Jan. 5, 2001, at 18A.
GUIDELINE 6.1—WORKLOAD

The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants 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 Guidelines.

History of Guideline

The original edition of this Guideline stated that “attorneys accepting appointments pursuant to these Guidelines . . . should not accept appointment” if their workload would interfere with the provision of “quality representation or lead to the breach of professional obligations.”

Although that admonition has been retained in Guideline 10.3, this Guideline, which in accordance with Guideline 1.1 applies to all defense counsel (not just appointed members of the private bar), has been added to make clear that it is the responsibility of the jurisdiction creating the system to establish mechanisms for controlling attorney workloads.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 (3d ed. 1992) (“Workload”).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTIONS Standard 4-1.3 (“Delays; Punctuality; Workload”) in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).


NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.3 (1976) (“Elimination of Excessive Caseloads”).


Commentary

In order to achieve the goal of providing capital defendants with high quality legal representation, the caseloads of their attorneys must be such as to permit the investment of the extraordinary time and effort necessary to ensure effective and zealous representation in a capital case. As the commentary to the ABA Defense Services Standards notes:

One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. . . .

All too often in defender organizations[,] attorneys are asked to provide representation in too many cases. . . . Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive
workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system.\textsuperscript{112}

A numerical set of caseload standards, standing alone, would not ensure high quality legal representation. While national caseload standards should in no event be exceeded, the concept of “workload” (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s non-representational duties) is a more accurate measurement of counsel’s ability to provide quality representation. In assessing counsel’s workload, the Responsible Agency must also consider whether counsel has adequate access to essential support staff such as investigators, mitigation specialists, paralegals, and legal secretaries. Counsel’s workload, including legal cases and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline to undertake additional cases above such levels.\textsuperscript{113}

In accordance with these principles, the Responsible Agency should assess the workload of eligible attorneys prior to appointment to ensure that counsel will be able to provide high quality legal representation. To assist in assessing workloads, some defender offices have established workload guidelines that are useful in determining whether the workload of a particular attorney is excessive. These guidelines may be consulted as one measure of appropriate workloads.\textsuperscript{114}

Studies have consistently found that defending capital cases requires vastly more time and effort by counsel than noncapital matters. For example, one study found that over the entire course of a case,

\begin{quote}
\textsuperscript{112} ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 cmt. (3d ed. 1992); see also MODEL CODE OF PROF’L RESPONSIBILITY EC 2-30 (1997); MODEL RULES OF PROF’L CONDUCT Rule 1.3 cmt. 2 (2002) (“A lawyer’s work load must be controlled so that each matter can be handled competently.”); Taylor-Thompson, supra note 37, at 1509 (“If a defense delivery system does not at once identify and impose limits on the number of cases for which an individual lawyer will be responsible, case pressures will inevitably overwhelm the lawyer and compromise the representation.”).

\textsuperscript{113} See infra Guideline 10.3 and accompanying commentary.

\textsuperscript{114} See NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guidelines 4.1, 5.1–5.3 (1976); NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.12 (1973). These standards all acknowledge the need to determine acceptable workloads, and all acknowledge within the standards themselves or in commentary the myriad factors that must be considered in weighing workload. Only the National Advisory Commission sets forth suggested numerical maximums for caseloads; those numbers are provided with the caveat “that particular local conditions—such as travel time—may mean that lower limits are essential.” Id. The National Advisory Commission standard does not address death penalty workloads.
\end{quote}
defense attorneys in federal capital cases bill for over twelve times as many hours as in noncapital homicide cases. In terms of actual numbers of hours invested in the defense of capital cases, recent studies indicate that several thousand hours are typically required to provide appropriate representation. For example, an in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889.116

Workloads for lawyers handling direct appeals should also be maintained at levels that are consistent with providing high quality legal representation. Like the responsibilities of counsel at trial, appellate work in a capital case is time-consuming and difficult. A capital trial record, which appellate counsel must review in full and with care, typically runs to thousands or even tens of thousands of pages—even before, pursuant to Guideline 10.7(B)(2), counsel investigates the possibility that the record may be incomplete. Once appellate counsel has reviewed the record, he or she must conduct especially wide-ranging legal research, canvassing both state and federal judicial opinions, before drafting the opening brief. Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of the defendant’s conviction or punishment.117 Further, counsel must aggressively examine the government’s brief and research its legal assertions in order to prepare an adequate reply. Preparing for and presenting oral argument requires counsel to invest still more hours. In California, where the Office of the State Public Defender handled capital appeals in the California Supreme Court, a 1989 study concluded that attorneys’ responsibilities should be limited to two to three such proceedings per year.118

115. See Federal Death Penalty Cases, supra note 91.
116. See id. This figure was only for the number of hours expended through the end of trial court proceedings, and did not include any post-conviction representation.
117. See supra text accompanying notes 42-44. Moreover, counsel must continue to investigate the facts. See infra Guideline 10.7 (A); see also Orazio v. Dugger, 876 F.2d 1508, 1513 (11th Cir. 1989) (holding appellate counsel ineffective because “[h]e did not review fully the trial court file or talk with petitioner or trial counsel,” and hence was unaware of a trial court ruling that should have been appealed).
Similarly, the workloads of counsel handling collateral proceedings must be carefully limited to allow for high quality legal representation. A 1998 survey of the time and expenses required in Florida capital post-conviction cases concluded that:

[The most experienced and qualified lawyers at Florida’s post-conviction defender office, the Office of Capital Collateral Representation[,] have estimated that, on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the United States Supreme Court following direct appeal to the denial of certiorari [from state post-conviction proceedings.]

It is the duty of the Responsible Agency to distribute assignments in light of each attorney’s duty under the Rules of Professional Conduct to “provide competent representation to a client,” which requires the legal knowledge, skill, thoroughness and preparation necessary for a complex and specialized area of the law. Thus, the Responsible Agency must monitor private counsel in accordance with Guideline 7.1, and provide them with additional assistance as necessary. And the Independent Authority must monitor the defender organizations of the jurisdiction and stand ready to supplement their resources with those of the private bar.

Regardless of the context, no system that involves burdening attorneys with more cases than they can reasonably handle can provide high quality legal representation. In the capital context, no such system is acceptable.

120. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2002).
121. See id. cmt. 1; see also ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.2(d), in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 1.3(a) (1995).
GUIDELINE 7.1—MONITORING; REMOVAL

A. The Responsible Agency should monitor the performance of all defense counsel to ensure that the client is receiving high quality legal representation. Where there is evidence that an attorney is not providing high quality legal representation, the Responsible Agency should take appropriate action to protect the interests of the attorney’s current and potential clients.

B. The Responsible Agency should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high quality legal representation.

C. The Responsible Agency should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments.

D. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the Responsible Agency should provide written notice that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.
E. An attorney or defender office sanctioned pursuant to this Guideline should be restored to the roster only in exceptional circumstances.

F. The Responsible Agency should ensure that this Guideline is implemented consistently with Guideline 2.1(C), so that an attorney’s zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Guideline.

History of Guideline

In the original edition, this Guideline provided that an attorney should receive no additional capital appointments if counsel had “inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client’s case.” In this edition, the standard has been changed to prohibit future appointment where counsel “has failed to provide high quality legal representation.” The change was made because the former language was considered insufficiently stringent. Subsection B is based on commentary to the original edition of the Guideline. Subsections C–E are taken from Subsections A and C of the original edition of the Guideline. Subsection F is new and is intended to emphasize the importance of the principle enunciated in Guideline 2.1(C).

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.3 (3d ed. 1992) (“Rotation of Assignments and Revision of Roster”).


NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.5.2 (1989) (“Removal from Program Roster(s)”).


Commentary

Consistent with its duty to ensure that high quality legal assistance is afforded to indigent capital defendants, the Responsible Agency should monitor the performance of all capital defense counsel, including defender offices. “Admittedly, this is not an easy task and there obviously are difficulties present in having third parties scrutinize the judgments of private counsel. On the other hand, the difficulty of the task should not be an excuse for doing nothing.”

While the Responsible Agency should investigate and maintain records regarding any complaints made against assigned counsel by judges, clients and other attorneys, an effective attorney-monitoring program in death penalty matters should go considerably beyond these activities. The performance of each assigned lawyer should be subject to systematic review based upon publicized standards and procedures. Counsel should be removed from the roster when counsel has failed to represent a client consistently with these Guidelines.

In fulfilling its monitoring function, the Responsible Agency should not attempt to micro-manage counsel’s work; most lawyering tasks may reasonably be performed in a variety of ways. In order to preserve the nature of the attorney-client relationship, counsel for the accused must have the freedom to represent their client as they deem professionally appropriate. Clients, moreover, should have the right to continue satisfactory relationships with lawyers in whom they have reposed their confidence and trust. Rather, the responsibility of the Responsible Agency is to ensure that, overall, the attorney is providing high quality legal representation. Where counsel fails to do so, whether

123. See id.
124. See infra Guidelines 10.1-10.15.2.
125. The standard for denying additional appointments to death penalty lawyers should be more strictly applied than the standard for denying additional appointments in non-capital cases. In non-capital criminal cases, the standard provides that “[w]here there is compelling evidence that an attorney consistently has ignored basic responsibilities[,] . . . the attorney’s name should be removed from the roster after notice and hearing, with the possibility of reinstatement after removal if adequate demonstration of remedial measures is shown.” ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.3 cmt. (3d ed. 1992) (emphasis added). As these Guidelines make clear, low quality representation of a capital defendant may have irrevocable consequences. Accordingly, the Responsible Agency should not wait for an attorney to “consistently . . . ignore[] basic responsibilities.” Id.
because of a mental or physical impairment,\textsuperscript{127} or for any other reason, the Responsible Agency should intervene. This may occur on the Responsible Agency’s own motion or as a result of a request by the defendant or the court.\textsuperscript{128}

In keeping with the paramount objective of protecting the rights and interests of the defendant, Subsection B provides that the Responsible Agency should have a regularized procedure for investigating and resolving complaints of inadequate representation. The procedure should recognize that many people (e.g., family members of the client, witnesses whom the attorney has interviewed or not interviewed) may be in a position to provide important information. The procedure should be publicized accordingly.

The Responsible Agency must monitor cases, and take appropriate action in the event of any substandard performance. If the jurisdiction has defender organizations, the entity monitoring them must review such problems with an eye towards rectifying both deficiencies on the part of individual staff lawyers and any structural flaws that those deficiencies may reveal. If inadequate training, office workload, or some other systemic problem has resulted in representation of lower quality than required by these Guidelines and the situation is not corrected, the office should be removed from the roster.

Because of the unique and irrevocable nature of the death penalty, counsel or offices that have been removed from the roster should be readmitted only upon exceptional assurances that no further dereliction of duty will occur. The Responsible Agency should not readmit counsel or the office to the roster unless it determines that the original removal was in error, or finds by clear and convincing evidence that the problem which led to the removal of counsel or the office has been identified and

\textsuperscript{127} It cannot always be safely assumed that counsel who has been determined to be qualified based on past performance will represent current or future clients satisfactorily. Circumstances can change. For example, the attorney may begin suffering from illness, chemical dependency or some other handicap unknown to the appointing authority, the court or the client. \textit{See} Kirchmeier, \textit{supra} note 29, at 455-60 (discussing cases in which defendants were represented by lawyers who were intoxicated, abusing drugs, or mentally ill).

\textsuperscript{128} \textit{See} ABA \textsc{standards for criminal justice: special functions of the trial judge} Standard 6-1.1(a) (3d ed. 1999) (“The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.”).
corrected. It may condition readmission on specific actions (e.g., proof of reduction in workload, proof of additional training and/or experience, substance abuse counseling, or correction of systemic defects in an office).
GUIDELINE 8.1—TRAINING

A. The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law;
2. pleading and motion practice;
3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
4. jury selection;
5. trial preparation and presentation, including the use of experts;
6. ethical considerations particular to capital defense representation;
7. preservation of the record and of issues for post-conviction review;
8. counsel’s relationship with the client and his family;
9. post-conviction litigation in state and federal courts;
10. the presentation and rebuttal of scientific
evidence, and developments in mental health fields and other relevant areas of forensic and biological science;

11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.

D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

History of Guideline

The importance of training was addressed in Guideline 9.1 of the original version of the Guidelines for lawyers seeking to receive appointments in capital cases. Subsections A and D have been added to this revised edition to emphasize that the Legal Representation Plan must provide for specialized training of all members of the defense team involved in the representation of capital defendants. Subsections B and C are based on the original edition of the Guideline. This revised edition of the Guideline has been amended to emphasize that qualified training programs must be “comprehensive” in scope. Thus the eleven areas of training set forth in Subsection B are new and are intended to indicate the broad range of topics that must be covered in order for an initial training program to meet minimum requirements. The requirement of participation in a continuing legal education program every two years is also a minimum; many capital defense counsel have discovered that they must attend training programs more frequently in order to provide effective legal representation.
Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.5 (3d ed. 1992) ("Training and Professional Development").


NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, MODEL PUBLIC DEFENDER ACT, Section 10 (1970) ("Office of Defender General").


NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.7 (1976) ("Training Staff Attorneys in a Defender System").

NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.8 (1976) ("Training Assigned Counsel").

Commentary

As indicated in the commentary to Guideline 1.1, providing high quality legal representation in capital cases requires unique skills. Accordingly, the standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case. Such training is not to be confined to instruction in the substantive law and procedure applicable to legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.

Once an attorney has been deemed qualified to accept appointments in capital cases, the standard of practice requires counsel to regularly receive formal training in order to keep abreast of the field. Continuing legal education, which is required by many state bars as a matter of course for all attorneys, is critically important to capital

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129. See, e.g., New York Capital Defender Office, Minimum Standards for Lead Counsel and Associate Counsel in Capital Cases, available at http://www.nycdo.org/35b/35b-std.html (requiring that applicants submit “a description of specialized criminal defense training programs regularly attended, such as the NITA, the National Criminal Defense College, or bar association criminal practice programs” and specifying that “[a]n attorney shall not be eligible to be appointed as lead counsel or associate counsel in a capital case unless the Capital Defender Office shall certify that the attorney satisfactorily has completed a basic capital training program prescribed by the Capital Defender Office” or qualifies for an Interim Certification because she is otherwise qualified and is “in active pursuit of such training”).

130. As one authority has noted, capital defense counsel must exhibit “constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.” Vick, supra note 4, at 358; see also Taylor-Thompson, supra note 37, at 1510.
defense attorneys. As the commentary to Guideline 1.1 indicates, they must not only have mastery of current developments in law, forensics, and related areas, but also be able to anticipate future ones.131

In recognition of the central role that ongoing training plays in the provision of effective capital defense representation, a number of professional organizations, including the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the Habeas Assistance Project, the NAACP Legal Defense and Education Fund, Inc., the office of the Kentucky Public Advocate, and the Association of the Bar of the City of New York, have regularly devoted significant efforts to providing educational programs of the quality contemplated by this Guideline.

Many such organizations also provide resources, such as newsletters, that counsel should utilize to learn of new developments and to benefit from the collective wisdom and experience of the capital defense bar.

131. See supra text accompanying note 28.
GUIDELINE 9.1—FUNDING AND COMPENSATION

A. The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.

B. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

2. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.

3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

C. 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 by those who assist counsel with the litigation of death penalty cases.

1. Investigators employed by defender organizations should be compensated according
to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.

2. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.

3. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

D. Additional compensation should be provided in unusually protracted or extraordinary cases.

E. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

History of Guideline

This Guideline was Guideline 10.1 in the original edition. The express disapproval of flat or fixed fee compensation provisions and statutory fee maximums is new to this edition. The provision is in keeping with Guideline 10.1(A) of the original edition, which mandates that counsel be fully compensated at a reasonable hourly rate of compensation, and follows the commentary to Standard 5-2.4 of the ABA Standards for Criminal Justice: Providing Defense Services, which observes that “[t]he possible effect of such rates is to discourage lawyers from doing more than what is minimally necessary to qualify for the flat payment.” Subsection B(2) is new to the Guideline and has been added to provide for compensation of attorneys employed by defender organizations. Subsection B(3) is based on the original edition of the Guideline, but a provision has been added indicating that there should be no distinction between the hourly rates of compensation for services
performed in or out of court. Subsection C is new to this edition and provides for compensation of the other members of the defense team. Subsection D is new to this edition. Subsection E is based on the original edition.

**Related Standards**


ABA STANDARDS FOR CRIMINAL JUSTICE: POSTCONVICTION REMEDIES STANDARD 22-4.3 (2d ed. 1980) (“Appointment of Counsel”).

NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.1 (“Assigned Counsel Fees”).

NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.2 (“Method of Compensation”).

NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.3 (“Payment of Expenses”).


Commentary

In order to fulfill its constitutional obligation to provide effective legal representation for poor people charged with crimes,\footnote{132. See generally Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).} “[g]overnment has the responsibility to fund the full cost of quality legal representation.”\footnote{133. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.6 (3d ed. 1992).} This means that it must “firmly and unhesitatingly resolve any conflicts between the treasury and the fundamental constitutional rights in favor of the latter.”\footnote{134. Pruett v. State, 574 So. 2d 1342, 1354 n.17 (Miss. 1990) (quoting Makemson v. Martin County, 491 So. 2d 1109, 1113 (Fla. 1986)).}

As Subsection A of this Guideline emphasizes, each jurisdiction is responsible for paying not just the direct compensation of members of
the defense team, but also the costs involved in meeting the requirements of these Guidelines for high quality legal representation (e.g., Guideline 4.1, Guideline 8.1).

As a rough benchmark, jurisdictions should provide funding for defender services that maintains parity between the defense and the prosecution with respect to workload, salaries, and resources necessary to provide quality legal representation (including benefits, technology, facilities, legal research, support staff, paralegals, investigators, mitigation specialists, and access to forensic services and experts). In doing so, jurisdictions must be mindful that the prosecution has access at no cost to many services for which the defense must pay. A prosecution office will not only benefit from the formal resources of its jurisdiction (e.g., a state crime laboratory) and co-operating jurisdictions (e.g., the FBI), but from many informal resources as well. For example, a prosecutor seeking to locate a witness in a distant city can frequently enlist the assistance of a local police department; defense counsel will have to pay to send out an investigator. Yet funding for defense services usually lags far behind prosecution funding.\(^{135}\)

In particular, compensation of attorneys for death penalty representation remains notoriously inadequate.\(^{136}\) As Justice Blackmun observed in 1994:

135. Studies indicate that funding for prosecution is, on the average, three times greater than funding that is provided for defense services at both the state and federal levels. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.6 cmt. (3d ed. 1992) (footnote omitted). The ABA has recently reaffirmed its commitment to the principle of equal funding, calling for a public defense system in which:

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.


136. See generally Ruth E. Friedman & Bryan A. Stevenson, Solving Alabama’s Capital Defense Problems: It’s a Dollars and Sense Thing, 44 ALA. L. REV. 1 (1992); Anthony Paduano &
Compensation for attorneys representing indigent capital defendants often is perversely low. Although a properly conducted capital trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings, many States severely limit the compensation paid for capital defense. . . .

As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client’s defense. 137

Low fees make it economically unattractive for competent attorneys to seek assignments and to expend the time and effort a case may require. A 1993 study of capital representation in Texas, for example, showed that “more and more experienced private criminal attorneys are refusing to accept court appointments in capital cases because of the time involved, the substantial infringement on their private practices, the lack of compensation for counsel fees and experts/expenses and the enormous pressure that they feel in handling these cases.” 138 Similarly, a survey of Mississippi attorneys appointed to represent indigent defendants in capital cases found that eighty-two percent would either refuse or be very reluctant to accept another appointment because of financial considerations. 139 A 1998 study of federal death penalty cases reported that “[a]lthough the hourly rates of compensation in federal capital cases are higher than those paid in non-capital federal criminal cases, they are quite low in comparison to hourly rates for lawyers generally, and to the imputed hourly cost of office overhead.” 140

While compensation is generally inadequate for representation at trial, it is even worse—and indeed, in a number of jurisdictions, nonexistent—for representation in state collateral proceedings. 141


139. See Friedman & Stevenson, supra note 136, at 31 n.148.

140. Federal Death Penalty Cases, supra note 91, at 28 (footnotes omitted).

141. For a survey of state practices regarding appointment and compensation of post-conviction counsel, see generally Hammel, supra note 47, and The Spangenberg Group, ABA Postconviction Death Penalty Representation Project, An Updated Analysis of the
Thousands of attorney hours are required to represent a death-sentenced prisoner effectively in such cases. Not surprisingly, few attorneys are willing to take on this responsibility for negligible compensation. As a result, a substantial and growing number of condemned inmates who have completed direct review are without legal representation.

It is such inmates—and the justice system—rather than lawyers (who can always move to more lucrative fields) that are victimized when jurisdictions fail to fulfill their financial responsibilities. What is “most important [is that] the quality of the representation often suffers when adequate compensation for counsel is not available.” This is not a merely theoretical concern. It is demonstrably the case that, by discouraging more experienced criminal defense lawyers from accepting appointments in capital cases, inadequate compensation has often left capital defense representation to inexperienced or outright incompetent counsel. A series of studies in several death penalty states have found that appointed counsel in death penalty cases have been subject to professional disciplinary action at significantly higher rates than other lawyers.

These realities underlie the mandate of this guideline that members of the death penalty defense team be fully compensated at a rate commensurate with the provision of high quality legal representation. The Guideline’s strong disapproval of flat fees, statutory caps, and other arbitrary limitations on attorney compensation is based upon the adverse effect such schemes have upon effective representation. Rather, compensation should be based on the number of hours expended plus the effort, efficiency, and skill of counsel. When assigned counsel is paid

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142. As discussed supra in the text accompanying note 119, a 1998 study of time and expenses required in Florida capital post-conviction cases concluded that on average, over 3,300 lawyer hours are required to represent a death-sentenced prisoner in Florida’s post-conviction proceedings. The Spangenberg Group, supra note 119, at 16.

143. See Celestine Richards McConville, The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel, 2003 Wisc. L. Rev. 31, 35 n.22; Smith & Starns, supra note 47, at 106-19 (discussing state provisions for appointment of counsel and states that fail to appoint or compensate counsel); infra note 334.


145. See Vick, supra note 4, at 398 (summarizing studies); see also Kirchmeier, supra note 29, at 455-60 (listing cases of appointed capital defense counsel who were intoxicated, abusing drugs, or mentally ill).

146. See Vick, supra note 4, at 399-400.

a predetermined fee for the case regardless of the number of hours of work actually demanded by the representation, there is an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee.\textsuperscript{148}

Moreover, any compensation system that fails to reflect the extraordinary responsibilities and commitment required of all members of the defense team in death penalty cases,\textsuperscript{149} that does not provide for extra payments when unusually burdensome representation is provided, or that does not provide for the periodic payment of fees to all members of the defense team will not succeed in obtaining the high quality legal representation required by these Guidelines.

For better or worse, a system for the provision of defense services in capital cases will get what it pays for.\textsuperscript{150}

\begin{footnotes}
\footnote{148. \textit{See}, \textit{e.g.}, Bailey v. State, 424 S.E.2d 503, 506 (S.C. 1992). The court stated: [I]t would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated. The indigent client, of course, will be the one to suffer the consequences if the balancing job is not tilted in his favor. \textit{Id.} (quoting Okeechobee County v. Jennings, 473 So. 2d 1314, 1318 (Fla. Dist. Ct. App. 1985), \textit{quashed sub nom.} Dennis v. Okeechobee County, 491 So. 2d 1115 (Fla. 1986)) (emphasis omitted).
\footnote{149. \textit{See supra} text accompanying notes 1-8.
\footnote{150. \textit{Cf.} Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992) (granting habeas corpus relief because "Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for").}

\end{footnotes}
GUIDELINE 10.1—ESTABLISHMENT OF PERFORMANCE STANDARDS

A. The Responsible Agency should establish standards of performance for all counsel in death penalty cases.

B. The standards of performance should be formulated so as to insure that all counsel provide high quality legal representation in capital cases in accordance with these Guidelines. The Responsible Agency should refer to the standards when assessing the qualifications or performance of counsel.

C. The standards of performance should include, but not be limited to, the specific standards set out in these Guidelines.

History of Guideline

This Guideline is former Guideline 11.1 with only stylistic revisions.

Related Standards


Commentary

The Structure of Guideline 10

Guideline 10 mandates the establishment of performance standards designed to insure the provision of high quality legal representation. Compliance with Guideline 10 may therefore be relevant to a determination as to whether a jurisdiction meets the requirements of Chapter 154 of the AEDPA, which provides governments with procedural advantages if they choose to establish effectual mechanisms “for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent [capital] prisoners[, and] . . . provide standards of competency for the appointment of such counsel.”

Guideline 10.1 directs the Responsible Agency to promulgate performance standards. Guidelines 10.2–10.15.1 contain specific standards that should be included in any set of performance standards. They do not constitute a complete set of performance standards, however. They address only those aspects of defense representation in which death penalty cases differ from other types of criminal cases152 and omit those that are applicable to the defense of criminal cases generally. Such standards should, however, also be included in the set established by the Responsible Agency, with the understanding that in capital cases the acceptable level of adherence to those standards must be higher than in non-capital ones. “[D]eath is . . . different”153 and, as discussed in the commentary to Guideline 1.1, death penalty cases have become so specialized that defense counsel in such cases have duties and functions definably different from those of counsel in ordinary criminal cases. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, become

151. 28 U.S.C. § 2261(b) (2000). The standards of other Guidelines, such as Guideline 2.1 (“Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases”), Guideline 5.1 (“Qualifications of Defense Counsel”), Guideline 7.1 (“Monitoring; Removal”), and Guideline 9.1 (“Funding and Compensation”), should also guide the determination as to whether a jurisdiction has “opted in” to Chapter 154.

152. For a general description of these, see supra commentary to Guideline 1.1. Guideline 10 should be read against the background provided by that commentary.

educated regarding a wide range of mental health issues and scientific technologies, and be able to develop strategies for applying them in the pressure-filled environment of high-stakes, complex litigation. The level of attorney competence that may be tolerable in non-capital cases can be fatally inadequate in capital ones. The standards of performance established under this Guideline should accordingly insure that all aspects of the representation conform to the special standard of practice applicable to capital cases.

154. For general standards regarding the performance of criminal defense counsel, see ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4, in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); INSTITUTE OF JUDICIAL ADMIN./ABA JUVENILE JUSTICE STANDARDS ANNOTATED, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1980); and NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1997).

155. For example, as discussed in the commentary to Guideline 1.1, the current Supreme Court standard for effective assistance of counsel, articulated in Strickland v. Washington, 466 U.S. 668, 687 (1984), requires the defendant to show that counsel’s performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence. The application of this standard to capital cases had long been in an entirely unsatisfactory state, as many commentators observed. “Myriad cases in which defendants have been executed confirm that Strickland’s minimal standard for attorney competence in capital cases is a woeful failure. Demonstrable errors by counsel, though falling short of ineffective assistance, repeatedly have been shown to have had fatal consequences.” Randall Coyne & Lyn Entzeroth, Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions, 4 GEO. J. ON FIGHTING POVERTY 3, 18 (1996). In case after case, attorneys who failed to present any evidence in mitigation of the death penalty, or who presented a bare minimum of such evidence, were found to satisfy Strickland, see, e.g., Chandler v. United States, 218 F.3d 1305, 1319, 1327 (11th Cir. 2000) (en banc), cert. denied, 531 U.S. 1204 (2001), even though “the failure to present mitigating evidence is a virtual invitation to impose the death penalty.” White, supra note 3, at 341.

There is reason to believe that the Supreme Court has heard these concerns. In no case, capital or non-capital, had the Court ever held counsel to have performed ineffectively under Strickland until it determined in Williams v. Taylor, 529 U.S. 362, 395-96 (2000), that the lawyers in a capital case had been deficient in failing to conduct a thorough investigation of their client’s background for sentencing purposes. The Court followed up with Wiggins v. Smith, 123 S. Ct. 2527, 2536-37 (2003), which, relying upon the first edition of these Guidelines as a guide to reasonable professional performance, also held counsel in a capital case to have provided ineffective assistance by failing to conduct a complete mitigation investigation. The effect may be that, at least in capital cases, the lower courts will have to re-interpret Strickland as imposing considerably more stringent standards than had hitherto been assumed. See Marcia Coyle, New Standards in Death Cases: High Court Rules on Effective Counsel, NAT’L L. J., July 14, 2003, at 1 (“The promise of Williams—to put teeth into the Strickland standards—has not been fulfilled, according to some scholars and litigators. But Wiggins, they added, will not be so easily ignored by lower courts.”). This view finds support in the fact that Justice O’Connor wrote both Strickland and Wiggins, reinforcing the point that the former will have to be read in light of the latter.

156. The standards established by the Responsible Agency should clearly state that performance in the capital context should be measured with reference to the special expertise required in capital cases. See, e.g., State v. Davis, 561 A.2d 1082, 1089 (N.J. 1989) (stating that meeting the Strickland standard in capital cases requires “capital competence”); see generally
Consistent with the overall purpose of these Guidelines, the specific standards of Guidelines 10.2-15.2 are intended to describe appropriate professional conduct. Compliance with those standards may therefore be relevant in the judicial evaluation of the performance of defense counsel to determine the validity of a capital conviction or death sentence. They should in any event be utilized by the Responsible Agency in determining the eligibility of counsel for appointment or reappointment to capital cases and when monitoring the performance of counsel.

See supra Guidelines 5.1 and 7.1, and accompanying commentary.
GUIDELINE 10.2—APPLICABILITY OF PERFORMANCE STANDARDS

Counsel should provide high quality legal representation in accordance with these Guidelines for so long as the jurisdiction is legally entitled to seek the death penalty.

History of Guideline

This Guideline is based on Guideline 11.3 of the original edition and has been revised for consistency with Guideline 1.1.

Related Standards


NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.6 (1989) (“Duration and Continuity of Representation”).


Commentary

The Supreme Court has stated that the “existence [of a death penalty statute] on the statute books provide[s] fair warning as to the
degree of culpability which the State ascribe[s] to the act of murder.” 160

In accordance with Guideline 1.1 (B), once a client is detained under circumstances in which the death penalty is legally possible, counsel should proceed as if it will be sought. 161

As described supra in the text accompanying footnotes 13-17, early investigation to determine weaknesses in the State’s case and uncover mitigating evidence is a necessity, and should not be put off in the hope that the death penalty will not be requested, or that the request will be dropped at a later point.

Moreover, early investigation may uncover mitigating circumstances or other information that will convince the prosecutor to forgo pursuit of a death sentence. 162

Jurisdictions vary in whether the defense must be formally notified as to whether the prosecution will seek the death penalty. 163 If required

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161. In a number of cases, courts have found no bar to the prosecution pursuing a death sentence, despite belated notice to the defense. See, e.g., State v. Lee, 917 P.2d 692, 698-99 (Ariz. 1996) (affirming death sentence where state filed its written notice eighty-seven days late under state law, because defendant had actual notice that State intended to pursue death penalty); People v. Dist. Court, Gilpin County, 825 P.2d 1000, 1002-03 (Colo. 1992) (concluding defendant received adequate notice of intent to seek death penalty where prosecution never stated death penalty would not be sought and notice was filed forty-one days before trial, even though discovery had been completed and date for filing pretrial motions had passed).

162. See, e.g., State v. Pirtle, 904 P.2d 245, 254 (Wash. 1995) (noting that under state law, “[b]efore the death penalty can be sought, there must be ‘reason to believe that there are not sufficient mitigating circumstances to merit leniency’”) (quoting State v. Campbell, 691 P.2d 929, 942 (Wash. 1984)); U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-10.030 (2001) [hereinafter UNITED STATES ATTORNEYS’ MANUAL] ("In any case in which a United States Attorney’s Office is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, to the United States Attorney for consideration."). "Input from the defendant as to mitigating factors is normally desirable, because the subjective factors are better known to the defendant." State v. Pirtle, 904 P.2d at 254 (citation omitted); see also infra text accompanying notes 244-45.

163 Some jurisdictions require the defense be provided formal notice of the government’s intent to seek the death penalty well before the guilt/innocence phase. See, e.g., ARIZ. R. CRIM. P. 15.1(g)(1) (requiring a prosecutor to provide the defendant notice of intent to seek the death penalty “no later than 60 days after the arraignment in superior court”); MD. CODE ANN., CRIM. LAW § 2-202(a) (2002) (providing that: A defendant found guilty of murder in the first degree may be sentenced to death only if:
(1) At least 30 days before trial, the State gave written notice to the defendant of: (i) The State's intention to seek a sentence of death; and (ii) Each aggravating circumstance on which the State intends to rely);
NEV. SUP. CT. R. 250(4)(c) (“No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance.”); N.Y. CRIM. PROC. LAW § 250.40(1)-(2) (McKinney 2002) (stating that:
notice has not been given, counsel is under no duty to invite a death penalty prosecution. While preparing for a capital case when notice has not been given, counsel should also prepare to challenge any prosecution efforts that should be barred for failure to give notice.\textsuperscript{164}

Counsel must continue to treat the case as capital “until the imposition of the death penalty is no longer a legal possibility.”\textsuperscript{165}

\textbf{A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless . . . the people file with the court and serve upon the defendant a notice of intent to seek the death penalty . . . within one hundred twenty days of the defendant’s arraignment upon an indictment charging the defendant with murder.};\textsuperscript{166}

\textbf{WASH. REV. CODE ANN. § 10.95.040(2)-(3) (West 2002) (stating the state is precluded from seeking the death penalty unless written notice is served on the defendant or counsel “within thirty days after the defendant’s arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice”); UNITED STATES ATTORNEYS’ MANUAL, supra note 162, § 9-10.030 (“If the United States Attorney decides to request approval to seek the death penalty, the United States Attorney’s Office should inform counsel for the defendant.”).}

Other jurisdictions do not require notice. See, e.g., Dist. Court, Gilpin County, 825 P.2d at 1002 (“There is no Colorado statute requiring the prosecutor to give notice of intent to seek the death penalty.”); Sireci v. State, 399 So. 2d. 964, 970 (Fla. 1981) (“When one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony punishable by a maximum sentence of death.”); Williams v. State, 445 So. 2d 798, 804 (Miss. 1984) (“Anytime an individual is charged with murder, he is put on notice that the death penalty may result.”). In jurisdictions where the prosecutor is not statutorily required to give notice of the intent to seek the death penalty, due process nonetheless requires that the defendant have adequate notice. See Lankford v. Idaho, 500 U.S. 110, 119-22 (1991) (holding due process was violated where the trial court imposed a death sentence after the prosecution stated it would not recommend a death sentence and the trial judge was silent following the state’s decision).

\textsuperscript{164} See, e.g., Holmberg v. De Leon, 938 P.2d 1110, 1111 (Ariz. 1997) (granting defense motion to strike State’s notice of intent to seek death penalty on ground that it violated state court rule requiring notice within 30 days of arraignment); State v. Second Judicial Dist. Court, 11 P.3d 1209, 1211, 1215 (Nev. 2000) (concluding trial court acted within its discretion in denying prosecution motion for leave to file untimely notice of intent to seek death penalty; defense opposed motion). Counsel should be mindful of the possibility that it may be appropriate to pursue the challenge through some collateral proceeding (e.g, application for a writ of prohibition). See infra text accompanying note 230.

\textsuperscript{165} History of Guideline 1.1, supra.
GUIDELINE 10.3—OBLIGATIONS OF COUNSEL RESPECTING WORKLOAD

Counsel representing clients 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 Guidelines.

History of Guideline

This Guideline is based on Guideline 6.1 of the original edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 (3d ed. 1992) (“Workload”).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.3 (“Delays; Punctuality; Workload”) in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).


NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.3 (1976) (“Elimination of Excessive Caseloads”).

Commentary

It is each attorney’s duty under the Model Rules of Professional Conduct neither to accept employment when it would jeopardize the lawyer’s ability to render competent representation nor to handle cases without “adequate preparation.” Applying these professional norms to the special context of defense representation in death penalty cases, this Guideline mandates that attorneys maintain a workload consistent with the provision of high quality legal representation, bearing in mind the considerations discussed in the commentary to Guideline 6.1

Once having agreed to represent a capital client, counsel should control their overall workload so as to be able to do so effectively. Counsel who determine, in the exercise of best professional judgment, that accepting new cases or continuing with old ones will lead to providing capital defense representation of less than high quality should take such steps as may be appropriate to reduce pending or projected caseloads, such as seeking assistance from the Responsible Agency, refusing further cases and moving to withdraw from existing cases.

167. Id. at R. 1.1 cmt. 5; cf. David J. Williams, Letter to the Editor, LA. B.J., Aug./Sep. 2002, at 86 (Letter from counsel to Leslie Dale Martin, who was executed on May 10, 2002, stating that “the caseload of the lead counsel was such that he only had time to read through the file once before trial. . . . This case cost me most of the respect that I formerly had for the criminal justice system”).
In short, an attorney whose workload threatens to cause a breach of his or her obligations under these Guidelines has a duty to take corrective action. Counsel in that situation may not simply attempt to muddle through.
GUIDELINE 10.4—THE DEFENSE TEAM

A. When it is responsible for designating counsel to defend a capital case, the Responsible Agency should designate a lead counsel and one or more associate counsel. The Responsible Agency should ordinarily solicit the views of lead counsel before designating associate counsel.

B. Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.

1. Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Guidelines, unless:

   a. The Guideline specifically imposes the duty on “lead counsel,” or
   
   b. The Guideline specifically imposes the duty on “all counsel” or “all members of the defense team.”

C. As soon as possible after designation, lead counsel should assemble a defense team by:

1. Consulting with the Responsible Agency regarding the number and identity of the associate counsel;

2. Subject to standards of the Responsible Agency that are in accord with these Guidelines and in consultation with associate counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:
a. at least one mitigation specialist and one fact investigator;

b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and

c. any other members needed to provide high quality legal representation.

D. Counsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.

History of Guideline

This Guideline is new. It supplements Guideline 4.1.

Related Standards

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 (1986) (“Roles of Mental Health and Mental Retardation Professionals in the Criminal Process”).

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-5.7 (1986) (“Evaluation and Adjudication of Competence to Be Executed; Stay of Execution; Restoration of Competence”).


Commentary

As reflected in Guideline 4.1 and the accompanying commentary, the provision of high quality legal representation in capital cases requires a team approach that combines the different skills, experience, and perspectives of several disciplines.168 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 to skilled assistants and focus on the legal issues in the case,169 improves the relationship with the client and his family by providing more avenues of communication, and provides more support to individual team members.170

This Guideline contemplates that the Responsible Agency will ordinarily171 begin by designating lead counsel for a particular case and then, in consultation with that counsel, designate one or more associate counsel.172 As described in Subsection B, the role of lead counsel is to direct the work of the defense team in such a way that, overall, it provides high quality legal representation in accordance with these Guidelines and professional standards. Accordingly, lead counsel is free

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168. See TEXAS DEATH PENALTY MITIGATION MANUAL, supra note 105.
170. See TEXAS DEATH PENALTY MITIGATION MANUAL, supra note 105.
171. This term is meant to accommodate the variety of exigent circumstances under which the provision of high quality legal representation might require a different procedure. For example, the client may be so situated that the professionally responsible course is to have a relatively junior attorney deal with the immediate situation, designating lead counsel subsequently. Alternatively, the client might insist on having a particular retained or pro bono attorney involved in the representation.
172. Cf. N.Y. JUD. LAW § 35-b(2) (McKinney 2002) (“With respect to counsel at trial and at a separate sentencing proceeding, the court shall appoint two attorneys, one to be designated ‘lead’ counsel and the other to be designated ‘associate’ counsel.”); CAL. R. CT. R. 4.117(c)(1) (effective Jan. 1, 2003) (“If the court appoints more than one attorney, one must be designated lead counsel . . . and at least one other must be designated associate counsel . . . .”). Because the Responsible Agency has a continuing duty to monitor the performance of the defense team to insure that it is providing high quality legal representation at every stage of the case, see supra Guideline 7.1, the Responsible Agency may appropriately change these designations to reflect developments in the case (e.g., it moves to a new post-conviction stage, or lead counsel becomes ill).
to allocate the duties imposed by these Guidelines to appropriate members of the defense team, with two exceptions: (1) duties (such as the one contained in Subsection (C)) that are specifically imposed on “lead counsel,” and (2) duties (such as the one contained in Guideline 10.13) that are specifically imposed on “all counsel” or “all members of the defense team.”

After designation, lead counsel should assemble the rest of the defense team. The Responsible Agency should give lead counsel maximum flexibility in this regard. For example, counsel should structure the team in such a way as to distinguish between experts who will play a “consulting” role, serving as part of the defense team covered by the attorney-client privilege and work product doctrine, and experts who will be called to testify, thereby waiving such protections. This may well require, in the words of the Guideline, “appropriate contractual arrangements” (Subsection C(2)).

However, Subsection C(2) provides that the Responsible Agency may impose standards on the composition of the defense team that are in accord with these Guidelines. Examples would include a requirement that a staff attorney of a defender organization utilize in-house resources in the first instance, that compensation levels be limited to levels consistent with Guideline 9.1(C), or that non-attorneys meet appropriate professional qualifications.

The defense team should include at least two attorneys, a fact investigator, and a mitigation specialist. The roles of these individuals are more fully described in the commentaries to Guideline 1.1 and Guideline 4.1. In addition, as also described in the commentary to Guideline 4.1, the team must have a member (who may be one of the foregoing or an additional person) with the necessary qualifications to screen individuals (the client in the first instance, but possibly family members as the mitigation investigation progresses) for mental or psychological disorders or defects and to recommend such further investigation of the subject as may seem appropriate.

The team described in the foregoing paragraph is the minimum. In most cases, at least as trial approaches, the provision of high quality

173. See James J. Clark et al., The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense, in KY. DEPT OF PUB. ADVOC., MENTAL HEALTH & EXPERTS MANUAL ch. 8 (6th ed. 2002), available at http://dpa.state.ky.us/library/manuals/mental/ch08.html; ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 & cmt. (1989) (mental health and mental retardation experts serving as consultants are agents of the attorney, subject to the attorney-client privilege and the work-product doctrine); accord id. Standard 7-3.3 & cmt; see also supra Guideline 4.1(B)(2).
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. As discussed in the commentary to Guideline 4.1, because mental health issues pervade capital cases, a psychologist or other mental health expert may well be a needed member of the defense team. As the commentary to Guideline 4.1 also discusses, additional expert assistance specific to the case will almost always be necessary for an effective defense.

At every stage of the case, lead counsel is responsible, in the exercise of sound professional judgment, for determining what resources are needed and for demanding that the jurisdiction provide them. Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources, it is counsel’s obligation to insist upon making such requests ex parte and in camera.

If requests for the resources needed to provide high quality legal representation at any stage of the proceedings are denied, counsel should make a full record to preserve the issue for further review.

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174. Cf. Freedman, supra note 52, at 1089 n.* (noting that each of six primary attorneys and eleven other named professionals were “critical to saving Mr. Washington’s life.”).

175. See Guideline 4.1(B)(2); see generally Bittaker v. Woodford, 311 F.3d 715 (9th Cir. 2003).

176. Many jurisdictions provide, by statute or case law, that requests for expert assistance may be made ex parte so that indigent defendants are not required to divulge confidential work product or strategy to the prosecution. See, e.g., 18 U.S.C. § 3006A(a)(1) (2000) (providing for ex parte hearings for requests for investigative, expert, or other services for indigent defendants); CAL. PENAL CODE § 987.9(a) (West Supp. 2002); KAN. STAT. ANN. § 22-4508 (1995); MINN. STAT. ANN. § 611.21 (West Supp. 2002); NEV. REV. STAT. ANN. § 7.135 (Michie 1998); N.Y. COUNTY LAW § 722-c (McKinney Supp. 2002); S.C. CODE ANN. § 16-3-26(C)(1) (Law. Co-op. 2001); TENN. CODE ANN. § 40-14-207(b) (1997); Ex parte Moody, 684 So. 2d 114, 120 (Ala. 1996); Brooks v. State, 385 S.E.2d 81, 84 (Ga. 1989) (holding that while state could be heard on the issue of indigency, showing of need for expert should be made ex parte); McGregor v. State, 733 P.2d 416, 416 (Okla. Crim. App. 1987) (stating that “to allow participation, or even presence, by the State would thwart the Supreme Court’s attempt to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants”); Ex parte Lexington County, 442 S.E.2d 589, 594 (S.C. 1994) (equal protection concerns require hearing to be both ex parte and in camera); State v. Barnett, 909 S.W.2d 423, 429 (Tenn. 1995); Williams v. State, 958 S.W.2d 186, 192-94 (Tex. Crim. App. 1997).

GUIDELINE 10.5—RELATIONSHIP WITH THE CLIENT

A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.

B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel’s entry into the case.

2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client’s rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

3. Counsel at all stages of the case should re-advice the client and the government regarding these matters as appropriate.

C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;

2. current or potential legal issues;

3. the development of a defense theory;

4. presentation of the defense case;
5. potential agreed-upon dispositions of the case;

6. litigation deadlines and the projected schedule of case-related events; and

7. relevant aspects of the client’s relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists).

History of Guideline

This Guideline collects, and slightly expands upon, material that was found in Guidelines 11.4.2, 11.6.1, and 11.8.3 of the original edition. The major revisions make this standard apply to all stages of a capital case and note expressly counsel’s obligation to discuss potential dispositions of the case with the client.

Related Standards


ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-5.2 (“Control and Direction of the Case”), in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).
Commentary

The Problem

Immediate contact with the client is necessary not only to gain information needed to secure evidence and crucial witnesses, but also to try to prevent uncounseled confessions or admissions and to begin to establish a relationship of trust with the client.

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.”178 There will also often be significant cultural

and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.

Counsel’s Duty

Although, as described supra in the text accompanying notes 103-07, ongoing communication by non-attorney members of the defense team is important, it does not discharge the obligation of counsel at every stage of the case to keep the client informed of developments and progress in the case, and to consult with the client on strategic and tactical matters. Some decisions require the client’s knowledge and agreement;179 others, which may be made by counsel, should nonetheless be fully discussed with the client beforehand.

Establishing a relationship of trust with the client is essential both to overcome the client’s natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel’s advice on important matters such as whether to testify and the advisability of a plea.180 Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls. It is also essential to develop a relationship of trust with the client’s family or others on whom the client relies for support and advice.

179. See, e.g., Nixon v. Singletary, 758 So. 2d 618, 624-25 (Fla. 2000) (ineffective assistance for counsel to fail to obtain client’s explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing); People v. Hattery, 488 N.E.2d 513, 519 (Ill. 1985) (same).

180. See ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-5.2 & cmt., in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); see also Kevin M. Doyle, Heart of the Deal: Ten Suggestions for Plea Bargaining, THE CHAMPION, Nov. 1999, at 68 (counsel should not expect client to accept plea bargain unless opinion is founded on experience and leg work investigating the case); White, supra note 3, at 371, 374 (thorough investigation and relationship of trust key to persuading client to accept appropriate plea offer).
Often, so-called “difficult” clients are the consequence of bad lawyering—either in the past or present.\textsuperscript{181} Simply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation.\textsuperscript{182}

Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation. Even apart from the need to obtain vital information,\textsuperscript{183} the lawyer must understand the client and his life history.\textsuperscript{184} To communicate effectively on the client’s behalf in negotiating a plea, addressing a jury, arguing to a post-conviction court, or urging clemency, counsel must be able to humanize the defendant. That cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him.\textsuperscript{185}

**Counsel’s Duties Respecting Uncooperative Clients**

Some clients will initially insist that they want to be executed—as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to

\textsuperscript{181} See White, supra note 3, at 338 (“Often, capital defendants have had bad prior experiences with appointed attorneys, leading them to view such attorneys as ‘part of the system’ rather than advocates who will represent their interests. Appointed capital defense attorneys sometimes exacerbate this perception by harshly criticizing their clients’ [sic] conduct or making it clear that they are reluctant to represent them. A capital defendant who experiences, or previously has experienced, these kinds of judgments understandably will be reluctant to trust his attorney.”) (footnotes omitted); infra note 313.
\textsuperscript{182} A lawyer can also frequently earn a client’s trust by assisting him with problems he encounters in prison, or otherwise demonstrating concern for his well being and a willingness to advocate for him. See id.; Lee Norton, Mitigation Investigation, in FLORIDA PUBLIC DEFENDER ASS’N, DEFENDING A CAPITAL CASE IN FLORIDA 25 (2001). Accordingly, such advocacy is an appropriate part of the role of defense counsel in a capital case. Indeed, a lawyer who displays a greater concern with habeas corpus doctrine than with recovering the radio that prison authorities have confiscated from the client is unlikely to develop the sort of relationship that will lead to a satisfactory legal outcome.
\textsuperscript{183} One important example is the fact that the client is mentally retarded—a fact that the client may conceal with great skill, see, e.g., James W. Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 430-31 (1985), but one which counsel absolutely must know. See Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that mentally retarded defendants may not constitutionally be executed). The issue of mental illness presents a very similar set of challenges.
\textsuperscript{184} See Goodpaster, supra note 3, at 321.
\textsuperscript{185} See Norton, supra note 182, at 5; White, supra note 3, at 375 (jury will be less likely to empathize with defendant if it does “not perceive a bond between the defendant and his attorney”).
simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide. Counsel should initially try to identify the source of the client’s hopelessness. Counsel should consult lawyers, clergy or others who have worked with similarly situated death row inmates. Counsel should try to obtain treatment for the client’s mental and/or emotional problems, which may become worse over time. One or more members of the defense team should always be available to talk to the client; members of the client’s family, friends, or clergy might also be enlisted to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had), may also be a valuable source of information about the possibility of making a constructive life in prison. A client who insists on his innocence should be reminded that a waiver of mitigation will not persuade an appellate court of his innocence, and securing a life sentence may bar the state from seeking death in the event of a new trial.

Counsel in any event should be familiar enough with the client’s mental condition to make a reasoned decision—fully documented, for the benefit of actors at later stages of the case—whether to assert the position that the client is not competent to waive further proceedings.

The Temporal Scope of Counsel’s Duties

The obligations imposed on counsel by this Guideline apply to all stages of the case. Thus, post-conviction counsel, from direct appeal through clemency, must not only consult with the client but also monitor the client’s personal condition for potential legal consequences. For example, actions by prison authorities (e.g., solitary confinement, administration of psychotropic medications) may impede the ability to present the client as a witness at a hearing or have legal implications.

186. See infra Guideline 10.7(A) and accompanying commentary; Kamen & Norton, supra note 178.
187. See Bullington v. Missouri, 451 U.S. 430, 445-46 (1981); see also Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). Moreover, if a mitigation investigator is productive, it may persuade the prosecutor to forgo the death penalty. In that event, the jury will not be “death-qualified” and the client’s chances of an acquittal will be enhanced.
189. See infra text accompanying notes 341.
190. Cf. Sell v. United States, 123 S. Ct. 2174, 2184 (2003) (holding that “the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if
and changes in the client’s mental state (e.g., as a result of the breakup of a close relationship or a worsening physical condition) may bear upon his capacity to assist counsel and, ultimately, to be executed.\^\textsuperscript{191} In any event, as already discussed, maintaining an ongoing relationship with the client minimizes the possibility that he will engage in counter-productive behavior (e.g., attempt to drop appeals, act out before a judge, confess to the media). Thus, the failure to maintain such a relationship is professionally irresponsible.\^\textsuperscript{192}
GUIDELINE 10.6—ADDITIONAL OBLIGATIONS OF COUNSEL REPRESENTING A FOREIGN NATIONAL

A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.

B. Unless predecessor counsel has already done so, counsel representing a foreign national should:

1. immediately advise the client of his or her right to communicate with the relevant consular office; and

2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client’s consular office and inform it of the client’s detention or arrest.

a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.

History of Guideline

This Guideline is new and reflects developments in law and practice since the original edition.

Related Standards


Commentary

The right to consular assistance is contained in Article 36 of the Vienna Convention on Consular Relations, a multilateral treaty ratified
unconditionally by the United States in 1969. Under its provisions, an
obligation rests on local authorities to promptly inform detained or
arrested foreign nationals of their right to communicate with their
consulate. At the request of the foreign national, local authorities must
contact the consulate and permit consular communication and access.

There is considerable evidence that American local authorities
routinely fail to comply with their obligations under the Vienna
Convention.193

Any such failure is likely to have both practical and legal
implications. As a practical matter, consuls are empowered to arrange
for their nationals’ legal representation and to provide a wide range of
other services. These include, to name a few, enlisting the diplomatic
assistance of their country to communicate with the State Department
and international and domestic tribunals (e.g., through amicus briefs),
assisting in investigations abroad, providing culturally appropriate
resources to explain the American legal system, and arranging for
contact with families and other supportive individuals. As a legal matter,
a breach of the obligations of the Vienna Convention or a bilateral
consular convention may well give rise to a claim on behalf of the client.

Enlisting the consulate’s support after obtaining the client’s consent
to do so should therefore be viewed by counsel as an important element
in defending a foreign national at any stage of a death penalty case,194

Paraguayan national’s argument for stay of execution not wholly without merit where the United
States government had submitted an amicus brief acknowledging that the Vienna Convention had
been violated); Sandra Babcock, The Role of International Law in United States Death Penalty
Cases, 15 LEIDEN J. INT. L. 367, 368 (2002) (describing violations as “widespread and
uncontested”); see also Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.A.),
Feb. 5, 2003 on Request for the Indication of Provisional Remedies) (ordering United States to
“take all measures necessary to ensure” that three Mexican nationals under state death sentences are
not executed pending resolution of Mexico’s claim “that, in the cases of 49 . . . detained Mexican
nationals . . . the United States made no attempt at any time to comply with Article 36 of the Vienna
Convention”).

Furthermore, counsel should be alert to the fact that the United States has bilateral
consular treaties with over fifty countries which may impose obligations additional to those under
the Vienna Convention. See generally U.S. Dep’t of State, The Bureau of Consular Affairs,
Consular Notification and Access, Part 5: Legal Material, at
www.travel.state.gov/notification5.html#provisions (listing treaties). One example is Article 16 of
the Consular Convention Between the United States and the United Kingdom, 3 U.S.T. 3426
(1952), which currently covers thirty-two independent countries around the world that were
formerly entities within the British Empire.

relief because it was ineffective assistance for trial counsel not to “inform Petitioner he could have
obtained financial, legal and investigative assistance from his consulate”); see also Breard v.
and counsel should also give careful consideration to the assertion of any legal rights that the client may have as a result of any failure of the government to meet its treaty obligations.

Subsection B(2)(a) recognizes, however, that cases do vary. A range of considerations may make clients reluctant to have their consular office informed of their detentions. In many circumstances, such as those in which clients simply fear embarrassment if word of their plight reaches home, the attorney should counsel the client to overcome the reluctance. But if the client is a political dissident and the likely effect of informing the consulate would be to cause adverse consequences to his relatives without obtaining any assistance with the case, the attorney might reasonably abide by the client’s direction to withhold notification. The matter should, however, be kept under continuing review, since conditions may well change over time.

Subsection A is included in the Guideline to emphasize that the determination of nationality may require some effort by counsel. A foreign government might recognize an American citizen as one of its nationals on the basis of an affiliation (e.g., one grandparent of that nationality) that would not be apparent at first glance.

Greene, 523 U.S. at 380; Madej v. Schomig, No. 98 C 1866, 2002 WL 31386480, at *2 (N.D. Ill., Oct. 22, 2002) (finding that had Polish Consulate in Chicago been notified as required by Vienna Convention, it “almost certainly” would have “provided Petitioner with an attorney who would have assisted in obtaining constitutionally effective assistance at the [capital] sentencing hearing,” rather than one who utterly failed to investigate or prepare. “With that assistance, there is a probability that the outcome of the sentencing hearing would have been different.”); Anne-Marie Slaughter, Editorial: On a Foreign Death Row, WASH. POST, Apr. 14, 1998, at A15 (noting that under the Vienna Convention on Consular Relations, “[a] citizen is entitled to the protection and advice of his or her government when caught in a foreign legal system and a foreign language [and access to] a translator, local counsel and diplomatic pressure if needed”). Foreign governments often have formal assistance programs in place for nationals facing the death penalty in the United States. See, e.g., Ana Mendieta, Mexico to Aid Nationals in U.S. Fund Will Help 45 Death Row Inmates, CHICAGO SUN-TIMES, Oct. 6, 2000, at 18 (describing creation of legal assistance program to defend the rights of Mexican nationals sentenced to death in the United States and bolster recognition of rights under the Vienna Convention); Court Blocks Execution of Canadian in Texas, WASH. POST, Dec. 10, 1998, at A47 (“Canada . . . regularly seeks clemency for Canadians sentenced to death abroad.”).
GUIDELINE 10.7—INVESTIGATION

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

History of Guideline

This Guideline is based on portions of Guideline 11.4.1 of the original edition. Changes in this Guideline clarify that counsel should conduct thorough and independent investigations relating to both guilt and penalty issues regardless of overwhelming evidence of guilt, client statements concerning the facts of the alleged crime, or client statements
that counsel should refrain from collecting or presenting evidence bearing upon guilt or penalty.

Subsection B(1) is new and describes the obligation of counsel at every stage to examine the defense provided to the client at all prior phases of the case. Subsection B(2) is also new and describes counsel’s ongoing obligation to ensure that the official record of proceedings is complete.

**Related Standards**

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION


**Commentary**

At every stage of the proceedings, counsel has a duty to investigate the case thoroughly. This duty is intensified (as are many duties) by the unique nature of the death penalty, has been emphasized by recent statutory changes, and is broadened by the bifurcation of capital trials. This Guideline outlines the scope of the investigation required by a capital case, but is not intended to be exhaustive.

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195. See Powell v. Alabama, 287 U.S. 45, 57 (1932) (describing “thorough-going investigation” as “vitally important”); ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1, 4-6.1, in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1997) (“Investigation”); see also HERTZ & LEIBMAN, supra note 28 at 489 n.41 (discussing duty described in Subsection (B) to conduct full investigation of prior proceedings); infra text and accompanying note 240 (same); infra note 351 (discussing duty of post-conviction counsel to investigate all potential claims, whether or not previously asserted).

196. See 28 U.S.C. § 2254(e)(2) (2000), which, as amended by the AEDPA, precludes certain claims from federal habeas corpus review if the petitioner “has failed to develop the factual basis” of them “in State court proceedings.” See Williams v. Taylor, 529 U.S. 420, 424 (2000) (construing this section).

197. See generally Lyon, supra note 3; Vick, supra note 4. Numerous courts have found counsel to be ineffective when they have failed to conduct an adequate investigation for sentencing. See, e.g., Wiggins v. Smith, 123 S. Ct. 2543-44 (2003) (counsel ineffective because, although they obtained some mitigation evidence, they failed to investigate client’s social history or explore the
Guilt/Innocence

As noted supra in the text accompanying notes 48-51, between 1976 and 2003 some 110 people were freed from death row in the United States on the grounds of innocence. Unfortunately, inadequate investigation by defense attorneys—as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony, flawed or false forensic evidence, and the special vulnerability of juvenile suspects—have contributed to wrongful convictions in both capital and non-capital cases. In capital cases, the mental vulnerabilities of a large portion of the client

numerous areas of mitigation listed in first edition of these guidelines); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant’s “nightmarish childhood,” borderline mental retardation, and good conduct in prison); Douglas v. Woodford, 316 F.3d 1079, 1087-89 (9th Cir. 2003) (although counsel did uncover and present some mitigating evidence, his investigation “was constitutionally inadequate” for failing to dig deeply enough into client’s social, medical, and psychological background; nor did counsel adequately prepare the penalty phase witnesses in order to present the material that he did have “to the jury in a sufficiently detailed and sympathetic manner”); Brownlee v. Haley, 306 F.3d 1043, 1070 (11th Cir. 2002) (counsel ineffective for failing to “investigate, obtain, or present any mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee’s borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse”); infra note 205.

As discussed infra note 261, another consequence of bifurcation is that counsel must investigate the possibility that the defendant was judged at either the guilt or penalty phases by one or more jurors who were not impartial.

198. See DEATH PENALTY INFORMATION CENTER, Innocence and the Death Penalty (2003), at http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (stating that, “[s]ince 1973, 111 people in 25 states have been released from death row with evidence of their innocence”) (latest release July 28, 2003); see generally infra note 231 (suggesting legal implications of these developments).


200. Recent years have seen a series of scandals involving the prosecution’s use, knowingly or unknowingly, of scientifically unsupportable or simply fabricated forensic evidence by governmental agents. See generally U.S. DEP’T JUSTICE, OFF. INSPI. GEN., THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1996) (detailing results of eighteen-month investigation into charges by whistleblower Frederic Whitehurst that FBI Laboratory mishandled “some of the most significant prosecutions in the recent history of the Department of Justice” and finding “significant instances of testimonial errors, substandard analytical work, and deficient practices”); Paul C. Giannelli, The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories, 4 VA. J. SOC. POL’Y & L. 439, 442-69 (1997) (summarizing numerous cases); supra note 51.

201. See generally BARRY SHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001).
population compound the possibilities for error. This underscores the importance of defense counsel’s duty to take seriously the possibility of the client’s innocence, to scrutinize carefully the quality of the state’s case, and to investigate and re-investigate all possible defenses.

In this regard, the elements of an appropriate investigation include the following:

1. **Charging Documents:**

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable law to identify:

   a. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   b. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

   202. See Atkins v. Virginia, 536 U.S. 304, 320-21 (2002) (“Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”); see also Jurek v. Estelle, 623 F.2d 929, 938, 941 (5th Cir. 1980) (reviewing “with that suspicion mandated by the Supreme Court” the voluntariness of a confession made by a defendant of “limited intelligence”); Freedman, supra note 52, at 1104-06 (noting characteristics of mentally retarded persons making them more likely to confess falsely).

   203. As this Guideline emphasizes, that is so even where circumstances appear overwhelmingly indicative of guilt. A recent study that includes both capital and non-capital DNA exonerations has found that in twenty-two percent of the cases the client had confessed notwithstanding his innocence. See Scheck et al., supra note 201, at 120. See Dan Morain, Blind Justice John Cherry’s Killing Left Many Victims; Was the Accused One of Them?, L.A. TIMES, July 16, 1989, View, at 6 (noting that Jerry Bigelow confessed many times, including to the media, and was eventually found to be innocent).

   204. See Henderson v. Sargent, 926 F.2d 706, 711-12 (8th Cir. 1991) (granting writ where trial counsel’s performance at guilt phase was ineffective in lacking “an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories,” and state post-conviction counsel was ineffective for failing to perform full analysis of “trial testimony and the police record [and failing to conduct] interviews with the persons who testified at trial or had firsthand knowledge of the events surrounding the murder”); People v. Johnson, 609 N.E.2d 304, 310-12 (Ill. 1993) (holding state post-conviction counsel ineffective for failing to interview witnesses that client claimed trial attorneys should have called); Steven M. Pincus, “It’s Good to be Free” An Essay About the Exoneration of Albert Burrell, 28 WM. MITCHELL L. REV. 27, 33-34 (2001).
c. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) that can be raised to attack the charging documents; and

d. defense counsel’s right to obtain information in the possession of the government, and the applicability, extent, and validity of any obligation that might arise to provide reciprocal discovery.

2. Potential Witnesses:

a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to:

   (1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;

   (2) potential alibi witnesses;

   (3) witnesses familiar with aspects of the client’s life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including:

      (a) members of the client’s immediate and extended family
      (b) neighbors, friends and acquaintances who knew the client or his family
      (c) former teachers, clergy, employers, co-workers, social service providers, and doctors
      (d) correctional, probation, or parole officers;
(4) members of the victim’s family.

b. Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

3. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports together with the underlying data therefor. Where necessary, counsel should pursue such efforts through formal and informal discovery.

4. Physical Evidence:

Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government’s forensic evidence, and conduct appropriate analyses of all other available forensic evidence.

5. The Scene:

Counsel should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).
Penalty

Counsel’s duty to investigate and present mitigating evidence is now well established.205 The duty to investigate exists regardless of the expressed desires of a client.206 Nor may counsel “sit idly by, thinking that investigation would be futile.”207 Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client’s competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.208

205. See, e.g., Wiggins v. Smith, 123 S. Ct. 2526 (2003) (counsel failed to uncover evidence that client never had a stable home and was repeatedly subjected to gross physical, sexual, and psychological abuse); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant’s “nightmarish childhood,” borderline mental retardation, and good conduct in prison); Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective for failing to investigate and present evidence of client’s brain damage due to prolonged pesticide exposure and repeated head injuries, and failing to present expert testimony explaining “the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child”), cert. denied, 536 U.S. 951 (2002); Coleman v. Mitchell, 268 F.3d 417, 449-51 (6th Cir. 2001) (though counsel’s duty to investigate mitigating evidence is well established, counsel failed to investigate and present evidence that defendant had been abandoned as an infant in a garbage can by his mentally ill mother, was raised in a brothel run by his grandmother where he was exposed to group sex, bestiality and pedophilia, and suffered from probable brain damage and borderline personality disorder), cert. denied, 535 U.S. 1031 (2002); Jermyn v. Horn, 266 F.3d 257, 307-08 (3d Cir. 2001) (counsel ineffective for failing to investigate and present evidence of defendant’s abusive childhood and “psychiatric testimony explaining how Jermyn’s development was thwarted by the torture and psychological abuse he suffered as a child”); supra note 197.

206. See Hardwick v. Crosby, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) (“Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick’s defense against the death penalty.”); Blanco v. Singletary, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for “latch[ing]ing” onto client’s assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation); see also Karis v. Calderon, 283 F.3d 1117, 1136-41 (9th Cir. 2002), cert. denied, 126 S. Ct. 2637 (2003).

207. Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980); accord Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) (counsel’s failure to investigate and present mitigating evidence at the penalty phase of the trial “because he did not think that it would do any good” constituted ineffective assistance).

208. See, e.g., Wiggins, 123 S. Ct. at 2526 (2003) (counsel’s ineffectiveness lay not in failure to present evidence of client’s family background, but rather in failure to conduct an investigation sufficient to support a professionally reasonable decision whether to do so); Douglas v. Woodford, 316 F.3d 1079, 1089 (9th Cir. 2003) (“It is, of course, difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists.”); Silva v. Woodford, 279 F.3d 825, 838-39 (9th Cir. 2002), cert. denied, 123 S. Ct. 342 (2002); Coleman, 268 F.3d at 447; Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) (“In addition to hampering [defense counsel’s] ability to make strategic decisions, [defense counsel’s] failure to investigate [defendant’s background] clearly affected his ability to competently advise [defendant] regarding the meaning of
Because the sentencer in a capital case must consider in mitigation, “anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,”209 “penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.”210 At least in the case of the client, this begins with the moment of conception.211 Counsel needs to explore:

(1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);

(2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

mitigation evidence and the availability of possible mitigation strategies.


210. Russell Stetler, Mitigation Evidence in Death Penalty Cases, THE CHAMPION, Jan./Feb. 1999, at 35; see also ABA CRIMINAL JUSTICE SECTION, supra note 86, at 63.

211. See Norton, supra note 182, at 2 (mitigation investigation must encompass client’s “whole life”); EQUAL JUSTICE INITIATIVE OF ALA., ALABAMA CAPITAL DEFENSE TRIAL MANUAL ch. 12 (3d ed. 1997) [hereinafter ALABAMA CAPITAL DEFENSE TRIAL MANUAL]; Lyon, supra note 3, at 703 (observing that “mitigation begins with the onset of the [defendant’s] life” because “[m]any [defendants’] problems start with things like fetal alcohol syndrome, head trauma at birth, or their mother’s drug addiction during pregnancy”); Vick, supra note 4, at 363.
(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.212

Accordingly, immediately upon counsel’s entry into the case appropriate member(s) of the defense team should meet with the client to:

1. discuss the alleged offense or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client’s rights;

2. explore the existence of other potential sources of information relating to the offense, the client’s mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors; and

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212. See supra text accompanying notes 13-27.
3. obtain necessary releases for securing confidential records relating to any of the relevant histories.

Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer. As noted supra in the text accompanying note 103, a mitigation specialist who is trained to recognize and overcome these barriers, and who has the skills to help the client cope with the emotional impact of such painful disclosures, is invaluable in conducting this aspect of the investigation.

It is necessary to locate and interview the client’s family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others. Records—from courts, government agencies, the military, employers, etc.—can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses’ recollections. Records should be requested

213. See Goodpaster, supra note 3, at 321; Lyon, supra note 3, at 704-06; Vick, supra note 4, at 366-67.

214. See Wiggins v. Smith, 123 S. Ct. 2527 (2003) (inadequacy of trial counsel’s mitigation investigation demonstrated by post-conviction presentation of expert’s report that demonstrated “the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents” through “state social services, medical, and school records, as well as interviews with petitioner and numerous family members”); Williams v. Taylor, 529 U.S. 362, 395 (2000) (counsel ineffective where they: failed to conduct an investigation that would have uncovered extensive records graphically describing Williams’ nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents’ custody.) (footnote omitted); Jermyn v. Horn, 266 F.3d 257, 307 (3d Cir. 2001) (counsel ineffective for failing to obtain school records that disclosed childhood abuse); see also ALABAMA CAPITAL DEFENSE TRIAL MANUAL, supra note 211; TEXAS DEATH PENALTY MITIGATION MANUAL, supra note 105, ch. 3; Norton, supra note 182, at 32-38.
concerning not only the client, but also his parents, grandparents, siblings, cousins, and children.\textsuperscript{215} A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment.\textsuperscript{216} The collection of corroborating information from multiple sources—a time-consuming task—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.\textsuperscript{217}

Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to:

a. school records 
b. social service and welfare records 
c. juvenile dependency or family court records 
d. medical records 
e. military records 
f. employment records 
g. criminal and correctional records 
h. family birth, marriage, and death records 
i. alcohol and drug abuse assessment or treatment records 
j. INS records

If the client was incarcerated, institutionalized or placed outside of the home, as either a juvenile or an adult, the defense team should investigate the possible effect of the facility’s conditions on the client’s

\textsuperscript{215} In order to verify or corroborate witness testimony about circumstances and events in the defendant’s life, defense counsel must “assemble the documentary record of the defendant’s life, collecting school, work, and prison records” which might serve as sources of relevant facts. Vick, supra note 4, at 367; see also Lyon, supra note 3, at 705-06. Contemporaneous records are more credible than witnesses sharing previously undisclosed memories or experts offering opinions that were formed only after the client faced capital charges. Records may also document events that neither the client nor family members remember. See, e.g., Williams, 362 U.S. at 395 n.19 (relying on a social worker’s graphic description of the Williams home that could not have been provided by client, who was too young, or the adult family members, who were too intoxicated, to recall the scene).

\textsuperscript{216} See Norton, supra note 182, at 3 (counsel should “investigate at least three generations” of the client’s family).

\textsuperscript{217} See id. (advocating “triangulation” of data).
contemporaneous and later conduct. The investigation should also explore the adequacy of institutional responses to childhood trauma, mental illness, or disability to determine whether the client’s problems were ever accurately identified or properly addressed. Even if the institution that responded to the client was not grossly abusive or neglectful, it may have been incompetent in a number of ways. For example, IQ testing or other psychological evaluations may have been performed by untrained personnel or using inappropriate instruments—flaws that might not appear on the face of the institutional records.

The circumstances of a particular case will often require specialized research and expert consultation. For example, if a client grew up in a migrant farm worker community, counsel should investigate what pesticides the client may have been exposed to and their possible effect on a child’s developing brain. If a client is a relatively recent immigrant, counsel must learn about the client’s culture, about the circumstances of his upbringing in his country of origin, and about the difficulties the client’s immigrant community faces in this country. Counsel should also be particularly sensitive in these circumstances to language or translation difficulties that may unwittingly have led to misunderstandings between the client and others, including government officials and members of the community at large, with whom he may have come into contact.

218. See Terry A. Kupers, M.D., Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It, 33-34 (1999); David M. Halbfinger, Care of Juvenile Offenders in Mississippi is Faulted, N.Y. Times, Sept. 1, 2003 at A13 (describing allegations of severely abusive conditions in Mississippi juvenile detention facilities and noting that “what is happening in Mississippi is by no means rare. Arizona, Arkansas, California, Georgia, Louisiana, Maryland, and South Dakota, among other states, have all had scandals in recent years,” although the conditions in Mississippi were supposed to have been corrected pursuant to a court order issued in 1977).


221. See Mak v. Blodgett, 970 F.2d 614, 616-18 & n.5 (9th Cir. 1992) (positive testimony from defendant’s family, combined with expert testimony about difficulty of adolescent immigrants from Hong Kong assimilating to North America, would have humanized client and could have resulted in a life sentence for defendant convicted of thirteen murders). See also Guideline 10.6 and accompanying commentary (noting that foreign government might recognize an American citizen as one of its nationals and provide counsel with extremely valuable assistance).
Miscellaneous Concerns

Counsel should maintain copies of media reports about the case for various purposes, including to support a motion for change of venue, if appropriate, to assist in the voir dire of the jury regarding the effects of pretrial publicity, to monitor the public statements of potential witnesses, and to facilitate the work of counsel who might be involved in later stages of the case.

Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside.\(^{222}\) Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.\(^{223}\)

Additional investigation may be required to provide evidentiary support for other legal issues in the case, such as challenging racial discrimination in the imposition of the death penalty or in the composition of juries.\(^{224}\) Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist.\(^{225}\)

As discussed \textit{infra} in the text accompanying notes 249-52, counsel should consider making overtures to members of the victim’s family—possibly through an intermediary, such as a clergy member, defense-victim liaison, or representative of an organization such as Murder Victim’s Families for Reconciliation—to ascertain their feelings about the death penalty and/or the possibility of a plea.\(^{226}\)

\(^{222}\) See Johnson v. Mississippi, 486 U.S. 578, 586-87 (1988); supra notes 7, 22.

\(^{223}\) See supra text accompanying notes 20-28.


\(^{225}\) See \textit{infra} Guideline 10.10.2; supra text accompanying note 7; \textit{infra} text accompanying notes 264-70.

\(^{226}\) See Russell Stetler, \textit{Working with the Victim’s Survivors in Death Penalty Cases}, \textit{The Champion}, June 1999, at 42; see also Michael Janofsky, \textit{Parents of Gay Obtain Mercy for His Killer}, N.Y. TIMES, Nov. 5, 1999, at A1 (describing widely publicized case in which the prosecutor decided to drop his request for the death penalty because the parents of the victim so requested).
GUIDELINE 10.8—THE DUTY TO ASSERT LEGAL CLAIMS

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and

2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and

3. evaluate each potential claim in light of:
   a. the unique characteristics of death penalty law and practice; and
   b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and
   c. the importance of protecting the client’s rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and
   d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client’s case and the applicable law in the particular jurisdiction; and
2. ensure that a full record is made of all legal proceedings in connection with the claim.

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:

1. asserting legal claims whose basis has only recently become known or available to counsel; and

2. supplementing claims previously made with additional factual or legal information.

History of Guideline

This Guideline is based on Guideline 11.5.1 (“The Decision to File Pretrial Motions”) and Guideline 11.7.3 (“Objection to Error and Preservation of Issues for Post Judgment Review”) of the original edition. New language makes clear that the obligations imposed by this Guideline exist at every stage of the proceeding and extend to procedural vehicles other than the submission of motions to the trial court.

In Subsection A(3)(b), the phrase “near certainty” is new and replaces the word “likelihood” from the original edition. The change reflects recent scholarship indicating that appellate and post-conviction remedies are pursued by almost 100% of capital defendants who are convicted and sentenced to death.

Subsections B and C are new to this edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.6 (“Prompt Action to Protect the Accused”), in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

Commentary

“One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial.” For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review.

As the text of the first sentence of Subsection A makes clear, this obligation is not limited to trial counsel or to motions made to the trial court. For example, if a state post-conviction court rules on the merits of a claim for relief, the claim will be available for federal review even if the state’s rules required the issue to be raised at trial. So, too, it may be appropriate for counsel to proceed on some claims (e.g., double jeopardy) by seeking an interlocutory supervisory writ from an appellate court.

227. Stephen B. Bright, Preserving Error at Capital Trials, THE CHAMPION, Apr. 1997, at 42-43. For example, John Eldon Smith was executed by the State of Georgia even though he was sentenced to death by a jury selected from a jury pool from which women were unconstitutionally excluded. The federal courts refused to consider the issue because Mr. Smith’s lawyers failed to preserve it. Mr. Smith’s co-defendant was also sentenced to death from a jury selected from the same pool. The issue was preserved in the co-defendant’s case, and the co-defendant’s conviction and death sentence were vacated. At retrial, the co-defendant was sentenced to life imprisonment. See Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., concurring in part and dissenting in part).


court\textsuperscript{230} or by otherwise seeking relief outside the confines of the capital litigation itself.\textsuperscript{231}

As discussed supra in the text accompanying note 28, most jurisdictions have strict waiver rules that will forestall post-judgment relief if an issue was not litigated at the first opportunity. An issue may be waived not only by the failure to timely file a pretrial motion, but also because of the lack of a contemporaneous objection at trial, or the failure to request a jury instruction, or counsel’s failure to comply with some other procedural requirement established by statute, court rule, or case law. Counsel must therefore know and follow the procedural requirements for issue preservation and act with the understanding that the failure to raise an issue by motion, objection, or other appropriate procedure may well forfeit the ability of the client to obtain relief on that issue in subsequent proceedings.

Whether raising an issue specific to a capital case (such as requesting individual, sequestered voir dire on death-qualification of the jury) or a more common motion shaped by the capital aspect of the case (such as requesting a change of venue because of publicity), counsel should be sure to litigate all of the possible legal\textsuperscript{232} and factual\textsuperscript{233} bases


\textsuperscript{231}. See Bradley v. Pryor, 305 F.3d 1287, 1289-90 (11th Cir. 2002) (holding that action seeking DNA samples for testing to establish the innocence of a capital prisoner is properly brought under Section 1983 rather than as habeas corpus petition), cert. denied, 123 S. Ct. 1909 (2003); supra text accompanying notes 5-9. As this example suggests, developments in DNA technology and increasing knowledge of the extent and causes of wrongful convictions in capital cases, see supra text and accompanying notes 48-51, 198-204, should lead defense attorneys to be aggressive in pursuing the implication of the Court’s assumption in 

\textsuperscript{232}. Counsel should always cite to any arguably applicable provision of the United States Constitution, the state constitution, and state law as bases for granting a claim. A reviewing court may refuse to consider a legal theory different from that put forward originally. See Anderson v. Harless, 459 U.S. 4, 6 (1982) (refusing to consider violation of Due Process Clause of federal Constitution because defense counsel in state courts relied solely upon due process clause of state constitution). For example, courts have refused to consider an assertion that a statement was taken in violation of the Sixth Amendment right to counsel because it was argued in earlier proceedings only that the statement was obtained in violation of the Fifth Amendment protection against self-
for the request. This will increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction review in the event the claim is denied.

Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.\textsuperscript{234} As described in the commentary to Guideline 1.1, counsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; the client’s life may well depend on how zealously counsel discharges this duty.\textsuperscript{235} Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.\textsuperscript{236}

\textsuperscript{233} In this regard, as Subsection C indicates, counsel should bear in mind that in capital litigation the courts tend to be much more responsive to supplemental presentations than they might be in other contexts. See, e.g., Brooks v. Estelle, 702 F.2d 84, 84-85 (5th Cir. 1983) (noting petitioner’s multiple applications to the court and addressing them on the merits); Spaziano v. State, 660 So. 2d 1363, 1364, 65-66 (Fla. 1995) (granting motions filed by defendant facing fifth death warrant that “[sought] to open by rehearing an appeal that was finalized more than thirteen years ago and a post-conviction proceeding that was terminated with a denial of rehearing more than nine years ago” and ordering a remand that eventually resulted in an in-court recantation by a key witness and a life sentence); see also DNA Tests to be Done in ’74 Case, ORLANDO SENTINEL, Dec. 13, 2002, at B3.

\textsuperscript{234} See Bright, supra note 227, at 43 ("Failure to make an objection for fear of alienating the judge or jury may be a valid consideration in a case in which there is a good chance of acquittal or the length of sentence will be so short that appellate review will be irrelevant to the client. But in a capital case, it may deprive the client of a life-saving reversal on direct appeal or in habeas corpus proceedings.").

\textsuperscript{235} See supra text accompanying note 28. If a claim, whether meritorious or not, is being litigated anywhere in the country, counsel is likely to be charged with knowledge that the “tools to construct their constitutional claim” exist and be expected to raise it. Engle v. Isaac, 456 U.S. 107, 133 (1982). In Smith v. Murray, 477 U.S. 527 (1986), counsel failed to raise a particular issue on behalf of Mr. Smith in one state court because the state supreme court had recently rejected it. See id. at 531. Mr. Smith raised the issue in subsequent state and federal collateral proceedings, see id., and, well after these were concluded, the United States Supreme Court ruled favorably on the question. See id. at 536. However, because of counsel’s previous decision to forego the presentation of a claim that was then meritless, the Court “conclude[d] that . . . [Mr. Smith] must therefore be executed,” Id. at 540 (Stevens, J., dissenting), and he was. See Legislative Modification, supra note 12, at 852; see also infra note 343.

\textsuperscript{236} For example, execution by electrocution has become de facto unconstitutional because state governments have concluded that challenges to the practice have merit, even though the contrary precedent remains in place. See In re Kemmler, 136 U.S. 436, 449 (1890); cf. Alabama: Optional Execution by Injection, N.Y. TIMES, Apr. 26, 2002, at A20 (discussing how Alabama enacted a law making lethal injection the state’s primary method of execution when it looked as if the Supreme Court might rule that the electric chair was cruel and unusual punishment); Sara Rimer, Florida Lawmakers Reject Electric Chair, N.Y. TIMES, Jan. 7, 2000, at A13 (same in Florida).
Because “[p]reserving all [possible] grounds can be very difficult in the heat of battle during trial,” counsel should file written motions in limine prior to trial raising any issues that counsel anticipate will arise at trial. All of the grounds should be set out in the motion. Similarly, requests for rulings during the course of post-conviction proceedings (e.g., for investigative resources pursuant to Guideline 10.4(D)) should be made fully and formally.

In accordance with Subsection B(2), counsel at every stage must ensure that there is a complete record respecting all claims that are made, including objections, motions, statements of grounds, questioning of witnesses or venire members, oral and written arguments of both sides, discussions among counsel and the court, evidence proffered and received, rulings of the court, reasons given by the court for its rulings, and any agreements reached between the parties. If a court refuses to allow a proceeding to be recorded, counsel should state the objection to the court’s refusal, to the substance of the court’s ruling, and then at the first available opportunity make a record of what transpired in the unrecorded proceeding. Counsel should also ensure that the record is clear with regard to the critical facts to support the claim. For example, if counsel objects to the peremptory strike of a juror as race-based, counsel should ensure that it is clear from the record not only that the prosecutor struck a particular juror, but the race of the juror, of every other member of the venire, and the extent to which the unchallenged venire members shared the characteristics claimed to be justifying the challenge.

Further, as reflected in Guideline 10.7(B)(2), counsel at all stages of the case must determine independently whether the existing official record may incompletely reflect the proceedings, e.g., because the court reporter took notes but did not transcribe them or an interpreter’s translation was inaccurate, or because the court clerk did not include legal memoranda in the record transmitted to subsequent courts, or there was official negligence or misconduct.

As the nonexclusive list of considerations in Subsection A(3) suggests, there are many instances in which counsel should assert legal claims even though their prospects of immediate success on the merits

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237. Bright, supra note 227, at 45.
238. See ALABAMA CAPITAL DEFENSE TRIAL MANUAL, supra note 211, at 53.
240. See Bright, supra note 227, at 46.
are at best modest. Examples of such circumstances (in addition to those in which counsel need to forestall later procedural defenses (Subsection A(3)(c)), include instances where:

- the claim should be preserved in light of foreseeable future events (e.g., the completion of an investigation, a ruling in a relevant case); or

- asserting the claim may increase the government’s incentive to reach an agreed-upon disposition; or

- the presentation made in support of the claim may favorably influence other relevant actors (e.g., the Governor).241

GUIDELINE 10.9.1—THE DUTY TO SEEK AN AGREED-UPON DISPOSITION

A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.

B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;

2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;

3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;
4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;

5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;

6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;

7. the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;

8. concessions that the client might offer, such as:
   a. an agreement to waive trial and to plead guilty to particular charges;
   b. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;
   c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;
   d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;
e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;

f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;

g. an agreement with the victim’s family, which may include matters such as: a meeting between the victim’s family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;

h. agreements such as those described in Subsections 8(a)-(g) respecting actual or potential charges in another jurisdiction;

9. benefits the client might obtain from a negotiated settlement, including:

a. a guarantee that the death penalty will not be imposed;

b. an agreement that the defendant will receive a specified sentence;

c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;

d. an agreement that one or more of multiple charges will be reduced or dismissed;

e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;

g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client’s confinement;

h. agreements such as those described in Subsections 9(a)-(g) respecting actual or potential charges in another jurisdiction.

C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.

E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client’s initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client’s best interest.

F. Counsel should not accept any agreed-upon disposition without the client’s express authorization.

G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.
History of Guideline

Guideline 10.9.1 is based on aspects of Guidelines 11.6.1, 11.6.2, and 11.6.3 of the original edition. New language has been added to clarify the importance of pursuing an agreed-upon disposition at every phase of the case, not just as a substitute for proceeding to trial initially. The current version of the Guideline also requires that counsel enter into a continuing dialogue with the client about the content of any such agreement, including advantages, disadvantages, and potential consequences.

This Guideline omits the requirement, which appeared in Guideline 11.6.1 of the original edition, of client consent to initiate plea discussions, in recognition of the possible unintended consequence of premature rejection of plea options by a suicidal or depressed client. However, Guideline 10.9.2(A) does require counsel to obtain the client’s consent before accepting any agreed-upon disposition.

Related Standards


Commentary

Guidelines 10.9.1–2 both deal with the subject of agreed-upon dispositions. They and their associated commentaries should be read together.
“Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible”; as a result, plea bargains in capital cases are not usually “offered” but instead must be “pursued and won.” Agreements are often only possible after many years of effort. Accordingly, this Guideline emphasizes that the obligation of counsel to seek an agreed-upon disposition continues throughout all phases of the case. As in other sorts of protracted litigation, circumstances change over time (e.g., through replacement of a prosecutor, death of a prosecution witness, alteration in viewpoint of a key family member of the client or the victim, favorable developments in the law or the litigation, reconsideration by the client) and as they do new possibilities arise. Whenever they do, counsel must pursue them.

In many jurisdictions, the prosecution will consider waiving the death penalty after the defense makes a proffer of the mitigating evidence that would be presented at the penalty phase and explains why death would be legally and/or factually inappropriate. In some states and the federal government, this process is formalized and occurs before a decision is made whether to seek the death penalty. In other


244. *See* UNITED STATES ATTORNEYS’ MANUAL, *supra* note 162, § 9-10.030. New York law gives the District Attorney a 120-day “deliberative period” to decide whether to file a notice of intent to seek the death penalty. *See* N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2002); Francois v. Dolan, 731 N.E.2d 614, 616 (N.Y. 2000). During that time, with the assistance of the Capital Defender’s Office, counsel is appointed and may attempt to persuade the prosecutor not to file a notice. *See* N.Y. JUD. LAW § 35-b (McKinney 2002). The notice may also be withdrawn at any time. *See* N.Y. CRIM. PROC. LAW § 250.40(4) (McKinney 2002). Between 1995 and mid-2003, District Attorneys in New York formally investigated seeking the death penalty against 780 defendants, but only filed notice that they were seeking the death penalty against forty-eight of
jurisdictions, the process is not formalized and may occur after the prosecution has announced its intention to seek the death penalty. In either event, the mitigation investigation is crucial to persuading the prosecution not to seek death.245

Although, for the reasons explained in the History to this Guideline, counsel does not need to have obtained client consent before entering into plea discussions, counsel does need to have thoroughly examined the quality of the prosecution’s case and investigated possible first-phase defenses and mitigation, as discussed in the commentary to Guideline 10.7. Counsel must also consider the collateral consequences of entering a plea. For example, when the resulting adjudication of guilt could be used as an aggravating circumstance in another pending case, counsel should endeavor to structure an agreement that would resolve both cases without imposition of the death penalty.

In some cases, where there is a viable first-phase defense, it may be possible to negotiate a plea to a lesser charge. And if it is trial counsel’s perception that the death penalty is being sought primarily to allow selection of a death-qualified (and therefore conviction-prone) jury, counsel should seek to remedy the situation through litigation in accordance with Guideline 10.8 as well as through negotiation. In many capital cases, however, the prosecution’s evidence of guilt is strong, and there is little or no chance of charge bargaining. In these cases, a guilty plea in exchange for life imprisonment is the best available outcome.

These considerations mean that 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,246 and some uniquely restrictive legal principles apply.247 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,


245. See supra text accompanying note 162; Doyle, supra note 180; White, supra note 3, at 328-29.

246. A number of concessions that the parties might exchange in the capital context appear in Subsection B.

expense, legal risks, and length of the capital trial and appellate process may make an agreement particularly desirable for the prosecution.  

A very difficult but important part of capital plea negotiation is often contact with the family of the victim. In some states, the prosecution is required to notify and confer with the victim’s family prior to entering a plea agreement. Any approaches to the victim’s family should be undertaken carefully and with sensitivity. Counsel should be creative in proposing resolutions that may satisfy the needs of the victim’s family, including providing more immediate closure by expressly foregoing appeals or arranging an apology or meeting between the victim’s family and the client if the client is willing and able to do so. As described supra in the text accompanying note 226, the defense team should consider seeking the assistance of clergy, a defense-victim liaison, or an organization of murder victims’ families in the outreach effort and in crafting possible resolutions. In any event, because the victim’s family can be critical to achieving a settlement, defense counsel should make the decision regarding contact on a fully informed and professional basis, rather than because of nervousness over entering a situation that might be emotionally stressful or in reliance on an unsupported guess as to what the response to an approach might be.

Except in unusual circumstances, all agreements that are made should be formally documented between the parties concerned (e.g., in a writing between the client and representatives of the victim). In any event, counsel has an obligation under Guideline 10.13 to maintain in his or her own files a complete written description of any agreement.

Agreements for action or nonaction by government actors in exchange for a plea of guilty are governed by Guideline 10.9.2(B)(2) and, for the client’s future benefit, should be set forth as clearly as possible on the record.

In addition to persuading the prosecution to negotiate a resolution to the case, counsel must often persuade the client as well. As discussed

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248. Plea offers are extended prior to trial in a significant proportion of cases and also commonly occur after protracted litigation, see supra note 243.

249. See Stetler, supra note 226, at 42; see also Gail Gibson & Laura Willis, Tears and Remorse Precede Life Term in Dawson Deaths, BALTIMORE SUN, Aug. 28, 2003, at 1 (as part of arrangement for life sentence, Darrell L. Brooks makes emotional apology in open court to families of seven victims of his arson).


251. See supra text accompanying note 226.

252. See Ricketts v. Adamson, 483 U.S. 1, 7, 10-12 (1987) (where defendant was deemed to have breached terms of plea agreement by refusing to testify against co-defendant at a retrial, double jeopardy did not preclude state from vacating defendant’s plea of guilty to second degree murder, trying him for capital murder and sentencing him to death).
in the commentary to Guidelines 10.5 and 10.9.2, a relationship of trust with the client is essential to accomplishing this. The entire defense team must work from the outset of the case with the client and others close to him to lay the groundwork for acceptance of a reasonable resolution.

If the possibility of a negotiated disposition is rejected by either the prosecution or the client when a settlement appears to counsel to be in the client’s best interest, counsel should continue efforts at persuasion while also continuing to litigate the case vigorously (Subsection G).
GUIDELINE 10.9.2—ENTRY OF A PLEA OF GUILTY

A. The informed decision whether to enter a plea of guilty lies with the client.

B. In the event the client determines to enter a plea of guilty:

1. Prior to the entry of the plea, counsel should:
   a. make certain that the client understands the rights to be waived by entering the plea and that the client’s decision to waive those rights is knowing, voluntary and intelligent;
   b. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea;
   c. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court and providing a statement concerning the offense.

2. During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

History of Guideline

This Guideline amends Guideline 11.6.4 of the original edition to clarify that the decision regarding whether to enter a plea of guilty must be informed and counseled, yet ultimately lies with the client.
Related Standards


Commentary

If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client’s trial rights.

The relationship that the defense team has established with the client and his or her family will often determine whether the client will accept counsel’s advice regarding the advisability of a plea. The case must therefore be diligently investigated so that the client will have as realistic a view of the situation as possible. As the commentary to Guideline 10.5 describes, a client will, quite reasonably, not accept
counsel’s advice about the case if the attorney has failed to conduct a meaningful investigation.  

A competent client is ultimately entitled to make his own choice. Counsel’s role is to ensure that the choice is as well considered as possible. This may require counsel to work diligently over time to overcome the client’s natural resistance to the idea of standing in open court, admitting to guilt, and perhaps agreeing to permanent imprisonment. Or it may require counsel to do everything possible to prevent a depressed or suicidal client from pleading guilty where such a plea could result in an avoidable death sentence.  

Because of the factors described supra in the text accompanying notes 178-92, it will often require the combined and sustained efforts of the entire defense team to dissuade the client from making a self-destructive decision. As noted there, the defense team may also need to call on family, friends, clergy, and others to provide information that assists the client in reaching an appropriate conclusion.

253.  See supra text accompanying note 180.  
254.  See supra commentary to Guideline 10.5.
GUIDELINE 10.10.1—TRIAL PREPARATION OVERALL

As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

History of Guideline

The revisions to this Guideline, which was formerly Guideline 11.7.1, are stylistic.

Related Standards


Commentary

Formulation of and adherence to a persuasive and understandable defense theory are vital in any criminal case. In a capital trial, the task of constructing a viable strategy is complicated by the fact that the proceedings are bifurcated. The client is entitled to have counsel insist that the state prove guilt beyond a reasonable doubt.\(^{255}\) At the same time, if counsel takes contradictory positions at guilt/innocence and sentencing, credibility with the sentencer may be damaged and the defendant’s chances for a non-death sentence reduced. Accordingly, it is critical that, well before trial, counsel formulate an integrated defense theory\(^{256}\) that will be reinforced by its presentation at both the guilt and

\(^{255}\) See Nixon v. Singletary, 758 So. 2d 618, 624-25 (Fla. 2000) (ineffective assistance where counsel failed to obtain client’s explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing); People v. Hattery, 488 N.E.2d 513, 518-19 (Ill. 1985) (same).

\(^{256}\) See infra text accompanying notes 273-75; McNally, supra note 242, at 8-11; White, supra note 3, at 356-58.
mitigation stages. Counsel should then advance that theory during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument.

257. As the text accompanying notes 104-07, supra, suggests, for counsel to gamble that there never will be a mitigation phase because the client will not be convicted of the capital charge is to render ineffective assistance.

258. See Bright, supra note 227, at 40.
GUIDELINE 10.10.2—VOIR DIRE AND JURY SELECTION

A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding “death qualification” concerning any potential juror’s beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

C. Counsel should consider seeking expert assistance in the jury selection process.

History of Guideline

This Guideline is based on Guideline 11.7.2 of the original edition. Subsection A of the Guideline has been amended to make clear that potential jury composition challenges should not be limited to the petit jury, but should also include the selection of the grand jury and grand
jury forepersons. Subsection B has been amended to reflect recent scholarship demonstrating that the starkest failures of capital voir dire are the failure to uncover jurors who will automatically impose the death penalty following a conviction or finding of the circumstances which make the defendant eligible for the death penalty, and the failure to uncover jurors who are unable to consider particular mitigating circumstances. Subsection C is new. Its language is derived from NAT’L
(“Voir Dire and Jury Selection”), and the accompanying commentary.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION
Standard 4-7.2 (“Selection of Jurors”), in ABA STANDARDS FOR
CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION
(3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY
Standard 15-2.1 (“Selection of Prospective Jurors”), in ABA
STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY
Standard 15-2.2 (“Juror Questionnaires”), in ABA STANDARDS FOR

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY
Standard 15-2.3 (“Challenge to the Array”), in ABA STANDARDS FOR

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY
Standard 15-2.4 (“Conduct of Voir Dire Examination”), in ABA
STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY
Standard 15-2.5 (“Challenges for Cause”), in ABA STANDARDS FOR
ABA GUIDELINES


**Commentary**

Jury selection is important and complex in any criminal case. In capital cases, it is all the more critical. Counsel should devote substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and choosing a jury most favorable to the theories of mitigation that will be presented. Given the intricacy of the process and the sheer amount of data to be managed, counsel should consider obtaining the assistance of an expert jury consultant.  


260. See NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 7.2 & cmt. (1995) (“Voir Dire and Jury Selection”) (noting that the need for jury selection experts is “most obvious in extraordinary cases such as death penalty cases”). In addition, counsel investigating a capital case should be particularly alert to the possibility that, notwithstanding surface appearances, one or more jurors were unqualified to sit at either phase.
Counsel’s jury selection strategy should minimize the problem of “death qualified” juries that result from exclusion of potential jurors whose opposition to capital punishment effectively skews the jury pool not only as to imposition of the death penalty but as to conviction. Case law stemming from Supreme Court decisions that address capital jury selection procedures has resulted in a highly specialized and technical procedure. As a practical matter, the burden rests with defense counsel to “life qualify” a jury. Counsel should conduct a voir dire that is broad enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law, whether by interviewing jurors or otherwise. Such inquiries can be “critical in discovering constitutional errors.”

Exposure to the death qualification process makes a juror more likely to assume the defendant will be convicted and sentenced to death; more likely to assume that the law disapproves of persons who oppose the death penalty; more likely to assume that the judge, prosecutor, and defense attorney all believe the defendant is guilty and will be sentenced to die; and more likely to believe that the defendant deserves the death penalty.

Nonetheless, the current state of Supreme Court case law is that a jurisdiction does not violate the federal Constitution by using the death qualification process. See Lockhart v. McCree, 476 U.S. 162, 173 (1986).

Id.; see also Liebman, supra note 29, at 2097 & n.164 (discussing studies demonstrating that death qualification process produces juries more likely to convict than non-death-qualified juries, and that repeated discussion of death penalty during voir dire in capital cases makes jurors substantially more likely to vote for death). Nonetheless, the current state of Supreme Court case law is that a jurisdiction does not violate the federal Constitution by using the death qualification process. See Lockhart v. McCree, 476 U.S. 162, 173 (1986).

See, e.g., Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding “juror[s] who will automatically vote for the death penalty in every case” or are unwilling or unable to give meaningful consideration to mitigating evidence must be disqualified from service); Wainwright v. Witt, 466 U.S. 412, 424-26 (1985) (holding that trial judges may exclude from a capital jury persons whose “views on [capital punishment] would ‘prevent or substantially impair the performance of [their] duties . . . .'”); Adams v. Texas, 448 U.S. 38, 42, 49 (1980) (invalidating statute disqualifying any juror who would not swear “that the mandatory penalty of death or imprisonment for life would not affect his deliberations on any issue of fact”); Witherspoon v. Illinois, 391 U.S. 101, 116 (1968) (holding that persons who have qualms about the death penalty in general and who might be inclined to oppose it as a matter of public policy, but who can put aside those reservations in a particular case, and in compliance with their oaths as jurors, consider imposing the death penalty according to the relevant state law, may not be precluded from serving as jurors in a death penalty case).
they are unwilling to consider mitigating evidence. Counsel should also develop a strategy for rehabilitating those prospective jurors who have indicated opposition to the death penalty. Bearing in mind that the history of capital punishment in this country is intimately bound up with its history of race relations, counsel should determine whether discrimination is involved in the jury selection process. Counsel should investigate whether minorities or women are underrepresented on the jury lists from which grand and petit juries are drawn, or if race or gender played a role in the selection of grand jury forepersons. The defense in a capital case is entitled to voir dire to discover those potential jurors poisoned by racial bias, and should do so when appropriate. Death qualification often results in the removal of more prospective jurors who are members of minority groups than those who are white, because minority jurors are more likely to express reservations about the death penalty. Neither race nor gender may form a basis for peremptory challenges, but a recent empirical analysis of capital murder cases supports the conclusion that “discrimination in the use of peremptory challenges on the basis of race and gender . . . is widespread.” Counsel should listen closely to the prosecutor’s voir


267. See Bright, supra note 225, at 20.


269. David C. Baldus et al., The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis, 3 U. PA. J. CONST. L. 3, 10 (2001); see generally Jeffrey S. Brand, The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters, 1994 WIS. L. REV. 511 (finding persistent widespread discrimination in the use of peremptory challenges and attributing it to unwillingness or inability of the courts to scrutinize manifestly pretextual nonracial justifications). These findings emphasize the duty of counsel to pursue this area energetically, both factually and legally. See, e.g., Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 CORNELL L. REV. 1, 124-25 (1990) (proposing Thirteenth Amendment theory entitling a minority
dire, challenges for cause and reasons for exercising peremptory challenges, make appropriate objections, and ensure that all information critical to a discrimination claim is preserved on the record. 270

defendant to specific number of minority jurors). In particular, in light of the considerations discussed in this paragraph of text and the history described supra note 28, counsel would be unwise to assume the permanence of the 5-4 ruling in McCleskey v. Kemp, 481 U.S. 279 (1987).

270. See supra Guideline 10.8(B)(2) and text accompanying note 238.
GUIDELINE 10.11—THE DEFENSE CASE CONCERNING PENALTY

A. As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution’s case in aggravation.

B. Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.

C. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.

D. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution’s case in aggravation.

E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.

F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:

1. Witnesses familiar with and evidence relating to the client’s life and development, from conception to the time of sentencing, that would be
explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client’s life, or would otherwise support a sentence less than death;

2. Expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability for the underlying offense(s); to give a favorable opinion as to the client’s capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;

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

4. Witnesses who can testify about the adverse impact of the client’s execution on the client’s family and loved ones.

5. Demonstrative evidence, such as photos, videos, 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.

G. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution’s presentation of otherwise
inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.

H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.

I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.

J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. carefully consider

   a. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and

   b. the legal and strategic issues implicated by the client’s co-operation or non-cooperation;

2. insure that the client understands the significance of any statements made during such an interview; and
3. attend the interview.

K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

History of Guideline

The substance of this Guideline is drawn from Guideline 11.8.3 of the original edition. The principal changes are the expansion of coverage to counsel at all stages of the proceedings, and language changes to underscore the range and importance of expert testimony in capital cases, the breadth of mitigating evidence, and counsel’s duty to present arguments in mitigation.

Related Standards


Commentary

Capital sentencing is unique in a variety of ways, but only one ultimately matters: the stakes are life and death.

This commentary is written primarily from the perspective of trial counsel. But corresponding obligations rest on successor counsel. This Guideline has been broadened to include them because of the realities that in capital cases (a) more evidence tends to become available to the defense as time passes, and (b) updated presentations of the defense case on penalty in accordance with Guideline 10.15.1(E)(3) may influence decisionmakers both on the bench (e.g., an appellate court considering a claim of ineffective assistance of counsel) and off it (e.g., the prosecutor, the Governor).

The Importance of an Integrated Defense

During the investigation of the case, counsel should begin to develop a theme that can be presented consistently through both the first and second phases of the trial. Ideally, “the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.” Consistency is crucial because, as discussed in the commentary to Guideline 10.10.1, counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime. First phase defenses that seek to reduce the client’s culpability for the crime (e.g., by negating intent) rather than to deny involvement altogether are more likely to be consistent with mitigating evidence of mental illness, retardation, domination by a co-defendant, substance abuse, or trauma. But whether or not the guilt phase defense will be that the defendant did not

271. See supra text accompanying note 39.
272. Lyon, supra note 3, at 711.
274. In fact, most statutory mitigating circumstances, which were typically adapted from the Model Penal Code, are “imperfect” versions of first phase defenses such as insanity, diminished capacity, duress, and self-defense. See Carol S. Steiker & Jordan M. Steiker, Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing, 102 YALE L.J. 835, 856-57 (1992) (reviewing BEVERLY LOWRY, CROSSED OVER: A MURDER, A MEMOIR (1992)). Of course, the defendant’s penalty phase presentation may not constitutionally be limited to statutory mitigating circumstances and the jury must be allowed to give full consideration to any non-statutory ones he advances. See Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Lockett v. Ohio, 438 U.S. 586, 604 (1978).
commit the crime, counsel must be prepared from the outset to make the transition to the penalty phase.\textsuperscript{275}

The Defense Presentation at the Penalty Phase

As discussed in the commentary to Guideline 10.7, areas of mitigation are extremely broad and encompass any evidence that tends to lessen the defendant’s moral culpability for the offense or otherwise supports a sentence less than death.\textsuperscript{276} Often, a mitigation presentation is offered not to justify or excuse the crime “but to help explain it.”\textsuperscript{277} If counsel cannot establish a direct cause and effect relationship between any one mitigating factor and the commission of a capital offense,

\textsuperscript{275} For an example of an argument making an effective transition, see Edith Georgi Houlihan, \textit{Defending the Accused Child Killer}, \textit{The Champion}, Apr. 1998, at 23. Jurisdictions vary as to whether the defendant has a right to present lingering doubt as a mitigating circumstance. \textit{Compare} People v. Sanchez, 906 P.2d 1129, 1178 (Cal. 1995) (stating that under California law, “the jury’s consideration of residual doubt is proper”), \textit{with} Way v. State, 760 So. 2d 903, 916-17 (Fla. 2000) (rejecting claim under Florida constitution that a defendant must be permitted to present mitigating “evidence relevant only to establish a lingering doubt”). Existing case law in the United States Supreme Court suggests that a capital defendant has no federal constitutional right to have lingering doubt considered as a mitigating circumstance at the penalty phase. \textit{See} Franklin v. Lynaugh, 487 U.S. 164, 174 (1988). Given the significant number of death row exonerations, \textit{see supra} text accompanying notes 48-51 & 198-204, and the degree to which these have plainly troubled many Justices, \textit{see} Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002) (“Despite the heavy burden that the prosecution must shoulder in capital cases . . . in recent years a disturbing number of inmates on death row have been exonerated.”), \textit{supra} text accompanying note 31, there is ample reason to doubt the force of this precedent. \textit{See CONSTITUTION PROJECT, supra} note 50, at 40-41 (advocating allowing lingering doubt to be considered as a mitigating circumstance); \textit{see generally} Christina S. Pignatelli, \textit{Residual Doubt: It’s a Life Saver}, 13 CAP. DEF. J. 307 (2001).

\textsuperscript{276} \textit{See} Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (stating that “it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant’s character or record or the circumstances of the offense’”); McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (reaffirming that “States cannot limit the sentencer’s consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer’s discretion, but must allow it to consider any relevant information offered by the defendant’’); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (holding evidence of defendant’s positive adaptation to prison is relevant and admissible mitigating evidence even though it does “not relate specifically to petitioner’s culpability for the crime he committed”). Similarly, counsel could appropriately argue to the jury that the death sentence should not be imposed on a client because doing so would tend to incite the client’s political followers to avenge him by committing further crimes. \textit{See, e.g.}, Benjamin Weiser, \textit{Jury Rejects Death Penalty for Terrorist}, \textit{N.Y. Times}, July 11, 2001, at B1 (reporting successful use of this argument at trial of defendant convicted of bombing American embassy).

\textsuperscript{277} Haney, \textit{supra} note 93, at 560. \textit{See} Simmons v. Luebbers, 299 F.3d 929, 938-39 (8th Cir. 2002) (“Mitigating evidence was essential to provide some sort of explanation for Simmons’s abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons’s attorneys’ representation was ineffective.”), \textit{cert. denied} 123 S. Ct. 1582 (2003).
counsel may wish to show the combination of factors that led the client to commit the crime. But mitigation evidence need not be so limited. Depending on the case, counsel may choose instead to emphasize the impact of an execution on the client’s family, the client’s prior positive contributions to the community, or other factors unconnected to the crime which militate against his execution (Subsection F). In any event, it is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors.

Since an understanding of the client’s extended, multi-generational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client’s complete social history from before conception to the present. Expert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations. For example, expert testimony may explain the permanent neurological damage caused by fetal alcohol syndrome or childhood abuse, or the hereditary nature of mental illness, and the effects of these impairments on the client’s judgment and impulse control. Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an “all-purpose” expert who may have insufficient knowledge or experience to testify persuasively. In order to prepare effectively for trial, and to choose the best experts, counsel should take advantage of training materials and seminars and remain current on developments in fields such as neurology and psychology, which often have important implications for understanding clients’ behavior. Counsel should also

278. See Haney, supra note 93, at 600.
279. For an example of the process working as it should, see Alex Kotlowitz, In the Face of Death, N.Y. TIMES MAG., July 6, 2003, at 32. See generally Scott E. Sundby, The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony, 83 VA. L. REV. 1109, 1140-41 (1997) (noting that jurors find expert testimony unpersuasive if it is not tied into other evidence presented in the case).
280. See White, supra note 3, at 342-43.
281. See, e.g., Ainsworth v. Woodford, 268 F.3d 868, 876 (9th Cir. 2001) (stating that “the introduction of expert testimony would also have been important” to explain the effects that “serious physical and psychological abuse and neglect as a child” had on the defendant).
282. See Caro v. Calderon, 165 F.3d 1223, 1226-27 (9th Cir. 1999) (although counsel consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, counsel failed to consult neurologist or toxicologist who could have explained neurological effects of defendant’s extensive exposure to pesticides).
283. High quality continuing legal education programs on the death penalty, such as those noted supra in the commentary to Guideline 8.1, regularly present such information.
seek advice and assistance from colleagues and experts in the field of capital litigation.

Counsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for the expert’s conclusions.\textsuperscript{284} Community members such as co-workers, prison guards, teachers, military personnel, or clergy who interacted with the defendant or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility.\textsuperscript{285}

Family members and friends can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants. These witnesses can also humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way, such as attempting to protect other family members from domestic violence or trying to be a good parent and provider.\textsuperscript{286} Similarly, acquaintances who can testify to the client’s performance of good works in the community may help the decisionmaker to have a more complete view of him. None of this evidence should be offered as counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer, someone for whom one could reasonably see a constricted but worthwhile future.

In addition to humanizing the client, counsel should endeavor to show that the alternatives to the death penalty would be adequate punishment. Studies show that “future dangerousness is on the minds of most capital jurors, and is thus ‘at issue’ in virtually all capital trials,” whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration.\textsuperscript{287} Accordingly, counsel should give serious consideration to making an explicit presentation of information on this subject. Evidence that the client has adapted well to prison and has had few disciplinary problems can allay jurors’ fears and reinforce other positive mitigating evidence.\textsuperscript{288} Counsel should therefore always

\textsuperscript{284} See Sundby, supra note 279, at 1163-84.
\textsuperscript{285} See id. at 1118, 1151.
\textsuperscript{288} See Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (stating that jury would “quite naturally” give great weight to “[t]he testimony of… disinterested witnesses” such as “jailers who would have had no particular reason to be favorably predisposed toward one of their charges”);
encourage the client not only to avoid any disciplinary infractions but also to participate in treatment programs and/or educational, religious or other constructive activities.

Counsel is entitled to impress upon the sentencer through evidence, argument, and/or instruction that the client will either never be eligible for parole, will be required to serve a lengthy minimum mandatory sentence before being considered for parole, or will be serving so many lengthy, consecutive sentences that he has no realistic hope of release.  

In at least some jurisdictions, counsel may be allowed to present evidence concerning the conditions under which such a sentence would be served.

Counsel should also consider, in consultation with the client, the possibility of the client expressing remorse for the crime in testimony, in allocution, or in a post-trial statement. If counsel decides that a trial presentation by the client is desirable, and the proposed testimony or allocution is forestalled by evidentiary rulings of the court either

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Sundby, supra note 279, at 1147 (noting tendency of juries to respond favorably to testimony of prison employees).

289. The Supreme Court has held that:
where a capital defendant’s future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant ‘to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.’

Shafer v. South Carolina, 532 U.S. 36, 39 (2001) (quoting Ramdass v. Angelone, 530 U.S. 156, 165 (2000) (plurality opinion)). The precise contours of this rule remain in dispute, see Brown v. Texas, 522 U.S. 940, 940-41 (1997), and counsel may appropriately seek to extend them (e.g., by applying the rule to other alternative sentences than life imprisonment without parole or by requiring that the jury receive the information through instructions).

Some state courts have held that the trial court must resolve, before the capital sentencing hearing, issues such as the length of other sentences the defendant would serve and whether he would be eligible for parole. See Clark v. Tansy, 882 P.2d 527, 534 (N.M. 1994) (holding that trial court must, upon defendant’s request, impose sentence for non-capital convictions prior to jury deliberations on death penalty); Turner v. State, 573 So. 2d 657, 674-75 (Miss. 1990) (stating that trial court should determine defendant’s habitual offender status before capital sentencing hearing so jury could be accurately informed of defendant’s parole ineligibility). In other jurisdictions, the defense can at least argue that the defendant is likely to receive lengthy, consecutive sentences. See Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990) (finding length of time a defendant would be “removed from society” if sentenced to life imprisonment is relevant mitigating evidence that the jury must be permitted to consider); Turner v. State, 645 So. 2d 444, 448 (Fla. 1994) (holding that jury could properly consider in mitigation that alternative to death sentences would have been two life sentences with combined minimum mandatory of fifty years).

290. In the federal capital sentencing of a defendant convicted of bombing American embassies overseas, the defense presented evidence about conditions at the federal “Super Max” prison in Florence, Colorado, where the defendant would be incarcerated if sentenced to life without parole. See Benjamin Weiser, Lawyers for Embassy Bomber Push for Prison Over Execution, N.Y. TIMES, June 27, 2001, at B4; see also infra note 311. The defendant was subsequently sentenced to life without parole. See Weiser, supra note 276.
disallowing it or conditioning it on unacceptable cross-examination, counsel should take care to make a full record of the circumstances, including the content of the proposed statement. In light of the strong common law underpinnings of allocution and the broad constitutional right to present mitigation that has already been described, any such issue is likely to merit the careful examination of successor counsel.

Finally, in preparing a defense presentation on mitigation, counsel must try to anticipate the evidence that may be admitted in response and to tailor the presentation to avoid opening the door to damaging rebuttal evidence that would otherwise be inadmissible.291

The Defense Response to the Prosecution’s Penalty Phase Presentation

Counsel should prepare for the prosecutor’s case at the sentencing phase in much the same way as for the prosecutor’s case at the guilt/innocence phase.292 Counsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted, or undercut. As discussed in the commentary to Guideline 10.2, jurisdictions vary in whether the defense must be formally notified as to whether the prosecution will seek the death penalty. If required notice has not been given, counsel should also prepare to challenge at the sentencing phase any prosecution efforts that should be barred for failure to give notice.293

Counsel should carefully research applicable state and federal law governing the admissibility of evidence in aggravation. Where possible, counsel should move to exclude aggravating evidence as inadmissible, and, if that fails, rebut the evidence or offer mitigating evidence that will blunt its impact.294

291. However, as Subsection G suggests, if there is uncertainty as to the scope of how wide this opening would be or if counsel believes that excessive rebuttal is to be admitted, they should object and make a full record on the issue.
292. See White, supra note 3, at 358.
293. See supra text accompanying notes 163-64.
294. See Smith v. Stewart, 189 F.3d 1004, 1010-11 (9th Cir. 1999) (concluding counsel was ineffective in part for failing to challenge the state’s use of prior rape convictions in aggravation as prior violent offenses where both of the convictions occurred when Arizona law did not include violence as an element of rape); Parker v. Bowersox, 188 F.3d 923, 929-31 (8th Cir. 1999) (concluding trial counsel was ineffective for failing to present evidence to rebut the only aggravating circumstances); Summit v. Blackburn, 795 F.2d 1237, 1244-45 (5th Cir. 1986) (concluding trial counsel was ineffective for failing to argue the lack of corroborating evidence of the sole aggravating factor when under state law a defendant cannot be convicted based solely on an
If (but only if) the defense presents an expert who has examined the client, a prosecution expert may be entitled to examine the client to prepare for rebuttal. Counsel should become familiar with the governing law regarding limitations on the scope of expert evaluations conducted by prosecution experts, and file appropriate motions to ensure that the scope of the examination is no broader than legally permissible. If the examination is not limited as counsel deem appropriate, Subsection J(1) requires them to give careful consideration to their response (e.g., refuse to participate on possible pain of preclusion, participate at the cost of an irretrievable surrender of information, seek relief from a higher court). Counsel must discuss with the client in advance any evaluation that is to take place and attend the examination in order to protect the client’s rights (Subsections J(2)-(3)). Counsel may also seek to have the evaluation observed by a defense expert.

Counsel should integrate the defense response to the prosecution’s evidence in aggravation with the overall theory of the case. In some cases, counsel’s response to aggravating evidence at the penalty stage converges with the defense presentation at the guilt/innocence phase. The prosecutor will offer no additional evidence at the penalty phase but will simply rely on aggravating factors established by the evidence at the uncorroborated confession and the only evidence supporting the aggravating factor was defendant’s confession).

295. See, e.g., Estelle v. Smith, 451 U.S. 454, 468 (1981) (per curiam) (stating “[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding”).

296. As described infra in note 297, several states explicitly limit this right in various ways.

297. See, e.g., Fed. R. Crim. P. 12.2(c)(4) (2003) (“No statement made by a defendant in the course of any [court-ordered psychiatric] examination . . . may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant . . . has introduced evidence”); Abernathy v. State, 462 S.E.2d 615, 616 (Ga. 1995) (holding that where defendant intends “to introduce evidence of mental illness in any phase of trial,” he may be required “to submit to an independent psychiatric evaluation or be barred from presenting such evidence, even in mitigation”); State v. Reid, 981 S.W.2d 166, 168 (Tenn. 1998) (stating that once defendant files notice of intent to present expert testimony regarding mitigating evidence, state expert may examine defendant; however, state expert report will be provided only to the defense until after conviction and after defendant confirms intent to rely on expert testimony as part of case in mitigation); see also Fla. R. Crim. P. 3.202(d) (2002) (“After the filing of [notice] . . . to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. . . . The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.”); Dillbeck v. State, 643 So. 2d 1027, 1030-31 (Fla. 1994) (“W[here] the defendant plans to use only in the penalty phase the testimony of an expert who has interviewed him or her, the State is entitled to examine the defendant only after conviction and after the State has certified that it will seek the death penalty.”); State v. Johnson, 576 S.E.2d 831, 835-37 (Ga. 2003).
guilt/innocence phase, such as that the murder was committed during the course of a felony. In such cases, counsel’s rebuttal presentation should focus on the circumstances of the crime, and defendant’s conduct as it relates to the elements of the applicable aggravating circumstances.

In other cases, the prosecution will introduce additional aggravating evidence at the penalty stage. If the prosecutor seeks to introduce evidence of unadjudicated prior criminal conduct as aggravating evidence, counsel should fully investigate the circumstances of the prior conduct and determine whether it is properly admissible at the penalty stage.

If the prosecution relies upon a prior conviction (as opposed to conduct), counsel should also determine whether it could be attacked as the product of an invalid guilty plea, as obtained when the client was unrepresented by counsel, as a violation of double jeopardy, or on some other basis. Counsel should determine whether a constitutional challenge to a prior conviction must be litigated in the jurisdiction where the conviction occurred.

298. See, e.g., Lowenfield v. Phelps, 484 U.S. 231, 246 (1988); see also Fla. Stat. Ann. § 921.141(5) (West 2001) (listing as an aggravating circumstance the fact that the crime was committed while the defendant was engaged in, or an accomplice to, the commission or attempted commission or flight after committing or attempting to commit any one of twelve enumerated felonies). In some states, the prosecution is essentially limited at the penalty phase to the evidence admitted at the guilt phase. See, e.g., N.Y. Crim. Proc. Law § 400.27(3), (6) (McKinney 2002).

299. See supra text accompanying notes 23, 222-23. In some jurisdictions, only criminal conduct for which the client has been convicted is admissible at the penalty stage. See, e.g., Fla. Stat. Ann. § 921.141(5) (listing as aggravating circumstance the fact that the defendant was previously convicted of capital felony or a felony involving violence). In others, no conviction is necessary, but the admissibility of a prior bad act may depend on other factors. See, e.g., Cal. Penal Code § 190.3 (West 1999) (allowing admission of evidence of other criminal activity at penalty phase even though the defendant was not convicted for it, unless the defendant was prosecuted and acquitted or it did not involve the use or threat of violence); Pace v. State, 524 S.E.2d 490, 505 (Ga. 1999) (prior crime without conviction may be used in aggravation unless there is a previous acquittal). As a matter of constitutional law, the attack on the admission of unadjudicated prior misconduct in capital sentencing, which has long been a powerful one in light of the Court’s established recognition of the need for special reliability in that context, see Monge v. California, 524 U.S. 721, 731-33 (1998) (collecting authority), has received additional support both from Ring v. Arizona, 536 U.S. 584 (2002) and from the Court’s elaboration of due process limitations in related contexts. See State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1523 (2003) (in assessing punitive damages a recidivist may be punished more severely than a first offender, but only where the repeated misconduct is of the same sort as that involved in current case).


303. See Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 402-04 (2001); see also supra note 22.
In jurisdictions where victim impact evidence is permitted, counsel, mindful that such evidence is often very persuasive to the sentencer, should ascertain what, if any, victim impact evidence the prosecution intends to introduce at penalty phase, and evaluate all available strategies for contesting the admissibility of such evidence\textsuperscript{304} and minimizing its effect on the sentencer.\textsuperscript{305}

In particular, in light of the instability of the case law,\textsuperscript{306} counsel should consider the federal constitutionality of admitting such evidence to be an open field for legal advocacy.\textsuperscript{307}

Counsel should also evaluate how to blunt certain intangible factors that can be damaging to a capital defendant at sentencing, including the heinous nature of the crime or the sentencer’s possible racial antagonism for the client.\textsuperscript{308} In jurisdictions where the alternative to a death sentence is life without the possibility of parole, counsel should consider informing the jury of the defendant’s parole ineligibility in order to blunt the concern that the defendant may one day be released from custody.\textsuperscript{309} If they have not done so previously in building their affirmative case for

\begin{footnotesize}
\begin{enumerate}
\item Limitations on the admission of such evidence exist in a number of jurisdictions as a matter of state law. See, e.g., People v. Edwards, 819 P.2d 436, 464-67 (Cal. 1991); Bivins v. State, 642 N.E.2d 928, 956-57 (Ind. 1994).
\item Of course, counsel should also pursue all available state law theories that might exclude such evidence, as indicated supra in note 232; see, e.g., Olsen v. State, 2003 Wyo. LEXIS 57, 176-93 (April 14, 2003) (reviewing Wyoming statutory scheme and concluding it does not authorize admission of victim impact evidence in capital case); People v. Logan, 224 Ill. App.3d 735 (1st Dist. 1991) (notwithstanding that no death penalty had been imposed, it was ineffective assistance of appellate counsel to fail to challenge victim impact testimony as inadmissible under state law or limit its impact). For example, on the assumption that victim impact evidence in support of the death penalty would be admissible, there is conflicting case law in various states on whether the defense can call members of the victim’s family to testify in opposition to the client’s execution. Cf. supra text accompanying note 277 (noting that Constitution requires defendants to be able to offer any evidence that might cause sentencer to decline to impose a death sentence in the case at hand).
\item See White, supra note 3, at 359-60.
\item See supra text accompanying notes 289-90.
\end{enumerate}
\end{footnotesize}
a penalty less than death, counsel should also consider putting on evidence describing the conditions under which the client would serve a life sentence to rebut aggravating evidence of future dangerousness.

Jury Considerations

Personal argument by counsel in support of a sentence less than death is important. Counsel who seeks to persuade a decisionmaker to empathize with the client must convey his or her own empathy. While counsel may choose to discuss the gravity of the sentencer’s life and death decision, the fact that the jury will have been death-qualified means that trumpeting absolutist arguments against the death penalty is less likely to move the audience than sounding pro-life, pro-mercy notes that derive their resonance from the specific facts at hand.

It is essential that counsel object to evidentiary rulings, instructions, or verdict forms that improperly circumscribe the scope of the mitigating evidence that can be presented or the ability of the jury to consider and give effect to such evidence. Counsel should also object to and be

310. See supra text accompanying note 290.
311. See United States v. Johnson, 223 F.3d 665, 671 (7th Cir. 2000) (describing how, to rebut government’s assertion of future dangerousness, federal capital defendant put on evidence at penalty phase regarding conditions at “Supermax” prison where defendant would be housed if sentenced to life imprisonment), cert. denied, 534 U.S. 829 (2001); supra note 290.
312. See supra text accompanying note 185; White, supra note 3, at 374-75. An attorney whose contempt for his client is palpable cannot provide effective representation. See, e.g., Rickman v. Bell, 131 F.3d 1150, 1157 (6th Cir. 1997) (describing counsel’s “repeated expressions of contempt for his client” as providing the defendant “not with a defense counsel, but with a second prosecutor[;] creating a loathsome image . . . that would make a juror feel compelled to rid the world of him”); Clark v. State, 690 So. 2d 1280, 1283 (Fla. 1997) (“Counsel completely abdicated his responsibility to Clark when he told the jury that Clark’s case presented his most difficult challenge ever in arguing against imposition of the death penalty.”).
313. See supra commentary to Guideline 10.10.2.
314. See, e.g., Penry v. Johnson, 532 U.S. 782, 799-800 (2001) (instructions and verdict form prevented jury from giving effect to mitigating evidence of defendant’s mental retardation); McKoy v. North Carolina, 494 U.S. 433, 439-41 (1990) (verdict form and instructions suggesting mitigating circumstances must be found unanimously improperly restricted jurors’ ability to give effect to mitigating evidence); Mills v. Maryland, 486 U.S. 367, 384 (1988) (same); Belmontes v. Woodford, 355 F.3d 1024, 1032 (9th Cir. 2003) (granting habeas relief on penalty because “the jury was not instructed that it must consider Belmontes’ principal mitigation evidence, which tended to show that he would adapt well to prison and likely become a constructive member of society if incarcerated for life without possibility of parole”); Davis v. Mitchell, 318 F.3d 682, 691 (6th Cir. 2003); Banks v. Horn, 316 F.3d 228, 233 (3d Cir. 2003) (“‘Under the United States Supreme Court’s cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one the Court dares not risk.’”) (quoting Mills, 486 U.S. at 384); Lenz v. Warden, 579 S.E.2d 194,
prepared to rebut arguments that improperly minimize the significance of mitigating evidence or equate the standards for mitigation with those for a first-phase defense. At the same time, counsel should request instructions that will ensure that the jury understands, considers, and gives effect to all relevant mitigating evidence. It is vital that the instructions clearly convey the differing unanimity requirements applicable to aggravating and mitigating factors.

If the jury instructions are insufficient to achieve the purposes described in the previous paragraph or are otherwise confusing or misleading, counsel must object, even if the instructions are the standard ones given in the jurisdiction. If the court does not instruct the jury on individual mitigating circumstances, counsel should spell them out in closing argument.

196 (Va. 2003) (holding trial counsel ineffective for failure to object to defective penalty phase verdict form).

315. Prosecutors will frequently try to argue, for example, that “not everybody” who is abused as a child grows up to commit capital murder or that mental illness did not “cause” the defendant to commit the crime. See Haney, supra note 93, at 589-602. Both of these arguments are objectionable on Eighth Amendment grounds because they nullify the effect of virtually all mitigation. See id.; supra text accompanying notes 277-80. In any event, counsel can seek to counter such arguments by emphasizing the unique combination of factors at play in the client’s life and demonstrating that there are causal connections between, for example, childhood abuse, neurological damage, and violent behavior. See, e.g., Phyllis L. Crocker, Childhood Abuse and Adult Murder: Implications for the Death Penalty, 77 N.C. L. REV. 1143, 1157-66 (1999) (reviewing psychological and medical “research on the correlation between childhood abuse and adult violence”).


317. See Blume et al., supra note 287, at 398-99. See also Theodore Eisenberg & Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 CORNELL L. REV. 1, 11-12 (1993) (describing results of study showing jury confusion as to meaning of instructions, particularly about the mitigating circumstance burden of proof); James Luginbuhl & Julie Howe, Discretion in Capital Sentencing Instructions: Guided or Misguided?, 70 IND. L.J. 1161, 1167 (1995) (describing results of study showing that a substantial percentage of jurors do not understand instructions concerning aggravating and mitigating evidence, burdens of proof and unanimity).

318. See McKoy v. North Carolina, 494 U.S. 433, 444 (1990) (instructions allowing jury to consider only mitigating circumstances found unanimously violated Eighth Amendment); Mills v. Maryland, 486 U.S. 367, 375-80 (1988) (same result where jury could misinterpret instructions to require unanimity); supra note 315.
Record Preservation

In some jurisdictions, counsel is required or allowed to either proffer to the court or present to the sentencer mitigating evidence, regardless of the client’s wishes. Even if such a presentation is not mandatory, counsel should endeavor to put all available mitigating evidence into the record because of its possible impact on subsequent decisionmakers in the case.

319. See, e.g., Hardwick v. Crosby, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) (“Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick’s defense against the death penalty.”); Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993) (finding that: when a defendant, against his counsel’s advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant’s decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.); State v. Koedatch, 548 A.2d 939, 993-95 (N.J. 1988) (mitigating factors must be introduced regardless of the defendant’s position).
GUIDELINE 10.12—THE OFFICIAL PRESENTENCE REPORT

A. If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:

1. where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;

2. provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it;

3. review the completed report;

4. take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report;

5. take steps to preserve and protect the client’s interests where the defense considers information in the presentence report to be improper, inaccurate or misleading.

History of Guideline

This Guideline is based on Guideline 11.8.4 of the original edition. New requirements in the Guideline include: (1) counsel’s obligation to become familiar with the procedures governing preparation, submission, and verification of official presentence reports, where there is a chance that such a report may be presented to the court at any time; (2) counsel’s obligation to provide information that is favorable to the client
to the person who is preparing the report; (3) counsel’s obligation to prepare the client for and attend an interview with the person preparing the report, provided counsel has first determined such an interview to be appropriate.

**Related Standards**


**ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.1 (“Sentencing”) in ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).**

**Commentary**

In many jurisdictions, an official presentence report may be prepared prior to the imposition of sentence in a capital case. How such reports may be used in the sentencing process differs from jurisdiction to jurisdiction, and counsel should become familiar with the statutes, court rules, case law, and local practice governing their use.

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321. For example, in Florida, a presentence investigation report is required in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigating evidence. See Muhammad, 782 So. 2d at 363. In California, although a probation report is prepared
There are also constitutional limits on the use of presentence reports in capital sentencing.322

In some jurisdictions, a presentence report is not prepared unless requested by the defense. Counsel should carefully consider the implications of such a request.323 In jurisdictions where a presentence report is prepared regardless of the wishes of the defense, counsel should submit information favorable to the client, including the client’s social history and expert evaluations. If the report preparer does not include the defense materials, counsel should consider how they might otherwise be made part of the client’s official records. This information may not only affect the sentencing decision, but also the client's classification, programming and treatment in the prison system following imposition of sentence. In any event, counsel should make a clear record of any inaccuracies they discern in the report.

prior to the trial court’s ruling on a capital defendant’s post-trial motion to modify the death verdict, it is error for the judge, in ruling on that motion, to consider information contained in the probation report that was not presented to the jury. See, e.g., People v. Kipp, 956 P.2d 1169, 1189-90 (Cal. 1998).

322. See Gardner v. Florida, 430 U.S. 349, 358-62 (1977) (holding that if, in imposing a death sentence, the trial judge relies in part on confidential information in a presentence investigation report, the report must be disclosed to defense counsel or due process is violated).

323. For example, in Ohio, a presentence report is prepared only at the request of the defense and, if the defense requests the preparation of a report, the prosecution is allowed to present victim impact evidence, other crimes evidence, and other information that may not otherwise be admissible at the penalty phase to the jury. See OHIO REV. CODE ANN. § 2929.03(D)(1) (Anderson 1999); State v. White, 709 N.E.2d 140, 153-55 (Ohio 1999). Because Ohio provides capital defendants the right to reasonably necessary investigation, experts, or other assistance for trial and penalty phases, see OHIO REV. CODE ANN. § 2929.024 (Anderson 1999), capital counsel who request a presentence report instead may be ineffective for doing so. See Glenn v. Tate, 71 F.3d 1204, 1209-10 (6th Cir. 1995) (finding counsel ineffective in part because they requested a psychological report under the presentence report statute, rather than as necessary investigation, which mandated the results be shared with the jury).
GUIDELINE 10.13—THE DUTY TO FACILITATE THE WORK OF SUCCESSOR COUNSEL

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;

B. providing the client’s files, as well as information regarding all aspects of the representation, to successor counsel;

C. sharing potential further areas of legal and factual research with successor counsel; and

D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

History of Guideline

This Guideline is new.

Related Standards


Commentary

All members of the defense team must anticipate and facilitate the duty of successor counsel, embodied in Guideline 7.1(B)(1), to investigate the defense presentation at all prior stages of the case. As set forth in Subsection A, this duty includes an affirmative obligation to
maintain contemporaneous records that will enable successor counsel to have a factual predicate for the assertion of whatever legal claims may arise. For example, there may be issues as to whether the government produced certain evidence or whether counsel knew of the existence of a particular witness or legal theory. Each counsel’s files should be maintained in a manner sufficient to enable successor counsel to answer questions of this sort through appropriate documentation (e.g., notes of client interviews, telephone message slips, etc.).

Even after team members have been formally replaced, they must continue to safeguard the interests of the client. Specifically, they must cooperate with the professionally appropriate strategies of successor counsel (Subsection D). And this is true even when (as is commonly the case) successor counsel are investigating or asserting a claim that prior counsel was ineffective.\(^3\) As the California Bar has ruled in a formal opinion,

\[\text{[T]he Rules of Professional Conduct impose a duty upon trial counsel to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel. This decision is in accord with the general rule that the attorney owes a duty of complete fidelity to the client and to the interests of the client.}\(^3\)

The duties contained in this Guideline are of enormous practical significance to the vindication of the client’s legal rights. “[T]he strategic thinking of the lawyer, and learning this strategic thinking[,] is absolutely critical to the thorough presentation of a post-conviction claim. It should be routinely and openly presented to the post-conviction counsel.”\(^3\) To do otherwise is professionally unethical.\(^3\)

\(^3\) See 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.”).

\(^3\) See State Bar of Cal, Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 1992-127 (1992), at http://www.calbar.ca.gov/calbar/html_unclassified/ca92-127.html. See 1 Hertz & Lieberman, supra note 28, at 485 n.20 (discussing the duties described in this Guideline and noting that “if former counsel was ineffective, it is his responsibility to the client and the profession to cooperate in redressing the violation”) (emphasis omitted).

\(^3\) See id. (“[G]iven the peculiar aspects of the role of counsel whose former client brings a post-conviction action, [it] violates counsel’s ethical obligations” to fail to cooperate with successor counsel in “the disclosure to the post-conviction counsel of files and notes from the representation,
GUIDEINE 10.14—DUTIES OF TRIAL COUNSEL AFTER CONVICTION

A. Trial counsel should be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence.

B. Trial counsel should take whatever action(s), such as filing a notice of appeal, and/or motion for a new trial, will maximize the client’s ability to obtain post-conviction relief.

C. Trial counsel should not cease acting on the client’s behalf until successor counsel has entered the case or trial counsel’s representation has been formally terminated. Until that time, Guideline 10.15.1 applies in its entirety.

D. Trial counsel should take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

History of Guideline

This Guideline is based on Guideline 11.9.1 of the original edition. Subsection B has been revised to require that trial counsel take whatever action(s) will maximize the client’s ability to obtain post-conviction relief. Additionally, Subsection D has been revised to require that the volunteering of absences in the record and the volunteering of counsel’s strategic thinking in the case.”); Meegan B. Nelson, Note, When Clients Become “Ex-Clients”: The Duties Owed After Discharge, 26 J. LEGAL PROF. 233, 241 (2002) (“Essentially, a failure to cooperate with the client’s new attorney can constitute the same violations as a failure to cooperate with the actual client under Model Rule 1.16.”); see generally State Bar of Ariz Comm. on the Rules of Prof’l Conduct, Formal Op. 98-07 (1998) (discussing ethical obligations surrounding file retention and surrender to clients and successor counsel); Returning Client Files After Termination, HAWAII BAR J., Sept. 1998, at 16 (finding an ethical obligation to release to the client “all file materials which, if not released . . . would prejudice the rights of the client”).
counsel take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

Related Standards


Commentary

Post-conviction procedures, and therefore the duties of counsel, vary among jurisdictions. Whatever the procedures, the client should be advised of what will happen following sentencing. For example, if the client will be given any psychological examination or will otherwise be interviewed by prison personnel or others following the court’s imposition of sentence, the client should be counseled regarding that interview and advised of the potential legal impact of any statements the client might make there.

The client should also be advised of all available avenues of judicial review and what the client must do to secure review (e.g., sign a notice of appeal or affidavit of indigency). Trial counsel should file the necessary documents and take whatever other steps are needed to preserve the client’s right to review, such as ordering transcripts of the trial proceedings and objecting to any governmentally imposed barriers (e.g., failure to provide counsel) to obtaining such review. If there are

328. For example, trial counsel in California is given, by statute, certain post-conviction duties and must remain on the case until the record is certified. See CAL. PENAL CODE §§1239(b), 1240.1(c)(1) (West Supp. 2003).


any further actions available that might expand the scope of review (e.g., filing a motion for a new trial), trial counsel should take them.\footnote{This comports with the requirements for counsel in all criminal cases. See NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 9.2(a) (1995); cf. Mayo v. Cockrell, 287 F.3d 336, 338, 341 (5th Cir. 2002) (denying federal habeas corpus relief where trial counsel was unaware that he remained on case until replaced, appellate counsel was unaware of his appointment until after expiration of time for filing of new trial motion, and a meritorious new trial motion went unfiled), cert. denied, 123 S. Ct. 443 (2002).}

In short, trial counsel is responsible for making sure that the client’s legal position does not suffer any harm during the period of transition to successor counsel. To avoid prejudice to the client, trial counsel should, in accordance with Subsection D, make every effort to ensure that this period is as short as possible. But, in any event, trial counsel may not cease acting on the client’s behalf until successor counsel has entered the case. As Subsection C provides, until that time trial counsel must discharge the duties common to all post-conviction counsel as set forth in Guideline 10.15.1 (including obtaining a stay of execution if needed).

Trial counsel must also monitor the client’s personal condition as set out in Guideline 10.15.1(E)(2). If the client’s mental status deteriorates under the impact of the conviction and death sentence, the client may inappropriately decide to cease efforts to secure review, thereby creating a series of problems for the defense team that might well have been avoided.

Once successor counsel are in place, trial counsel continue to be under the obligation, imposed by Guideline 10.13, to recognize a continuing duty to safeguard the interests of the client and to cooperate fully with successor counsel.
GUIDELINE 10.15.1—DUTIES OF POST-CONVICTION COUNSEL

A. Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction’s procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.

B. If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.

C. Post-conviction counsel 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. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

D. The duties of the counsel representing the client on direct appeal should include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.

E. Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:

1. maintain close contact with the client regarding litigation developments; and
2. continually monitor the client’s mental, physical and emotional condition for effects on the client’s legal position;

3. keep under continuing review the desirability of modifying prior counsel’s theory of the case in light of subsequent developments; and

4. continue an aggressive investigation of all aspects of the case.

History of Guideline

This Guideline is based on Guideline 11.9.3 of the original edition. Subsections A, B, and D are entirely new. Subsection C includes new language regarding the manner in which post-conviction counsel must present all arguably meritorious issues. Subsection E includes new language emphasizing the ongoing obligations imposed by these Guidelines upon post-conviction counsel.

Related Standards


Commentary

Almost all of the duties imposed by Guidelines 10.3 et seq. are applicable in the post-conviction context. Subsection E notes this by way of reminder. Post-conviction counsel should consult those Guidelines and accompanying commentaries.
The Paramount Duty to Obtain a Stay

No matter how compelling the client’s post-conviction case may be, he faces the risk that his execution will moot it. This is a phenomenon unique to capital litigation and one that must be uppermost in the mind of post-conviction counsel.

When states fail to provide post-conviction counsel entirely or in a timely manner, or request the setting of an execution date to advance the litigation, or impose short periods of time for filing substantive post-judgment pleadings, the result is emergency requests for stays of execution so that substantive pleadings will be considered. Although

332. See Brooks v. Estelle, 702 F.2d 84, 84-85 (5th Cir. 1983) (dismissing appeal, which had received certificate of probable cause from district court, as moot since petitioner had been executed following the denial of a stay by Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982)).

333. There has been no right to state post-conviction counsel in Georgia. See Gibson v. Turpin, 513 S.E.2d 186, 188 (Ga. 1999). In August 1996, Georgia Supreme Court Justice Robert Benham noted that several persons under sentence of death in Georgia were in “immediate need of legal representation,” and asked area law firms to volunteer. Bill Rankin, When Death Row Inmates Go To Court Without Lawyers: In the Late Stages of Their Fight to Stay Alive, Some Must Represent Themselves, ATLANTA J. & CONST., Dec. 29, 1996, at D5 (internal quotation marks omitted). One Atlanta civil firm that volunteered was assigned the case of Marcus Wellons. See id. Three days after the firm received a copy of the trial transcript, the trial court set an execution date for two weeks later. See id. The firm rushed to the Georgia Supreme Court and asked for more time to submit a formal post-conviction petition. See id. Hours before Mr. Wellons’s scheduled execution, the Court denied the request by a 4-3 vote. See id. As guards were about to shave Mr. Wellons’s head for that evening’s electrocution, the federal district court granted a stay of execution. See id. State counsel and the federal defender were given ten months to prepare the federal petition. See id.

A similar instance of legal Russian roulette took place in Alabama in 2001 in the case of Thomas D. Arthur. See Arthur v. Haley, 248 F.3d 1302 (11th Cir. 2001) (affirming grant of stay on day before scheduled execution to inmate who had been unrepresented for more than two years following direct appeal); Agency Claims Death Row Inmates Without Lawyers a Growing Problem, CHATTANOOGA TIMES FREE PRESS, March 26, 2001, at B8 (describing Arthur case and absence of any state funding for post-conviction representation in Alabama). As suggested supra note 47, counsel should be aggressive in challenging such irresponsible behavior by the states as a federal constitutional violation.

334. For example, in Kentucky capital cases the Attorney General invariably requests an execution date at the end of direct appeal, and the Governor invariably signs the death warrant. No stay of execution may be granted until the state post-conviction petition is filed. As a result, in order to obtain a stay, counsel must often file a state post-conviction petition well before the time allowed under state law because there is an outstanding execution date. The practice is the same in federal habeas proceedings. See, e.g., Execution of Killer Delayed, CINCINNATI ENQUIRER, June 9, 2000, at D1B.

335. When a capital case enters a phase of being “under warrant”—i.e., when a death warrant has been signed—time commitments for counsel increase, “due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts.” ABA POST-CONVICTION DEATH PENALTY REPRESENTATION PROJECT ET AL., TIME AND EXPENSE ANALYSIS IN POSTCONVICTION DEATH PENALTY CASES 10 (1987).
the ABA and other professional voices have repeatedly condemned this system. Defense counsel must make the best of it—by seeking stays or reprieves from any available source and challenging the unfairness of any overly restrictive constraints on the filing of substantive pleadings and/or stays.

And to the extent that counsel can responsibly reduce the stresses imposed upon the client by this often nightmarish system, counsel should of course do so (e.g., by reassuring the client of the unlikelihood of the execution actually occurring on its nominal date, notwithstanding the alarming preparations being made by the prison).

Keeping the Client Whole

Even if their executions have been safely stayed, however, the mental condition of many capital clients will deteriorate the longer they remain on death row. This may result in suicidal tendencies and/or impairments in realistic perception and rational decisionmaking. Counsel should seek to minimize this risk by staying in close contact with the client.

336. See ABA CRIMINAL JUSTICE SECTION, supra note 86, at 10-11 (calling for automatic federal stays throughout post-conviction period); Legislative Modification, supra note 12, at 855 (“We agree with the Powell Committee [appointed by Chief Justice Rehnquist to study reform of capital habeas corpus] that the current mechanisms for obtaining stays of execution are irrational and indefensible. At best, they lead to an enormous waste of legal effort by all participants in the system, and at worst they result in inconsistencies that have fatal consequences.”); Ira P. Robbins, Justice by the Numbers: The Supreme Court and the Rule of Four – Or is it Five?, 36 SUFF. U. L. REV. 1 (2002); Eric M. Freedman, Can Justice Be Served by Appeals of the Dead?, NAT’L L.J., Oct. 19, 1992, at 13 (current situation respecting stays is “no way to run a judicial system”).


(I thought I had advised the Supreme Court of Missouri once before, in Williams, that...


339. See supra text accompanying notes 189-92.
Counsel’s ongoing monitoring of the client’s status, required by Subsection E(2), also has a strictly legal purpose. As described supra in the text accompanying notes 188-92, a worsening in the client’s mental condition may directly affect the legal posture of the case and the lawyer needs to be aware of developments. For example, the case establishing the proposition that insane persons cannot be executed 340 was heavily based on notes on the client’s mental status that counsel had kept over a period of months.

The Labyrinth of Post-conviction Litigation

A. The Direct Appeal

Practice varies among jurisdictions as to the limits of the appellate process and the relationship between direct appeals and collateral post-conviction challenges to a conviction or sentence. 341 Issues that are only partially or minimally reflected by the record, or that are outside the record, should be explored by appellate counsel as a predicate for informed decisionmaking about legal strategy.

As Subsection C emphasizes, it is of critical importance that counsel on direct appeal proceed, like all post-conviction counsel, in a manner that maximizes the client’s ultimate chances of success. “Winnowing” issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. 342 When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited. 343


341. In some states, there is a unitary appeal system in which direct appeal and collateral challenges such as ineffective assistance of counsel claims are raised simultaneously. See, e.g., IDAHO CODE § 19-2719 (Michie Supp. 2002). In other jurisdictions, ineffective assistance of counsel claims generally may not be raised on direct appeal but are reserved for separate post-conviction proceedings. See, e.g., Lawrence v. State, 691 So. 2d 1068, 1074 (Fla. 1997) (explaining that claims of ineffective assistance of counsel are not cognizable on direct appeal). The federal system follows the latter rule. See Massaro v. United States, 123 S. Ct. 1690 (2003) (unanimous).

342. For example, as described supra in note 235 in Smith v. Murray, 477 U.S. 527 (1986), the Supreme Court declined to address the merits of a petitioner’s claim that his Fifth Amendment rights were violated by the testimony of a psychiatrist who had examined the defendant without warning him that the interview could be used against him. See id. at 529. Appellate counsel failed to assert this claim on direct appeal because the Virginia Supreme Court had rejected such claims at that time. See id. at 531. The Supreme Court subsequently found such testimony unconstitutional in Estelle v. Smith, 451 U.S. 454 (1981). In a “Catch-22” for the defendant, the Court concluded appellate counsel was not ineffective, because the “process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence,
Appellate counsel must be familiar with the deadlines for filing petitions for state and federal post-conviction relief and how they are affected by the direct appeal. If the conviction and sentence are affirmed, appellate counsel should ordinarily file on the client’s behalf a petition for certiorari review in the United States Supreme Court. Under the AEDPA, a client’s one-year statute of limitations for filing a petition for federal habeas corpus relief generally begins to run upon the denial of certiorari or when the 90 days for filing a petition has elapsed.\footnote{28 U.S.C. § 2244(d)(1)(A) (2000); see Liebman & Hertz, supra note 28, § 1.1b.} Appellate counsel should therefore immediately inform successor counsel if he or she does not intend to file a petition for certiorari or when a petition for is denied; if successor counsel is not yet appointed, counsel should promptly advise the Responsible Agency of the need to designate successor counsel (Subsection D).

Appellate counsel should also advise the client directly of all applicable deadlines for seeking post-conviction relief and explain the tolling provisions of the AEDPA,\footnote{See, e.g., California Supreme Court, California Supreme Court Policies Regarding Cases Arising From Judgments of Death 3 (2002) (petitions for writ of habeas corpus to be filed within 180 days of final due date for filing reply brief on direct appeal); Okla. Stat. Ann. tit. 22, § 1089(D)(1) (West Supp. 2003) (motion for post-conviction relief must be filed within 90 days from filing of reply brief on direct appeal).} emphasizing that a state post-conviction motion should be filed sufficiently in advance of the one-year deadline to allow adequate time to prepare a federal habeas corpus petition. In states in which the direct appeal and state post-conviction review are conducted in tandem,\footnote{See supra Guideline 10.8, text accompanying notes 234-36; see also supra text accompanying note 28. For examples of such issues, see supra notes 231, 271, 276, 307, and infra note 352.} post-conviction proceedings may be concluded at the same time as, or even before, the direct appeal, effectively rendering the tolling provisions inapplicable.

In light of this mutual dependency among all the post-conviction legal procedures, it is of the utmost importance that, in accordance with Guideline 10.13, appellate counsel cooperate fully with successor counsel and turn over all relevant files promptly.

the hallmark of effective appellate advocacy.” Murray, 477 U.S. at 536 (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)). At the same time, the claim was not deemed sufficiently novel to constitute cause for the procedural default because “forms of the claim he [advanced] had been percolating in the lower courts for years at the time of his original appeal.” Murray, 477 U.S. at 536-37. Mr. Smith was therefore barred from raising the issue in federal habeas proceedings, id. at 539, and was executed.

343. It is for this reason that Subsection C refers to “issues . . . that are arguably meritorious under the standards applicable to high quality capital defense representation.” See supra Guideline 10.8, text accompanying notes 234-36; see also supra text accompanying note 28. For examples of such issues, see supra notes 231, 271, 276, 307, and infra note 352.


346.
B. Collateral Relief—State and Federal

As described in the commentary to Guideline 1.1, providing high quality legal representation in collateral review proceedings in capital cases requires enormous amounts of time, energy, and knowledge. The field is increasingly complex and ever-changing. As state and federal collateral proceedings become ever-more intertwined, counsel representing a capital client in state collateral proceedings must become intimately familiar with federal habeas corpus procedures. As indicated above, for example, although the AEDPA deals strictly with cases being litigated in federal court, its statute of limitations provision creates a de facto statute of limitations for filing a collateral review petition in state court. Some state collateral counsel have failed to understand the AEDPA’s implications, and unwittingly forfeited their client’s right to federal habeas corpus review.347

Collateral counsel has the same obligation as trial and appellate counsel to establish a relationship of trust with the client. But by the time a case reaches this stage, the client will have put his life into the hands of at least one other lawyer and found himself on death row. Counsel should not be surprised if the client initially exhibits some hostility and lack of trust, and must endeavor to overcome these barriers.

Ultimately, winning collateral relief in capital cases will require 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.348 Because an appreciable portion of the task of post-conviction counsel is to change the overall picture of the case, Subsection E(3) requires that they keep under continuing review the desirability of amending the defense theory of the case, whether one has been formulated by prior counsel in accordance with Guideline 10.10.1 or not.

For similar reasons, collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation.


in accordance with Guideline 10.7. (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case.\footnote{See supra text accompanying notes 47-58.}

That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel’s performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

As with every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues.\footnote{See supra Guideline 10.8 and accompanying commentary. As Subsection C emphasizes, the duty to investigate and present such claims applies to “all issues, whether or not previously presented.” Until previously unpresented issues are fully explored, there is no way to determine whether or not any arguably applicable forfeiture doctrines may be overcome. See House v. Bell, 311 F.3d 767 (6th Cir. 2002) (en banc), cert denied, 123 S. Ct. 2575 (2003) (certifying to state courts issue of whether procedural vehicle existed to present evidence of innocence first uncovered during federal habeas proceedings).}

These include not only challenges to the conviction and sentence, but also issues which may arise subsequently.\footnote{For example, although the Justices disagree on the point, as shown most recently by their varying opinions respecting the certiorari petition in Foster v. Florida, 123 S. Ct. 470 (2002), it may well be that after a certain length of time continued confinement on death row ripens into an Eighth Amendment violation.}

Collateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications.\footnote{See Mason v. Meyers, 208 F.3d 414, 417 (3d Cir. 2000) (stating that as a result of the strict rules governing successive habeas corpus petitions enacted by the AEDPA and codified at 28
any change in the availability of post-conviction relief may itself provide an issue for further litigation. This is especially true if the change occurred after the case was begun and could be argued to have affected strategic decisions along the way.

U.S.C. § 2244(b), "it is essential that habeas petitioners include in their first petition all potential claims for which they might desire to seek review and relief").

353. See, e.g., Lindh v. Murphy, 521 U.S. 320, 322-23 (1997) (discussing the retroactive application of various procedural provisions in the AEDPA to pending cases).
GUIDELINE 10.15.2—DUTIES OF CLEMENCY COUNSEL

A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.

B. Clemency counsel should conduct an investigation in accordance with Guideline 10.7.

C. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.

D. Clemency counsel should ensure that the process governing consideration of the client’s application is substantively and procedurally just, and, if it is not, should seek appropriate redress.

History of Guideline

This Guideline is based on Guideline 11.9.4 of the original edition. Subsection D of the Guideline was added to reflect the effect of the decision in Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998), on the duties of clemency counsel.

Related Standards

None.

Commentary

As discussed supra in the text accompanying notes 59-66, a series of developments in law, public opinion, and forensic science suggests that clemency petitions in capital cases will in the future enjoy a greater success rate than they do now, which will place additional demands on clemency counsel.
As Subsection B emphasizes, further investigation is critical at this phase. Beyond that, the manner in which clemency is dispensed in the jurisdiction controls what clemency counsel needs to do.354

Counsel should be familiar with the clemency-dispenser, and with the factors the clemency-dispenser has historically found persuasive. As possible innocence is the most frequently cited reason for clemency,355 if there is a possibility that the client is innocent, counsel should mobilize an especially detailed investigation to determine whether confidence in the client’s guilt can be undermined. If doubts about the fairness of the judicial proceedings that produced the death sentence have led to clemency in other cases, counsel should consider whether particular instances of procedural unfairness can be set out as to the client’s case.356 If personal characteristics of the condemned, such as youth, mental illness,357 spousal abuse, or cultural barriers, have proven helpful

354. The states utilize fifty different clemency processes, which can be categorized in the following manner: the Governor has sole authority over the clemency process; the Governor cannot grant clemency without a recommendation from a board or advisory group to do so; the Governor decides clemency after receiving a nonbinding recommendation from a board or advisory group; a board or advisory group makes the clemency determination; or, the Governor sits as a member of the board which makes the clemency determination. The Death Penalty Information Group details the process by state. See DEATH PENALTY INFORMATION CENTER, Clemency, at http://www.deathpenaltyinfo.org/article.php?did=126&scid=13 (last visited Aug. 18, 2003) [hereinafter Clemency]. For federal death row inmates, the President alone has pardon power. See U.S. CONST. art. II, § 2, cl. 1.

355. The Death Penalty Information Center reports that since 1976, of the thirty-five death row inmates who have been granted clemency for reasons other than the personal convictions of the governor in opposition to the death penalty, the possible innocence of the condemned inmate was provided as the reason for granting clemency in sixteen cases (forty-six percent). See Clemency, supra note 354.

356. For example, in 1999 the Governor of Arkansas commuted the death sentence of Bobby Ray Fretwell after receiving a letter from a juror at Fretwell’s trial stating that he had been “the lone holdout against the death penalty but relented for fear he would be an outcast in the small community where the killing occurred.” See Arkansas Governor Spares Killer’s Life After Juror’s Plea, L.A. TIMES, Feb. 6, 1999, at A19. In the case of Charlie Brooks, who was executed in Texas in 1982, counsel enlisted the trial prosecutor to argue before the Board of Pardons and Paroles that it would be unfair to execute the client when his co-defendant was serving a term of years and the state did not know who the triggerman had been. See Robert Reinhold, Groups Race to Prevent Texas Execution, N.Y. TIMES, Dec. 6, 1982, at A16.

357. As indicated supra text accompanying note 64, a broad range of humanitarian concerns unrelated to issues of guilt has traditionally supported executive clemency. For example, in June 2003 Governor Paul E. Patton of Kentucky commuted the death sentence of Kevin Stanford because he had been seventeen at the time of the commission of his crimes. See Henry Weinstein, Death Sentence Commuted for Ky. Man Who Killed at 17, L.A. Times, June 22, 2003, at 36. In 2002, the Georgia Board of Pardons commuted the death sentence of Alexander Williams to life in prison without parole in large part due to Williams’s profound mental illness. See Rhonda Cook, Death Penalty Reduced to Life, ATLANTA J. & CONST., Feb. 26, 2002, at A1.
in past clemency proceedings, then counsel should discover and demonstrate examples of the client’s similar characteristics to the extent possible.

In any event, the presentation should be as complete and persuasive as possible, utilizing all appropriate resources in support (e.g., relevant outside organizations, the trial judge, prominent citizens), and discussing explicitly why the clemency-dispenser should act favorably notwithstanding the repeated reaffirmation of the client’s conviction and sentence by the judicial system. For example, counsel may be in a position to argue that the underlying claims were powerful ones but procedural technicalities barred the courts from addressing their merits.

As discussed in the text supra accompanying notes 65-66, due process protections apply to clemency proceedings, and counsel should be alert to the possibility of developing the nascent existing law in this area.
‘THE GUIDING HAND OF COUNSEL’ AND THE ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES

Robin M. Maher*

More than seventy years ago, the United States Supreme Court found itself reviewing what was then the most sensational criminal case in recent years.¹ Nine poor, young African Americans were facing death sentences after being convicted of raping two white women in Alabama.² The question was simple: were the defendants entitled to effective assistance of counsel in a death penalty trial as part of their constitutional right to due process?³

On November 7, 1932, Mr. Justice George Sutherland announced the Court’s decision. He first famously declared that defendants in capital cases have the right to the “guiding hand of counsel at every step in the proceedings against [them].”⁴ Poor defendants had the right to have counsel appointed if necessary.⁵ While the Court was still years away from acknowledging that the right to counsel was essential in all felony cases, the words of this conservative justice marked a significant change in the law.

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¹  The “Scottsboro Boys” ranged in age from 13 to 20 and were nearly lynched before their trial could begin:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were . . . put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them. Powell v. Alabama, 287 U.S. 45, 57-58 (1932); see also DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH, 5-6 (special ed., The Notable Trials Library 2000) (giving age range of Scottsboro boys as 13-20).

²  See Powell, 287 U.S. at 49-50.

³  See id. at 52.

⁴  Id. at 69.

⁵  See id. at 72.
moment in criminal legal jurisprudence and foreshadowed the Court’s 1963 landmark opinion in *Gideon v. Wainright.*

Equally important, however, was how the Court reached its decision. It found that the trial court’s failure to make an effective appointment of counsel was a clear *denial of due process*, with all its attendant implications of fairness and justice: “[T]he right to counsel is of such character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’” On that November day, the Court concluded for the first time that effective legal assistance in the preparation and defense of a capital case was an essential component of due process and a fair trial.

Observers that day might have reasonably expected that legal representation for capital defendants would change forever. They would be disappointed to know how many problems remain.

Seventy-one years later, the United States Supreme Court once again found itself hearing oral arguments regarding the death sentence of another indigent African American defendant, Kevin Wiggins. Mr. Wiggins, very much like the Scottsboro Boys, was poor, vulnerable, and accused of a heinous crime against a white victim. Like the lawyers in the Scottsboro case, Mr. Wiggins’s lawyers failed to adequately investigate the facts or prepare the case for trial. They waived critical rights of the defendant at trial. Like the Scottsboro lawyers, they failed

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7. On the morning of trial, the trial court appointed an intoxicated real estate lawyer and a “doddering, extremely unreliable, senile” lawyer of almost seventy years old to serve as defense counsel for the defendants. *Carter,* supra note 1, at 18. They replaced “all seven members of the Scottsboro bar” who had been summarily appointed at arraignment. *Id.* at 17. The lawyers conducted no investigation and met with their clients for a mere thirty minutes before the trial began. *See id.* at 23. They managed very little by way of defense and waived closing arguments. *See id.* at 31-35.


to discover critical evidence for the defense. I can only imagine that Mr. Justice Sutherland would be surprised at the poor quality of legal representation that Mr. Wiggins received. Our society has seen incredible technological advances and achievements in the past seventy years. Unfortunately, our capital defense systems have not shared in that progress.

The ABA has long been concerned with the provision of effective counsel for all criminal defendants, especially for those facing the death penalty. In 1989, the ABA first published its Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which detailed the kind of competent, effective legal representation that all capital defendants were entitled to receive. Earlier this year, after a two-year effort drawing upon the expertise of a broad group of distinguished and experienced judges, lawyers, and academics, the ABA House of Delegates overwhelmingly approved revisions to those Guidelines to update and expand upon the obligations of death penalty jurisdictions to ensure due process of law and justice.

“These Guidelines are not aspirational.” They articulate a national standard of care and the minimum that should be required in the defense of capital cases. Sadly, however, we know that all too often, the kind of zealous, effective legal representation the Guidelines describe does not occur.

13. The Scottsboro lawyers were appointed immediately before trial and never discovered any facts at all. See Powell, 287 U.S. at 53-56. Mr. Wiggins’s lawyers failed to uncover evidence of sexual abuse and torture he had been subject to as a child as well as other powerful mitigating evidence. See Wiggins, 123 S. Ct. at 2533, 2536-38.


15. In February 2003 the ABA House of Delegates passed the following resolution adopting the Guidelines:

Resolved, That the American Bar Association adopts the black letter ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, dated February 2003; and


17. See id. at Guideline 1.1, text accompanying note 73.

18. See id. at Guideline 1.1, text accompanying note 29-32, 46.
Nearly every week I hear of another death row prisoner whose conviction or sentence has been set aside because of serious constitutional errors at trial, or actual innocence. It forces me to wonder what would have happened to these men and women had they not had the good fortune to have competent legal representation on appeal. What will happen to the men and women on death rows around the country represented by appointed counsel without the knowledge, skill, or experience to satisfy the Guidelines, lawyers who are merely required to have “a law license and a pulse?” The risk—the very likelihood—that we have or will execute an innocent person because we have failed to provide them with competent and effective legal counsel at trial or post-conviction is deeply troubling.

Mr. Wiggins, fortunately, will not be among the wrongfully executed. A law firm agreed to take his appeal pro bono and for the first time Mr. Wiggins received the assistance of a competent legal advocate. At the Supreme Court, his new lawyers argued that Mr. Wiggins’s Sixth Amendment rights had been violated because of the poor performance and mistakes his lawyers made at trial. The Court turned to the ABA Guidelines to help assess the performance of Mr. Wiggins’s trial counsel and found that their conduct had fallen well short of these professional norms. The Guidelines, the Court said, “are guides to determining what is reasonable” in the defense of a capital case. Mr. Wiggins will receive another sentencing hearing and a first chance at justice.

But what about the next young man or woman facing a death sentence who needs legal assistance? We cannot recruit enough volunteer lawyers to represent all those who need them, nor should we rely on inexperienced but well-meaning civil lawyers as a substitute for the experienced and well-trained capital defenders that governments have an obligation to provide.

As the Guidelines emphasize, that obligation cannot be met by piecemeal efforts aimed at particular cases, but requires sustained

20. See Elizabeth Amon, *Jenner & Block: Death Penalty Pros*, NAT’L L.J., Jan. 6, 2003, at A8. Since the mid-1980s the ABA Death Penalty Representation Project has recruited, trained, and supported volunteer lawyers, most of whom are civil lawyers, to represent death row inmates who do not have counsel. The profession can rightly take pride in this effort.
21. See, e.g., *supra* notes 11-12 and accompanying text. Similarly, the International Labor Defense recruited a prominent criminal lawyer as pro bono counsel to the Scottsboro Boys after the U.S. Supreme Court remanded the case for new trial. See *Carter*, *supra* note 1, at 182.
22. See Wiggins, 123 S. Ct. at 2536-37.
23. Id.
institutional commitment. All of us—bar associations, judges, legislators, and lawyers—must work together to bring about badly needed reform of our capital defender systems.

The ABA Guidelines provide a blueprint for that reform. To improve the quality and availability of counsel, we must require independent appointing authorities to set performance standards and qualifications for counsel, require training of recruited and appointed lawyers, and investigate all complaints regarding the performance of capital defense counsel. Every capital defense lawyer must possess the requisite knowledge and skills necessary to handle the demanding aspects of a capital case. The team of experts that the lawyer assembles should be multi-disciplinary and capable of handling the complex and highly specialized issues that death penalty cases present. But that is only the beginning. Even the best of lawyers needs resources if she is to provide effective representation. We need to adequately fund capital defender offices in parity with the prosecutorial effort and limit the caseloads of capital defenders so that they can provide high quality legal representation to each and every defendant they represent.

These are just a few of the reforms that must occur, and no one believes that it will be easy to realize them. It will require an investment of time and money and care, from all of us. But the effort is both worthy and long overdue. For in calling upon every death penalty jurisdiction to adopt the revised Guidelines, the ABA is doing no more than seeking implementation of a ‘‘fundamental principle’’ of liberty and justice’ that Justice Sutherland recognized more than seventy years ago. 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 execution of the innocent.

26. See id. at Guidelines 5.1, 10.1.
27. See id. at Guidelines 4.1, 10.4.
28. See id. at Guideline 9.1. Currently capital prosecution is generally funded at approximately three times the level of capital defense. See id. at note 135.
29. See generally id. at Guideline 6.1, commentary.
ADD RESOURCES AND APPLY THEM SYSTEMATICALLY: GOVERNMENTS’ RESPONSIBILITIES UNDER THE REVISED ABA CAPITAL DEFENSE REPRESENTATION GUIDELINES

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1. The overwhelming majority of non-capital murder prosecutions result in a guilty plea, thus saving the government the cost of a trial. In cases being pursued capitally, however, the defendant has little incentive to plead guilty, his lawyer is duty-bound to discourage him from doing so, see ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), Guideline 10.9.2, commentary [hereinafter GUIDELINES] (“If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client’s trial rights”), and if a guilty plea nonetheless emerges it may well be followed by a collateral attack on its validity. Thus, a state that wishes to implement the death penalty will need to budget for a trial in every case (even though the ultimate outcome of roughly sixty-eight percent of those trials will be a non-death sentence, see infra note 10). The state’s budget will also need to take account of the fact that the defense team will devote substantial efforts to persuading the prosecution to make the case a non-capital one. See id. at Guideline 10.9.1.

2. The Guidelines are imbued with the concept that at every moment of its work a capital defense team must maintain a dual focus on the guilt and penalty phases. See, e.g., id. at Guidelines 10.7 (A), 10.11(A), (L), and text accompanying notes 104, 227-59; see generally, John L. Petterson, Death-penalty cases can strain state, county budgets, THE KANSAS CITY STAR, June 21, 2003, at 1 (listing reasons in addition to bifurcation for costs of death penalty cases).
necessarily entails substantially higher costs than the contrary decision does.³

Specifically, the costs of representing the defendant—costs that the Constitution requires the government to bear⁴—are significantly higher in capital cases than in non-capital ones. Because “death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal

³ See, e.g., Philip J. Cook & Donna B. Slawson, The Costs of Processing Murder Cases in North Carolina 77-78 (1993), at http://www.pubpol.duke.edu/people/faculty/cook/comnc.pdf (last visited Aug. 1, 2003) (concluding, in a study funded by the North Carolina Administrative Office of the Courts, that maintaining a capital litigation system costs the state of North Carolina an additional $163,000 per case, and up to $2.16 million per execution, beyond the costs of a non-capital system); S.V. Date, Palm Beach Post Capital Bureau, The High Price of Killing Killers: Death Penalty Prosecutions Cost Taxpayers Millions Annually, PALM BEACH POST, Jan. 4, 2000, at 1A (estimating that “$51 million a year . . . is how much Florida spends each year to enforce the death penalty—above and beyond what it would cost to punish all first degree murderers with life in prison without parole”); Christy Hoppe, Executions Cost Texas Millions Study Finds It’s Cheaper to Jail Killers for Life, DALLAS MORNING NEWS, Mar. 8, 1992, at 1A (“The [Dallas Morning News] study shows that [death penalty] trials and appeals take 7.5 years and cost taxpayers an average $2.3 million per case in Texas. To imprison someone in a single cell at the highest security level for 40 years costs about $750,000.”); Stephen Magagnini, Closing Death Row Would Save State $90 Million a Year, SACRAMENTO BEE, Mar. 12, 1988, at A1 (comparing the per execution costs of $15,000,000 with the $930,240 costs of 40 years in prison); Dave von Drehle, Bottom Line: Life in Prison One-sixth as Expensive, MIAMI HERALD, July 10, 1988, at 12A (reporting that Florida spends $3.2 million per execution on its capital punishment system, or approximately six times the cost of life imprisonment); see also James S. Liebman et al., Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 TEX. L. REV. 1839, 1862-63 (2000); Eric M. Freedman, The Case Against The Death Penalty, U.S.A. TODAY, Mar. 1, 1997 (Magazine), at 48, 49; Pamela Manson, Matter of Life or Death: Capital Punishment Costly Despite Public Perception, It’s Cheaper to Keep Killers in Prison, ARIZ. REPUBLIC, Aug. 23, 1993, at A1; see generally Robert Spangenberg & Elizabeth R. Walsh, Capital Punishment or Life Imprisonment? Some Cost Considerations, 23 LOYOLA L.A. L. REV. 45 (1989); infra note 9.

⁴ See Powell v. Alabama, 287 U.S. 45, 71-73 (1932) (requiring appointment of counsel in a capital case); Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942), as having “departed from the sound wisdom upon which the Court’s holding in Powell v. Alabama rested,” and holding all indigent defendants entitled to appointed counsel). Although the due process holdings of these cases apply only to defendants who are indigent (as most are), the defendant’s Sixth Amendment right to a defense by effective counsel applies equally to both retained and appointed counsel. See Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980). Thus, even if only in the interests of having any convictions and death sentences that they obtain withstand appeal, the states need to insure competent counsel for all defendants. The new edition of the Guidelines explicitly recognizes this obligation. See GUIDELINES, supra note 1, at Guideline 1.1, History of Guideline (“The Guidelines formerly covered only ‘defendants eligible for appointment of counsel.’ Their scope has been revised for this edition to cover ‘all persons facing the possible imposition or execution of a death sentence.’ The purpose of the change is to make clear that the obligations of these Guidelines are applicable in all capital cases, including those in which counsel is retained or representation is provided on a pro bono basis.”).
cases, representing a capital defendant as competently as a non-capital one requires vastly more resources. And, of course, providing the capital defendant with representation only as good as the non-capital one would receive is just not sufficient in light of the chillingly real chance that an error may have fatal consequences.

Although these propositions are uncontroversial in the criminal justice community, the politicians who control state budgets benefit from pretending that they can deliver voters the claimed benefits of the death penalty without requiring voters to pay the associated costs, or at

5. GUIDELINES, supra note 1, at Guideline 1.1, text accompanying note 3. The remainder of the Commentary to Guideline 1.1 documents this proposition at some length. See also Monroe Freedman’s commentary, The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases, 31 HOFSTRA L. REV. 1167 (2003).

6. See McFarland v. Scott, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from denial of certiorari) (“The unique, bifurcated nature of capital trials and the special investigation into a defendant’s personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials.”)

7. See GUIDELINES, supra note 1, at Guideline 10.1, text accompanying notes 154-55 (“The level of attorney competence that may be tolerable in noncapital cases can be fatally inadequate in capital ones.”) (footnotes omitted).

8. Perhaps symbolically, the revised Guidelines passed the ABA House of Delegates by a margin of over ninety percent and without a single voice being raised in opposition. See Marcia Coyle, New Standards in Death Cases; High Court Rules on Effective Assistance of Counsel, NAT’L L.J., July 14, 2003, at 1. The reasons for this consensus are straightforward. “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.” Comm’n on Civ. Rts., Ass’n of the Bar of the City of N.Y., Legislative Modification of Federal Habeas Corpus in Capital Cases, 44 REC. ASS’N OF THE BAR OF CITY OF N.Y. 848, 854 (1989). Judges and prosecutors are well aware that the quality of defense counsel “is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence.” GUIDELINES, supra note 1, at Guideline 1.1, commentary; see also id., text accompanying notes 29-31 (citing concerns of present Supreme Court Justices that without adequate defense counsel they cannot be sure of the justice of the outcomes they reach); Adam Liptak, Indiana Death Row Inmate Gets Support for DNA Test from Unlikely Source: His Prosecutor, N.Y. TIMES, July 24, 2003, at A12 (describing how Indiana capital defendant Darnell Williams’ prosecutor, Thomas Vanez, supports his demand for DNA testing in light of subsequent exoneration of a defendant Mr. Vanes had previously prosecuted: “I was convinced I was right,” Mr. Vanez . . . said. ‘DNA proved I was wrong. It’s a very sobering, troubling lesson to learn.’

9. Some recent evidence suggests that this pretense is becoming more difficult to maintain. See, e.g., Russell Gold, Counties Struggle With High Cost of Prosecuting Death-Penalty Cases, WALL ST. J., Jan. 9, 2002, at B1 (summarizing anecdotal and academic evidence from around country that counties with death penalty had higher taxes and fewer services than those without); Wiltrout, supra note 8 (“Small counties in South Georgia are going broke prosecuting and defending death penalty cases—even though fewer and fewer murderers are being put to death.”);
worst to pay them later rather than sooner. 10 So, defying the public interests in efficiency and justice, the states simply refuse to allocate sufficient funds to provide competent capital defense representation. 11

The Price of Justice: Kansas May Not Be Able to Afford Capital Punishment, HUTCHINSON NEWS, June 29, 2003, at B6 (editorial noting that Kansas recently joined Nevada, Illinois, Indiana, North Carolina, and Massachusetts in commissioning studies of costs of capital punishment, and expressing view that Kansas cannot afford it); see generally Ashley Rupp, Note, Death Penalty Prosecutorial Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?, 71 FORDHAM L. REV. 2735 (2003) (arguing that a state in which a defendant’s probability of facing the death penalty depends on budgetary considerations in the prosecuting county in violation of Furman v. Georgia, 408 U.S. 238 (1972)).

10. As an overall statistical generalization, there is a lag of about nine years between conviction and ultimate disposition of a capital case, with the outcome being a non-capital one roughly sixty-eight percent of the time. See Liebman, supra note 3, at 816-63. By the time such an outcome comes to public attention—through, for example, an appellate reversal or an exoneration—a voter is not likely to recognize that providing funding for effective defense representation at the outset would have obviated a great deal of the subsequent expenses and suffering. Even if the voter does, the responsible politicians, assuming them to be identifiable, will in all probability have left their original offices and thus escaped accountability.

Nonetheless, as I have previously suggested, from a public policy perspective, “[t]he single most meaningful reform of the capital punishment system, short of its abolition, would be the provision of effective trial counsel . . . If that happened . . . there would be far fewer convictions and death sentences, but those few would be much more likely to stick. That is an outcome that would be in the best interests of all concerned. When the government attempts to evade costs at the front end, they emerge at the back end—not just in the monetary drain of lengthy appeals, but in such injustices as the irreplaceable years that Earl Washington spent wrongfully imprisoned.” Eric M. Freedman, Earl Washington’s Ordeal, 29 HOFSTRA L. REV. 1089, 1106-07 (2001); cf. GUIDELINES, supra note 1, at Guideline 1.1, text accompanying note 38 (“[J]urisdictions that continue to impose the death penalty must commit the substantial resources necessary to ensure effective representation at the trial stage . . . [A]ny other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.”); id. at Guideline 4.1, text accompanying note 99 (“[J]urisdictions should . . . be mindful that sufficient funding early in a case may well result in significant savings to the system as a whole.”).

11. See GUIDELINES, supra note 1, at Guideline 1.1, n.30 and accompanying text (surveying current research on state of capital defense systems). The states’ constitutional obligations, see supra note 4, apply from trial through the end of direct appeals as of right. See Ross v. Moffitt, 417 U.S. 600 (1974). At the state post-conviction stage, the states, relying upon Murray v. Giarratano, 492 U.S. 1 (1989), do not recognize any such obligations, notwithstanding the suggestion in the controlling opinion of Justice Kennedy in that 4-1-4 decision that they might exist in certain factual circumstances. See Murray, 492 U.S. at 14-15 (emphasizing that concurrence is based “on the facts and record of this case,” in which “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia’s prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief”); cf. GUIDELINES, supra note 1, at Guideline 1.1 n.47 (urging that defense counsel continue to test the boundaries of this decision and pursue non-constitutional theories to obtain the right to post-conviction counsel).

The practical result is that many states provide capital prisoners no counsel at all for state post-conviction proceedings and “even in those states that nominally do provide counsel for collateral review, . . . chronic underfunding, lack of standards, and a dearth of qualified lawyers . . . have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance.” Id. The correctness of this description has been dramatically
But that does not make the costs disappear. It just shifts them. Specifically, many of the costs that should properly have been borne by the states as part of the policy decision to have a death penalty have been transferred to two groups. The first is capital defendants, who have paid in injustice for the lack of competent defense counsel. The second is pro bono lawyers and other defense professionals, who have to some small degree rescued the states from the consequences of their own irresponsibility. But none of this changes—indeed, it re-emphasizes—demonstrated in recent years by the unanimous course of decisions under Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1221-26 (1996) (amending 28 U.S.C. §§ 2244, 2253-55 and adding §§ 2261-66). That statute gives a number of procedural advantages to the states during the federal habeas corpus stage of capital litigation on condition that they provide “a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners [and] . . . provide standards of competency for the appointment of such counsel.” 28 U.S.C. § 2261(b) (2000). Shockingly, no state has been found to meet the condition. See Spears v. Stewart, 283 F.3d 992, 1019 (9th Cir. 2002) (holding state’s failure to comply with Arizona’s facially sufficient Chapter 154 mechanism prevented it from benefiting from the opt-in provisions in instant case); Kreutzer v. Bowersox, 231 F.3d 460, 462-63 (8th Cir. 2000) (stating Missouri does not qualify under Chapter 154); Tucker v. Catoe, 221 F.3d 600, 604-05 (4th Cir. 2000) (holding South Carolina’s “mere promulgation of a ‘mechanism’ [was] not sufficient to permit [it] to invoke [Chapter 154’s] provisions[;] . . . those mechanisms and standards must in fact be complied with”); Ashmus v. Woodford, 202 F.3d 1160, 1170 (9th Cir. 2000) (California does not qualify under Chapter 154); Baker v. Corcoran, 220 F.3d 276, 285-87 (4th Cir. 2000) (Maryland does not qualify under Chapter 154), cert. denied, 531 U.S. 1193 (2001); Green v. Johnson, 116 F.3d 1115, 1120 (5th Cir. 1997) (Texas does not qualify under Chapter 154); Brown v. Puckett, No. 3:01CV197-D, 2003 WL 21018627, at *2-3 (N.D. Miss. Mar. 1, 2003) (Mississippi does not qualify under Chapter 154); Kasi v. Angelone, 200 F. Supp. 2d 585, 592-93 n.2 (E.D. Va. 2002) (stating that “Virginia does not meet the [opt-in provisions]”); Smith v. Anderson, 104 F. Supp. 2d 773, 786 (S.D. Ohio 2000) (Ohio does not qualify under Chapter 154); Ward v. French, 989 F. Supp. 752, 757 (E.D.N.C. 1997) (North Carolina does not qualify under Chapter 154), aff’d, 165 F.3d 22 (4th Cir. 1998); Williams v. Cain, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (Louisiana does not qualify under Chapter 154). Austin v. Bell, 927 F. Supp. 1058, 1062 (M.D. Tenn. 1996) (finding “Tennessee law [providing] for the appointment of counsel to habeas petitioners did not satisfy prerequisites of § 2261(b)”); Ryan v. Hopkins, No. 4:CV95-3391, 1996 WL 539220, *3-4 (D. Neb. July 31, 1996) (stating “Nebraska’s framework for appointing counsel in post-conviction capital cases [was not] in compliance with subsections (b) and (c) of section 2261”).

12. See Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 BUFF. L. REV. 329, 337-38 (1995) (“The failure of the states to provide adequate resources for capital defense . . . is nothing less than a state-created systemic defect tainting most death sentences rendered in the United States. It virtually guarantees that most indigent defendants facing the death penalty will receive severely substandard representation, regardless of the abilities or shortcomings of individual defense lawyers.”).

13. Thus, for example, I have previously described in these pages the case of my client Earl Washington, who, having come within nine days of execution as a result of an utterly inept trial defense, was eventually released on the grounds of innocence—after eighteen years of imprisonment, and after a pro bono team of almost twenty lawyers and non-lawyers expended an estimated $10 million worth of professional time and other resources on the project. See Freedman, supra note 10, at 1089, n.*; see also MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-
the ineluctable fact that the constitutional duty to provide capital defendants with an effective defense belongs to the states. Hence, jurisdictions that wish to have a death penalty must bear the full costs of providing such a defense.14

But money alone will not do the job. Consistent effective capital defense representation is not the product of spontaneous generation; it is the result of a system for its provision—a system that involves not only identifying15 and compensating16 qualified lawyers, but also equipping the defense team with such fundamental resources as investigative, forensic and related services,17 and continuing professional education.18 “Attorney error is often the result of systemic problems, not individual deficiency.”19 Even a skilled lawyer making best efforts to defend her client competently is probably engaged in a foredoomed project if she is not part of a system that provides her with the back-up necessary to perform effectively. Consequently, the government is not spending its money efficaciously if it recruits hundreds of such lawyers, but does not create that system. Neither the problem of ineffective representation nor

EXECUTION OF EARL WASHINGTON JR. (2003) (providing fuller account). Reliance on this sort of massive rescue effort to save the state from the consequences of its failure to meet its constitutional obligations is both unrealistic and wrong in principle. See Vick, supra note 12, at 427-30.

14. The ABA recognizes that the states may not wish to bear this financial burden; in that case, they should forego the death penalty. Except for opposing execution of persons who are mentally retarded or were under eighteen at the time of their crimes, the ABA “takes no position on the death penalty”; it simply calls upon all jurisdictions wishing to retain capital punishment to comply with a series of policies—including the Guidelines—intended to insure due process and minimize the risk of execution of the innocent. See http://www.abanet.org/moratorium/resolution.html (containing ABA resolution of Feb. 3, 1997, embodying this position, with links to relevant policies); Editorial, Defending Against Death, COURIER J., Feb. 11, 2003, at 10A (supporting revised Guidelines and arguing that if the states can’t afford to meet them, “then states ought to get out of the execution business unless they’re willing to put innocent people to death”).


16. See GUIDELINES, supra note 1, at Guideline 9.1, text accompanying note 150 (“For better or worse, a system for the provision of defense services in capital cases will get what it pays for.”).


18. See GUIDELINES, supra note 1, at Guideline 8.1 (“Training”).

19. Id. at Guideline 1.1, text accompanying note 68.
the solution to it ultimately lies at the level of the individual case—although, to be sure, it is at that level that the problems become visible and the solutions must be implemented.

The mainstream legal community, including the ABA,\(^\text{20}\) has long understood the importance of system-building, but the revised Guidelines state the point especially forcefully. In articulating “the current consensus about what is required to provide effective defense representation in capital cases,”\(^\text{21}\) they set high performance standards not just for lawyers,\(^\text{22}\) but for death penalty jurisdictions.\(^\text{23}\) As the problems are systemic, it is “imperative”\(^\text{24}\) that the solutions be.

The Guidelines accordingly not only call on governments to deliver capital defense resources that are sufficient in amount,\(^\text{25}\) but also furnish the states with a user-friendly blueprint for using those resources wisely to create structures that will function well in the present and evolve effectively over time.\(^\text{26}\) This mandate for institution-building is welcome, and the states should lead it. Indeed, they must do so if the Guidelines are to achieve their ameliorative purposes and avoid becoming just a collection of lofty aspirations “that palter with us in a double sense, that keep the word of promise to our ear, and break it to our hope.”\(^\text{27}\)

\(\text{20}\) See, e.g., ABA CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES (1990), reprinted in Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 AM. U. L. REV. 1, 9 (1990) (mandating that “[j]urisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases”).

\(\text{21}\) GUIDELINES, supra note 1, at Guideline 1.1, History of Guideline.

\(\text{22}\) See id. (first edition called for ‘‘quality legal representation’’ but “[t]he language has been amended to call for ‘high quality legal representation’ to emphasize that . . . a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case”).

\(\text{23}\) See id. at Guideline 2.1 (“Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases”).

\(\text{24}\) Id. at Guideline 1.1, text accompanying notes 68-71.

\(\text{25}\) Recognizing that “resources are not unlimited,” id. at Guideline 4.1, text accompanying note 99, the Commentary to Guideline 9.1 reiterates existing ABA policy that “[a]s a rough benchmark, jurisdictions should provide funding for defender services that maintains parity between the defense and prosecution.” Id. at Guideline 9.1, text accompanying notes 134-35. It then goes on to note that, in fact, “[s]tudies indicate that funding for prosecution is, on the average, three times greater than funding that is provided for defense services at both the state and federal levels.” Id. at n.135.

\(\text{26}\) See id. at Guideline 3.1 (“Designation of a Responsible Agency”) and commentary.

\(\text{27}\) Id. at Guideline 1.1, text accompanying note 67, quoting WILLIAM SHAKESPEARE, MACBETH act 5, sc. 8; see also id., text accompanying note 71 (“The Guidelines . . . not only detail the elements of quality representation, but mandate the systematic provision of resources to ensure that such representation is achieved in fact . . . .”).
WHY AN INDEPENDENT APPOINTING AUTHORITY IS NECESSARY TO CHOOSE COUNSEL FOR INDIGENT PEOPLE IN CAPITAL PUNISHMENT CASES

Ronald J. Tabak*

I. INTRODUCTION

The revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases require that an agency “independent of the judiciary” be responsible for “ensuring that each capital defendant in the jurisdiction receives high quality legal representation.”1 This independent agency “and not the judiciary or elected officials should select lawyers for specific cases.”2

These mandates reflect two realities that have become overwhelmingly clear: (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 could have been selected.

Accordingly, an entity whose members are free from the political pressures that judges face, and have the requisite expertise and commitment to effective representation of people facing the death sentence, should be appointing counsel for these individuals.

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2. Id. at 3.1(B).
II. INCUMBENT AND PROSPECTIVE JUDGES FACE POLITICAL PRESSURES CONCERNING CAPITAL PUNISHMENT

A. Election, Re-election, and Retention Campaigns

Judges are either elected or face retention elections (in which voters decide whether judges should remain on the bench) in thirty-two of the thirty-eight states in the United States that have capital punishment.3

In 2003, the ABA’s Commission on the 21st Century Judiciary released its report, Justice in Jeopardy, which was the basis for a resolution on judicial independence adopted at the ABA annual meeting in August 2003.4 A consultant advised the Commission that “state court judges around the country” have faced re-election attacks or opposition in retention elections due to their adjudication of death penalty and other criminal matters.5 These included, inter alia:

In 1992, Florida Justice Rosemary Barkett’s retention was opposed by the National Rifle Association and a group of prosecutors and police officers, on the grounds that she was “soft on crime.”

In 1992, Mississippi Justice James Robertson lost his reelection bid, on the basis of a death penalty decision the Justice wrote.

. . . .

In 1996, The Tennessee Conservative Union and other groups successfully campaigned for the defeat of Tennessee Justice Penny White on account of a decision she joined overturning a death sentence.6

During Justice White’s retention election, the Republican Party used this message: “If you support capital punishment, vote NO on Penny White.”7 This and other attacks were based on her concurrence in

5. Id. at 48.
6. Id. at 25.
a decision in the only death penalty case that she ever adjudicated.8 Following her fifty-five percent to forty-five percent defeat in an election with an 18.6% voter turnout, Tennessee’s Governor said, “[s]hould a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so.”9

Following her defeat, the Tennessee Supreme Court—which previously had reversed or remanded about sixty percent of death penalty cases10—has mostly affirmed in capital cases. And its administrative office has sent out press releases when there are affirmances.11

In 1999, Justice White spoke about judicial independence to a group of judges.12 After her talk, one judge said to her, “You know, I got some really bad press over a bond motion not long ago. I’m here to tell you, I haven’t granted bond since, and I won’t. I can’t take the heat.”13

Justice Robertson’s defeat in the 1992 Mississippi Democratic primary resulted from a “law and order” campaign by an opponent backed by the state prosecutor’s association. Justice Robertson was attacked for stating in a concurring opinion that the Constitution forbids capital punishment for rape—something the United States Supreme Court had held in 1977.14 He was also attacked for supposedly believing that the death penalty was not justified for killing an unarmed delivery person in cold blood.15 Yet, his actual basis for dissent was that the trial court had neglected to charge the jury on the meaning of the “heinous, atrocious or cruel” aggravating factor, and ultimately, his view prevailed after the United States Supreme Court granted certiorari and remanded the case.16

In Texas, Court of Criminal Appeals Judge Charles F. Baird was defeated in 1998 after dissenting from the denial of the writ to death row inmate Karla Faye Tucker.17 The day following that decision, Baird’s re-election campaign consultant accurately said, “[t]his is the worst thing

8. See id. at 138.
9. Id. at 138-140.
10. See id. at 138.
11. See id. at 141.
12. See id. at 137.
13. Id. at 141.
15. See id. at 318.
16. Id.
17. See Breaking the Most Vulnerable Branch, supra note 7, at 133 (comments of Charles F. Baird).
you could have done for your political campaign.”18 In contrast, another member of the Court of Criminal Appeals promised during her campaign that “[i]f you elect me, I will never, ever vote to reverse a capital murder case,” and she lived up to that promise over the next five years, in about 250 capital cases—in none of which she voted for a reversal.19

Even when death penalty-oriented attacks fail to defeat incumbent judges, they can still have an impact on the courts. For example, North Carolina Chief Justice James Exum decided never again to run for re-election after surviving a re-election campaign in which, despite his numerous votes to uphold death sentences, he was attacked for his personal opposition to capital punishment.20

A subsequent North Carolina Supreme Court Chief Justice, Burley Mitchell, said the following in a letter to the state’s Law Enforcement Officers Association eliciting its support for his re-election: “In the first year of my leadership, the Supreme Court heard 87 criminal appeals. We allowed only one new sentencing hearing and did not send a single criminal case back for a new trial.”21

Campaign appeals such as Justice Mitchell’s are increasing in frequency. In Alabama, incumbent Supreme Court Judge Kenneth Ingram ran a commercial that began with videotape from the scene of a rape/murder, followed by a statement that Judge Ingram had sentenced the murderer to death, and then featured the victim’s daughter saying “[t]hank heaven Judge Ingram is on the supreme court.”22

The trend of increased politicization of judicial retention elections will probably continue, because “special interest groups have discovered that they are vehicles by which offending judges can be unseated and state judicial policy making can be influenced.”23

B. Judicial Appointments

Both at the state and federal levels, people who wish to be appointed as judges, and judges who wish to be elevated to higher courts, also face political pressures concerning capital punishment.

18. Id. at 133-34.
19. Id. at 134.
An egregious example at the state level is California Governor Gray Davis. Dean Peter Keane of the Golden Gate University Law School stated that several people who had been interviewed for possible judicial appointments were “absolutely traumatized” by death penalty questions they had been asked, and added that the Governor was requiring potential judges to say “they thought the death penalty was the greatest thing since sliced bread.”24 Davis’ spokeswoman Hilary McLean said all of Davis’ judicial appointees will have “certainly indicated clearly that they will uphold the law” on capital punishment, and that if they were personally opposed to the death penalty, “[t]hat person would be asked some additional questions about the process, about the death penalty. In that instance, whether or not the person would be ultimately appointed by the governor, I can’t tell you.”25

At the federal level, ranking minority member on the Senate Judiciary Committee, Orrin G. Hatch, who now chairs the Committee, announced in 1993 that Republicans would challenge any judicial nominees of the new President, Bill Clinton, who would “look for excuses not to carry” out capital punishment.26 Republican staffers pointed out that “the death penalty is a politically potent issue and worth raising, even if they have limited success in opposing judicial nominees.”27 Among those whom Senate Republicans unsuccessfully opposed in their two years in the minority at the outset of the Clinton administration were Rosemary Barkett and Martha Craig Daughtrey, both of whom were confirmed for court of appeals positions.28 The Republicans gained control of the Senate in 1995, and continued to use the death penalty as an issue in the judicial confirmation process.

The Republicans’ position affected President Clinton’s selections of whom to nominate to the federal bench.29 As then-NAACP Legal Defense & Educational Fund assistant counsel George Kendall stated in 1999, ever since Senator Hatch’s 1993 statement, the “White House has refrained from nominating anyone who has a background in working on cases where the death penalty was an issue and even other people who

25. Id.
27. Id.
28. See id.
29. See Breaking the Most Vulnerable Branch, supra note 7, at 145-46 (comments of George F. Kendall).
have shown a sensitivity to human rights.” For example, President Clinton did not nominate Jeff Coleman, a Jenner & Block partner with a superb legal record (mostly in commercial cases) who had secured habeas relief for a Georgia death row inmate whom he had represented pro bono. Some Senate Judiciary members were upset by that, and by Coleman’s work on some uncontroversial civil liberties cases.

In October 1999, the Senate defeated the federal district court nomination of Missouri Supreme Court Justice Ronnie White. All Republican Senators, except one who was absent, voted against the nomination, at the behest of Missouri Senator John Ashcroft, who was about to run for re-election. Senator Ashcroft asserted that Justice White was “pro-criminal,” had “a serious bias against the death penalty” and had “a tremendous bent toward criminal activity.” These accusations were extremely dubious, particularly since Justice White had voted to affirm in most capital punishment cases, and was endorsed by the Missouri police organization. Earlier in 1999, Missouri Senior Judge Charles Blackmar, a Republican who formerly served as Chief Justice of the Missouri Supreme Court, said that Ashcroft was “tampering with the judiciary, not only in Missouri but in any state that has the death penalty. He apparently is saying that a vote against the death penalty is activist or liberal and a vote for it is apparently all right.”

What is significant for the purposes of this Article is not the inaccuracy of the charges against Justice White, but that those who ended up defending him—and attacking Ashcroft in 2001, when he was up for confirmation as United States Attorney General—did so largely on the basis of the high percentage of death penalty cases in which he had voted to affirm. This in and of itself sent a signal to all would-be federal judges, and all incumbent federal judges who hoped to be appointed to higher courts, that they had better make sure that they not only did not vote to overturn the death penalty in controversial cases but

30. Id. at 144.
31. See id. at 145.
32. See id. at 144–45.
34. See id.
35. Id.
36. See id.
that they must also maintain a very high percentage of affirmances in capital punishment cases.\textsuperscript{38}

III. JUDGES HAVE APPOINTED INEFFECTUAL LAWYERS IN DEATH PENALTY CASES

There is a pervasive national problem in the quality of lawyers whom judges have appointed to represent indigent people facing capital punishment.

In July 2001, United States Supreme Court Justice Sandra Day O’Connor pointed to this problem. She said that due to this serious issue, “[p]erhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”\textsuperscript{39} Earlier that year, Justice Ruth Bader Ginsburg said, “I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial.”\textsuperscript{40}

Newspaper accounts have pointed to major problems in various states. For example, the Seattle Post-Intelligencer reported that in nearly 20\% of capital cases since 1981, the “court-appointed lawyers . . . had been, or were later, disbarred, suspended or criminally prosecuted.”\textsuperscript{41}

The Tennessean reported that “dozens of lawyers who have defended clients facing the death penalty in Tennessee have been in trouble themselves—disciplined by the state for unethical or illegal activities. Eleven of them appear on a current list of lawyers who meet Tennessee Supreme Court standards for future appointment in death penalty cases.”\textsuperscript{42} It later reported that the head of a state appellate representation office had testified that Tennessee judges appoint the

\textsuperscript{38} To put this matter in perspective, one should note that during the period 1973-1995 “of every 100 death sentences imposed, forty-seven [were] reversed at the state level, on direct appeal or collateral review. An additional twenty-one [were] overturned on federal habeas.” GUIDELINES, \textit{supra} note 1, n.46 (citing JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, pt. I, app. A, at 5-6 (2000)).

\textsuperscript{39} O’Connor Questions Death Penalty, N.Y. TIMES, July 4, 2001, at A9.

\textsuperscript{40} Anne Gearan, Supreme Court Justice Supports Death Penalty Moratorium, ASSOCIATED PRESS, Apr. 10, 2001; see GUIDELINES, \textit{supra} note 1, at Guideline 1.1, text accompanying note 30.


same ineffectual trial lawyers “over and over again” in death penalty cases.\footnote{See Duren Cheek, Counsel’s Competence Questioned, THE TENNESSEAN, Dec. 7, 2001.}

In Philadelphia, Pennsylvania, a Philadelphia Inquirer investigation disclosed that “Philadelphia’s poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders and contributors to the judges’s election campaigns.”\footnote{Fredric N. Tulsky, Big-time Trials, Small Time Defenses, PHILA. INQUIRER, Sept. 14, 1992, at A1.} The Inquirer further reported that the attorney who one year was appointed the most times, 34, to homicide cases was a former judge who had been removed from the bench for improper conduct.\footnote{Roxanne Patel & Fredric N. Tulsky, The Former City Judge Who Defended 34 Murder Suspects in a Year, PHILA. INQUIRER, Sept. 14, 1992, at A8.} The Inquirer found that “even officials in charge of the system say they wouldn’t want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder.”\footnote{Tulsky, supra note 44.}

Unsurprisingly, a greatly disproportionate percentage of those sentenced to death in Pennsylvania are from Philadelphia. This is due not only to its district attorney’s office having a much greater inclination to seek the death penalty than other district attorneys’ offices in the state, but also to the abysmal representation provided by judge-appointed lawyers in Philadelphia cases. One result of the Philadelphia Inquirer investigation was that the Philadelphia Public Defender’s office was permitted for the first time to represent defendants facing the death penalty. Thereafter, no one represented by that office has been sentenced to death, whereas numerous defendants who have been represented by judge-appointed counsel have received death sentences.\footnote{Tulsky, supra note 44.}

In North Carolina, an October 15, 2002 report by the Common Sense Foundation\footnote{COMMON SENSE FOUND., LIFE AND DEATH LOTTERY (Oct. 15, 2002), available at http://www.common-sense.org/?fnoc=./consider_this/consider_this_021015.} stated that more than one in six of North Carolina’s death row inmates were represented at trial by attorneys whom the North Carolina State Bar has disciplined.\footnote{See id; Life or Death Matter: New Report Questions Fairness of N.C. Murder Trials, CHARLOTTE OBSERVER, Oct. 22, 2002, at A16.} A North Carolina attorney who was not disciplined conceded that during the trial of Ronald Wayne Frye, the lawyer “was drinking heavily, . . . downing nearly a pint of [eighty]-
proof rum every afternoon” and that he had been “in a car wreck about the same time and was found with a near-lethal blood-alcohol level of 0.44%—at 11 a.m.”\textsuperscript{50} The jury that sentenced Frye to death heard almost nothing about his “nightmarish childhood,” during which “his alcoholic parents gave him away at a diner” at age 4, his new father beat him “with a bullwhip,” and he was “shuffled from family to family, six changes in all.”\textsuperscript{51} Frye was executed on August 31, 2001.\textsuperscript{52} Another lawyer who was not disciplined was Tim Merritt, who was dying of cancer during Bobby Lee Harris’ trial and took prescription drugs to ease his pain. His co-counsel was so disturbed at Merritt’s strange, harmful conduct that he asked him, “Whose side are you on?”\textsuperscript{53}

In 2002, California—which has experienced considerable problems with the quality of appointed counsel in death penalty cases—adopted qualification standards for death penalty defense counsel.\textsuperscript{54} However, the rule adopting these standards has a loophole allowing the trial judge to appoint someone who does not meet the standards\textsuperscript{55} and “leaves the selection of a defense lawyer to the judge, who may be inexperienced in death penalty cases or prey to local pressures.”\textsuperscript{56} Chief Justice Ronald George stated that at least the existence of the standards would help where the same ineffectual lawyer has been representing defendants in capital cases for years, since the trial judge will now have a ground on which to say, “I can turn him down.”\textsuperscript{57}

A Texas State Bar Committee study in 2000, entitled \textit{Muting Gideon’s Trumpet}, showed that many trial judges used a patronage system to appoint lawyers for indigent defendants.\textsuperscript{58} Those appointed by these judges made campaign donations to them.\textsuperscript{59} These lawyers were expected to help the judge end the cases quickly.\textsuperscript{60} One former judge recalled a colleague, George Walker, who appointed Joe Cannon to

\begin{itemize}
\item \textsuperscript{51} Id.
\item \textsuperscript{52} See id.
\item \textsuperscript{53} See Bob Burtman, \textit{Criminal Injustice}, INDEPENDENT ONLINE, Oct. 16, 2002.
\item \textsuperscript{54} Clair Cooper, \textit{Bar Raised for Lawyers in Death Penalty Cases}, SACRAMENTO BEE, Dec. 14, 2002.
\item \textsuperscript{55} See id.
\item \textsuperscript{56} See id.
\item \textsuperscript{57} See id.
\item \textsuperscript{58} See ALLAN K. BUTCHER & MICHAEL K. MOORE, \textit{MUTING GIDEON’S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS} 13 (Sept. 2000), \textit{available at} http://www.uta.edu/pols/moore/indigent/last.pdf.
\item \textsuperscript{59} See id.
\item \textsuperscript{60} See id.
\end{itemize}
handle death penalty cases.\textsuperscript{61} The former judge remarked that, "Joe was a nice man, but he was incompetent to handle capital cases. He was George’s buddy. He got the cases because he moved them. There was pressure—keep costs down, keep things moving."\textsuperscript{62}

Texas’ problems with indigent representation in death penalty cases pervades not only the trial and appeals levels, but also state post-conviction proceedings, in which the courts also appoint counsel.\textsuperscript{63} In December 2002, the Texas Defender Service issued a scathing report, \textit{Lethal Indifference}, concerning the assignment of lawyers for post-conviction proceedings.\textsuperscript{64} The report concluded that in cases since 1995, Texas death row inmates had a one in three chance of being executed without decent investigation or argument by counsel.\textsuperscript{65} The report found that incompetent and inexperienced counsel were often appointed, sometimes notwithstanding drug or serious mental problems.\textsuperscript{66} Yet, as the Austin American-Statesman editorialized, the head-in-the-sand response of the presiding judge of the Texas Court of Criminal Appeals—which had itself been responsible for several years’ worth of inadequate appointments—“only perpetuates the appearance that the court is more interested in efficiency and moving people through the system than in justice.”\textsuperscript{67}

Even more bizarre was that court’s response to the case of Leonard Uresti Rojas, who was executed on December 4, 2002.\textsuperscript{68} Over two months later, in February 2003, three members of the Texas Court of Criminal Appeals issued a dissent from the court’s rejection of Rojas’ assertion that he had had ineffective counsel in his post-conviction proceeding.\textsuperscript{69} The dissent noted that the attorney whom the Texas Court of Criminal Appeals assigned to handle the post-conviction case had no death penalty experience, had been sanctioned three times by the state bar association, had a bipolar disorder during the case, and admitted to

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See generally TEXAS DEFENDER SERVICE, \textit{LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS} (2002) [hereinafter \textit{LETHAL INDIFFERENCE}].
\item See \textit{LETHAL INDIFFERENCE} at 2.
\item See id. at 22.
\item See id.
\end{enumerate}
\end{footnotesize}
having done only minimal work and to having missed key deadlines. Judge Tom Price, who wrote the dissent, reiterated his view, first expressed in a January 2002 dissent, that the court should recognize the right to post-conviction counsel who is “more than a human being with a law license and a pulse.”

IV. CONCLUSION

When judges appoint counsel in capital cases, the appointed lawyers face a potential conflict of interest between the desire to please the judge—so that the lawyers will be appointed in other cases—and their obligation to represent their client zealously. In view of the political pressures faced by judges, whether they face retention elections, must run for re-election, or hope for appointment to higher courts, there is substantial danger that judges will appoint lawyers who are disinclined or unable to raise a vigorous defense or to make crucial objections.

Experience has shown that this is not only a danger; it is a systemic reality in all sections of the United States. As a result, all too many defendants have been executed more because of how badly their court-appointed lawyers have performed than because of how bad their conduct was.

The revised Guidelines thus stand on solid ground in recognizing that one necessary, albeit hardly sufficient, ingredient of any solution to the problem of ineffective defense representation in death penalty cases is to have independent appointing authorities appoint counsel for indigent people facing capital punishment.

70. See id.
THE DEFENSE TEAM IN CAPITAL CASES

Jill Miller, MSSW*

I started with this issue concerned about innocence. But once I studied, once I pondered what had become of our justice system, I came to care above all about fairness. Fairness is fundamental to the American system of justice and our way of life.¹

Fairness for those defendants facing the ultimate punishment of death requires that they be afforded zealous advocacy by competent counsel, and that counsel be provided with the resources necessary to effectively represent their clients. Stating that “[o]ur capital system is haunted by the demon of error, error in determining guilt, and error in determining who among the guilty deserves to die,” Governor Ryan cited many deficiencies in the justice system in Illinois, including poor lawyering and inadequate resources for defense counsel, in arriving at his decision to commute all death sentences.² Over the years the imposition of the death penalty has too often been a function of unqualified counsel or counsel who lacked the resources, including time, funding, and provision of investigative, expert and supportive services, to competently represent their clients, rather than a reasoned decision based on the circumstances of the crime and the background and character of the defendant.³

* Forensic Social Work Services. Any unfootnoted assertions in this Article are based upon personal knowledge acquired by the author during her extensive mitigation work experience in many different jurisdictions.


2. Id.

Courts addressing issues in capital cases have long affirmed the importance of individualized sentencing determinations and the need for a heightened degree of reliability when imposing the death penalty. Addressing this issue in 1976, the Supreme Court stated in Woodson v. North Carolina:

[D]eath is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind . . . [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense . . . .

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

As one author who has written on the duties of counsel in capital cases stated, “[r]eliability’ has a stronger meaning in capital cases than it does in the ordinary criminal case, requiring that the death sentence be imposed in accordance with procedures, standards, and actual practices designed to assure that death will not be imposed capriciously or disproportionately.” In a series of decisions following Woodson, the Supreme Court gave direction to counsel in capital cases regarding their responsibilities in undertaking the defense of persons facing the death penalty. Several key decisions provided guidance to counsel regarding their duties in preparing for the penalty phase of capital trials by discussing the nature of mitigating evidence that should be considered. In Lockett v. Ohio, the Court wrote that the sentencer could “not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than

5. Id. at 303-05 (citations and footnote omitted).
death.\textsuperscript{8} In \textit{Eddings v. Oklahoma},\textsuperscript{9} citing Eddings’ emotional disturbance and turbulent family history, the Court concluded, pursuant to \textit{Lockett}, that a statute could not preclude the sentencer from considering any mitigating factor or any relevant evidence, nor could the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.\textsuperscript{10}

In 1986, in the case of \textit{Skipper v. South Carolina},\textsuperscript{11} the Court ruled that the trial court erred in refusing to consider evidence of good adjustment to incarceration as mitigating.\textsuperscript{12} The Court noted that while this evidence may not be relevant to the issue of culpability for the crime, it was relevant to the issue of the appropriateness of a sentence less than death.\textsuperscript{13} In \textit{Penry v. Lynaugh},\textsuperscript{14} the Court ruled that procedures for sentencing could not preclude the sentencer from considering and giving weight to such factors as mental retardation or childhood abuse.\textsuperscript{15}

In that decision, Justice O’Connor noted the need for full consideration of all evidence that mitigates against imposition of the death penalty.\textsuperscript{16} The Court affirmed these concepts, and counsel’s duty in capital cases, in \textit{Williams v. Taylor},\textsuperscript{17} when it reversed a Virginia death sentence on the basis of ineffectiveness of counsel due to failure to investigate and present substantial mitigating evidence to the jury.\textsuperscript{18} More recently, in \textit{Wiggins v. Smith},\textsuperscript{19} the Court declared that counsel’s failure to fully investigate Wiggins’ background and present mitigating evidence of his fortunate “excruciating life history” violated his Sixth Amendment right to counsel.\textsuperscript{20} The Court, citing \textit{Williams} and its language on prevailing norms for thorough penalty phase investigation, including those reflected in ABA standards and guidelines, found that counsel’s actions could not be construed as strategic as counsel had failed to conduct a thorough social history investigation.\textsuperscript{21} The actions of counsel could not, according to the Court, be deemed reasonable as facts known to counsel

\textsuperscript{8} Id. at 604.
\textsuperscript{9} 455 U.S. 104 (1982).
\textsuperscript{10} See id. at 113-14.
\textsuperscript{11} 476 U.S. 1 (1986).
\textsuperscript{12} See id. at 6.
\textsuperscript{13} See id. at 7.
\textsuperscript{14} 492 U.S. 302 (1989).
\textsuperscript{15} See id. at 322.
\textsuperscript{16} See id. at 327-28.
\textsuperscript{17} 529 U.S. 362 (2000).
\textsuperscript{18} See id. at 398-99.
\textsuperscript{19} 123 S. Ct. 2527 (2003).
\textsuperscript{20} Id. at 2543-44.
\textsuperscript{21} See id. at 2536-37.
at the time would have led “a reasonable attorney to investigate further.”

These decisions clarify the responsibilities of counsel in a capital case, particularly as it relates to preparation for and presentation in the penalty phase. In addition to the usual requirements for trying a difficult homicide case, counsel in a capital case is required, pursuant to the revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, to thoroughly investigate the background and circumstances of the client in order to prepare a case for the penalty phase. Given the severity and irrevocability of a death sentence, extraordinary obligations are properly placed on counsel to prepare and try such a case.

When the ABA first adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in 1989 (based on “Standards for the Appointment and Performance of Counsel in Death Penalty Cases” developed and adopted by the National Legal Aid and Defender Association in 1987), they called for the appointment of two trial attorneys, qualified by training and experience, and the provision of “investigative, expert, and other services necessary to prepare and present an adequate defense.” At that time, the guidelines did not mandate a defense team that included an investigator and a mitigation specialist; however, commentary to the guidelines strongly supported the use of social workers or mental health professionals and investigators in assisting counsel. Though investigators had typically been used by attorneys in major criminal cases, and the use of mitigation specialists was becoming increasingly common in capital cases, by the late 1980s the standard of care in capital cases had not yet evolved to the point where an investigator and mitigation specialist, in addition to two attorneys, were required. That has changed. Today, the defense team concept, in which clients are provided with two attorneys, a mitigation specialist, and an investigator, is well-established and has become the accepted “standard of care” in the capital defense community.

22. Id. at 2538.
23. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), Guideline 10.7 [hereinafter GUIDELINES].
26. Id. at Guideline 8.1.
27. See id. at Guideline 11.8.6, commentary.
28. GUIDELINES, supra note 23, at Guideline 4.1, commentary.
I. WHY A TEAM

The trial of a capital case is an enormously complex and burdensome undertaking. In essence, it requires preparation for two trials—the trial on guilt/innocence and the trial for life in the penalty phase.\(^{29}\) A study on the costs and quality of representation in federal capital trials, conducted by the Judicial Conference of the United States, noted that “[l]awyers in a death penalty case must prepare for both trials, and must develop an overall strategy that takes the penalty phase into account even in the guilt phase.”\(^{30}\) The report stated that the nature of a capital case “transforms counsel’s role from start to finish.”\(^{31}\) The goal of saving the client’s life must be the top priority for the defense and must be considered in all other decisions made and actions taken by counsel from the inception of representation through the conclusion of the case.\(^{32}\) Guilt phase strategy must be coordinated with penalty phase strategy and must support the case in mitigation.\(^{33}\) In capital cases,

[Clients’] lives depend upon the effectiveness of counsel . . . particularly at the penalty phase of the trial. The existence of a penalty phase in capital trials makes such trials radically different from ordinary criminal trials . . . . The guilt trial establishes the elements of the capital crime. The penalty trial is a trial for life. It is a trial for life in the sense that the defendant’s life is at stake, and it is a trial about life, because a central issue is the meaning and value of the defendant’s life.\(^{34}\)

The skills and expertise required to effectively represent a capital client are broad and multi-disciplinary in nature, thus requiring a team approach.\(^{35}\) The team must be assembled in a manner that takes into account the specifics of the case and the needs and characteristics of the client.\(^{36}\) At least two attorneys are required, though in some cases it may be advisable to have more than two. There are several reasons for this

\(^{29}\) See Ellen Kreitzberg, Death Without Justice, 35 SANTA CLARA L. REV. 485, 488 (1995); Goodpaster, supra note 6, at 303.


\(^{31}\) Id. at I.B.(4).

\(^{32}\) See Goodpaster, supra note 6, at 320.

\(^{33}\) See GUIDELINES, supra note 23, at Guideline 4.1, commentary.

\(^{34}\) Goodpaster, supra note 6, at 303.

\(^{35}\) See GUIDELINES, supra note 23, at Guideline 10.4, commentary.

\(^{36}\) See id. at Guideline 4.1, commentary.
two-attorney requirement. As Goodpaster points out, the trial for life is very different in form and issues addressed than the trial on guilt, and requires different skills and expertise than those generally possessed by attorneys handling non-capital criminal cases.\textsuperscript{37} The body of law governing trials of capital cases is complex. It is constantly developing and changing. Given the possibility that the ultimate penalty, death, will be imposed, it is crucial that every fact and allegation be investigated and every possible issue be researched, raised, and litigated.\textsuperscript{38} Some defense teams find it necessary to assign a third attorney whose sole responsibility is to handle motions.\textsuperscript{39} Requiring at least two attorneys allows the defense to solicit the involvement of counsel who possess the different skills and areas of expertise required for the particular case.\textsuperscript{40}

The other two core members of the defense team are the investigator and the mitigation specialist.\textsuperscript{41} The team may then be expanded to include experts and consultants, as needed, and always includes support services, such as secretaries, paralegals, and law clerks.\textsuperscript{42} All persons providing services on behalf of the client should be considered and treated as members of the team. They are all essential in the effort to save the client’s life.

The possible introduction of evidence on prior criminal offenses and unadjudicated conduct in the penalty phase of the trial imposes an extra burden on counsel.\textsuperscript{43} All prior offenses and unadjudicated acts must be investigated, challenged and/or mitigated.\textsuperscript{44} It is possible that several mini-trials will take place during the penalty phase. In addition to investigating the life history of the client and preparing the case in mitigation, counsel must address the evidence presented in aggravation by the prosecution, and be prepared to challenge and mitigate it.\textsuperscript{45} Capital trials generally involve much more extensive use of experts than non-capital cases, including use of experts at both the guilt and penalty phases.\textsuperscript{46} The work of all experts and non-attorney team-members must be directed and monitored by counsel.\textsuperscript{47} The trial of a capital case requires skills and expertise not generally possessed by attorneys, most

\begin{itemize}
\item \textsuperscript{37} See Goodpaster, \textit{supra} note 6, at 303-04.
\item \textsuperscript{38} See GUIDELINES, \textit{supra} note 23, at Guideline 10.7, commentary.
\item \textsuperscript{39} See id. at Guideline 10.4, commentary.
\item \textsuperscript{40} See id.
\item \textsuperscript{41} See id. at Guideline 10.4(C)(2)(a).
\item \textsuperscript{42} See id. at Guideline 4.1, commentary.
\item \textsuperscript{43} See id. at Guideline 10.7, commentary.
\item \textsuperscript{44} See id.
\item \textsuperscript{45} See id. at Guideline 10.11(A).
\item \textsuperscript{46} See id. at Guideline 4.1(B).
\item \textsuperscript{47} See id. at Guideline 10.4(B).
\end{itemize}
notably for the investigation of the offense and the extensive investigation of social history that must be done. This includes the ability to analyze and understand the significance of that history in terms of the effects of various factors and experiences on the client’s development and behavior.\footnote{See id. at Guideline 10.7, commentary.} The capital offense and other charged offenses must be thoroughly investigated.\footnote{See id. at 196.} In addition, prior offenses and uncharged misconduct must be investigated.\footnote{See id. at 204.} 

Millard Farmer, an attorney who assisted with the Team Defense Project in Georgia in 1976, was one of the first to articulate the team concept in capital defense work.\footnote{See Team Defense: The Holistic Approach, an Interview with Millard Farmer, NLADA BRIEFCASE, Mar. 1979, at 16.} The project employed an interdisciplinary approach and strategies that reached beyond the courtroom in representing its clients.\footnote{See id. at 18.} Use of the defense team concept in the trial of capital cases ensures that clients facing the death penalty will be provided with representation that includes the combination of skills and expertise required for high quality advocacy. The exchange of views and perspectives of the various members of the team can produce more effective strategy. In addition, utilizing a team approach means that the burden of responsibility for saving the client’s life will be shared. The trial of a capital case can be extraordinarily demanding and stressful. The team becomes a support system for each member. As the commentary to Guideline 10.4 states,

\begin{quote}
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 to skilled assistants and focus on the legal issues in the case, improves the relationship with the client and his family by providing more avenues of communication, and provides more support to individual team members.\footnote{GUIDELINES, supra note 23, at Guideline 10.4, commentary (footnote omitted).}
\end{quote}

\section*{II. ASSEMBLING THE TEAM}

The newly revised ABA Guidelines provide that the defense team should be comprised of no fewer than two attorneys, an investigator, and a mitigation specialist.\footnote{See id. at 10.4(C)(2)(a).} At least one member of the team should be
qualified to screen persons for mental or psychological disorders or impairments. Though there are variations in how teams are assembled, lead counsel is generally responsible for assembling the team, including selecting the remaining members.

A. Lead and Co-Counsel

Lead counsel in a capital case is chosen in one of three ways: as a staff attorney in a defender office who is assigned the case; as appointed counsel by either a court or an appointing authority; or as counsel retained by the client. It is rare for a person of means in this country to face the death penalty. Consequently, there are few retained attorneys in capital cases. Co-counsel, or “second chair,” may be chosen by a program administrator, appointed by a court, selected by the lead counsel, or retained. Based on the needs of the case, the two attorneys then select the rest of the team. In addition to an investigator and a mitigation specialist, the team may include an additional member who possesses mental health skills and expertise.

The attorneys chosen to represent the capital client must be qualified by training and experience to undertake such representation and provide high quality advocacy. The ABA Guidelines address the issue of qualifications in Guideline 5.1, detailing the areas of knowledge and skills that counsel must have. In federal capital cases, there is not only a statutory requirement that two attorneys be assigned, but also a requirement that “at least [one] shall be learned in the law applicable to capital cases . . . .” The study of costs and quality of representation in federal capital cases, cited above, reported that judges and lawyers interviewed for the study “attested to the importance of the statutory ‘learned counsel’ requirement,” and the “importance of ‘doing it right the first time.’” This requirement assures that every client facing the
federal death penalty has at least one attorney who is experienced in the
trial of capital cases. This should be the practice in all capital cases,
regardless of the jurisdiction.

Counsel is responsible for the conduct of the case, and has the duty
to direct the work of the defense team in such a way that it provides high
quality representation.⁶⁵ Counsel allocates responsibilities among the
members of the team, determining, based on the needs of the particular
client and case, who will assume the various roles and duties.⁶⁶ Every
case is different, and requires different skills and expertise.⁶⁷ Counsel
must consider this in choosing the investigator, mitigation specialist, and
other experts.⁶⁸ In virtually every capital case, there are socio-economic
differences between the client and the defense team.⁶⁹ There are often
racial and cultural differences as well.⁷⁰ Cases present different factors
that must be understood and addressed, such as mental retardation,
mental illness, trauma, or substance abuse.⁷¹ Language and ethnic
heritage issues, including the need for an international investigation, are
factors that must be addressed.⁷² The characteristics and functioning,
including impairments, of the client are important considerations.⁷³ All
of these factors, including the ability of the team to relate to and gain the
trust and confidence of the particular client, must be taken into account
when choosing the other core members of the team and when retaining
other experts.

B. Investigators

Standards for criminal defense representation in non-capital as well
as capital cases are clear about counsel’s duty to fully investigate every
case for the determination of both guilt and sentence.⁷⁴ A skilled and
trained investigator is an essential member of the core team in capital

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⁶⁵. See GUIDELINES, supra note 23, at Guideline 10.4(B).
⁶⁶. See id. at Guideline 10.4(B)(1).
⁶⁷. See id. at Guideline 4.1, commentary.
⁶⁸. See id. at 143.
⁶⁹. See Russell Stetler, Mitigation Evidence in Death Penalty Cases, THE CHAMPION,
⁷⁰. See id. at 187-88.
⁷¹. See GUIDELINES, supra note 23, at Guideline 10.5, commentary.
⁷². See id. at 188.
⁷³. See id. at 187-88.
⁷⁴. See id. at Guideline 10.7; ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE
SERVICES, Standard 5-1.4 (1992); NAT’L LEGAL AID & DEF. ASS’N, PERFORMANCE GUIDELINES
cases.75 The investigator must thoroughly investigate the charged capital offense and any other offenses charged in the case, regardless of any statement or admission made by the client, or evidence of overwhelming guilt.76 Counsel cannot be expected to challenge the elements of the capital offense, statements by the client or other witnesses, forensic evidence, or the conduct of law enforcement or the prosecution absent a thorough, independent investigation by the defense team.77 Nor can they assert affirmative defenses without such investigation.78 Attention recently paid to the large number of wrongfully convicted persons released from death rows across the country underscores the need for better defense investigation.79 While counsel also has a duty to interview witnesses, attorneys may not necessarily have the specialized investigatory skills generally possessed by trained criminal investigators.80 Counsel cannot act as a witness; therefore, even when they do conduct interviews, they should have a third person present should they need to present testimony regarding such matters as conflicting statements, recantations, etc.81 This third person should generally be the investigator.

Investigators in capital cases have additional duties relating to the penalty phase of the trial. If prosecutors intend to present evidence in aggravation of prior criminal offenses or prior unadjudicated acts of misconduct, these should also be thoroughly investigated.82 Counsel has a duty to challenge and/or mitigate the evidence in aggravation.83 In some cases, working with investigators, attorneys have challenged prior offenses in habeas proceedings and have had criminal convictions reversed, thus precluding prosecutors from introducing this evidence as aggravation during the penalty phase.84 In addition to these duties, and depending on the needs and makeup of the team, the investigator may have a role in working with the mitigation specialist in conducting the

76. See id. at Guideline 10.7(A)(1).
77. See, e.g., Lisa Kemler, Friend of the Court, THE CHAMPION, Apr. 2002, at 45 ("[A] full investigation is necessary to evaluate the strength of any mitigating evidence in order to develop an effective strategy for the penalty phase. . . .").
78. See id.
79. See generally Adam Liptak, Number of Inmates on Death Row Declines as Challenges to Justice System Rise, N.Y. TIMES, Jan. 11, 2003, at A13.
80. See GUIDELINES, supra note 23, at Guideline 4.1, commentary.
81. See id.
82. See id. at Guideline 10.7, commentary.
83. See id. at Guideline 10.11(A).
social history investigation. The investigator can assist in obtaining life history records and locating persons who may be sources of social history information.

C. Mitigation Specialists

The fourth member of the core defense team is the mitigation specialist. Counsel’s duty in a capital case to thoroughly investigate the background and circumstances of the client’s life and to present all relevant mitigating evidence mandates the conducting of an extensive life history study, as well as an analysis of the factors and forces that influenced the client’s development, including personality and behavior. The history must be multi-generational in nature, assessing the effects of heredity and the inter-generational transmissions of patterns of behavior, and must be broad in scope. It involves investigation that goes beyond the individual, family, school, and neighborhood to include an examination of socio-economic, political, cultural, and environmental influences in the client’s life.

The social history investigation and psycho-social assessment should be conducted by a professional with skills and expertise not generally possessed by attorneys. It should be done by someone with an understanding of child and human development, including the manner in which development is influenced and the person shaped by heredity and environment. Skills in interviewing and information gathering, including the collection and analysis of life history records, are essential. The interviewing techniques employed in the social history investigation are different from those generally taught in law schools and employed by lawyers. Knowledge regarding human development and factors affecting it are necessary in order to know what questions to ask, what information to obtain, and how to make sense of that information. An awareness of the indicators of such things as cognitive impairments,

85. See, e.g., Michael L. Perlin, “The Executioner’s Face is Always Well Hidden”: The Role of Counsel and the Courts in Determining Who Dies, 41 N.Y.L. Sch. L. Rev. 201, 223 (1996) (citing the New York City Capital Defender Office’s use of both “typical fact investigators” and mitigation specialists in conducting social history investigations of all death penalty clients).
86. See Guidelines, supra note 23, at Guideline 10.7, commentary.
87. See id. at 203.
88. See generally, Stetler, supra note 69; Haney, supra note 58; Jill Miller, Expanding the Spheres of Mitigation Evidence, CAPITAL REPORT (Nat’l Legal Aid & Defender Ass’n), Sept./Oct. 1995.
89. See GUIDELINES, supra note 23, at Guideline 4.1, commentary.
90. See id. at Guideline 10.7, commentary.
91. See id.
92. See id.
mental illness, childhood abuse and trauma, and substance abuse and dependence is essential. The person conducting interviews must have the skills and expertise to assist the client, family members, and others in disclosing private, shameful, and sensitive information. The professional most commonly performing these duties in capital cases is the mitigation specialist.

The retention by counsel in capital cases of professionals to assist in preparation for the penalty phase by conducting a social history investigation emerged in the 1970s and early 1980s, most notably in Florida and California. George Kendall of the NAACP Legal Defense Fund noted that mitigation specialists were first used in jurisdictions where money was available to counsel to retain the services of persons skilled in interviewing clients and collateral sources, locating and obtaining records, and assessing the significance of life history events. By the mid to late 1980s, the concept of the mitigation specialist, or the use of social workers, mental health professionals, or other trained professionals, was well established. Today, employment of a mitigation specialist on the capital defense team is an accepted standard of care in federal and military cases, and should be in all jurisdictions and cases. The study of costs of representation in federal capital cases reported that, “[w]ithout exception, the lawyers interviewed . . . stressed the importance of a mitigation specialist to high quality investigation and preparation of the penalty phase.” While the primary reason for having mitigation specialists is that they have skills in conducting social history investigations and psycho-social assessments that lawyers do not, the study also noted that it is more cost-effective to use mitigation specialists as the hourly rates approved for them are generally substantially lower than those authorized for attorneys.

The role of the mitigation specialist in a capital case is to assist counsel by conducting a thorough social history investigation and psycho-social assessment; identifying factors in the client’s background

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93. See id.
94. See id. at Guideline 4.1, commentary.
95. See Jill Miller, Assessment of Performance and Supervision of Mitigation Specialist in State of New Jersey vs. Anthony DiFrisco, (Mar. 4, 1998), (on file in New Jersey v. DiFrisco, County of Essex Indictment # 2280-5-87) [hereinafter Assessment].
96. See id.
97. See id.
98. See FED. DEATH PENALTY CASES, supra note 30; Dwight H. Sullivan et al., Raising the Bar: Mitigation Specialists in Military Capital Litigation, 12 GEO. MASON U. CIV. RTS. L.J. 199, 228 (2002).
99. FED. DEATH PENALTY CASES, supra note 30.
100. See id.
or circumstances which indicate the need for expert evaluations; assisting in identifying the types of experts needed and locating appropriate experts; providing background materials and information to other experts to enable them to perform competent and reliable evaluations; consulting with counsel regarding the theory of the case and penalty phase strategy, thereby ensuring coordination of the strategy for the guilt phase with the strategy for the penalty phase; and working with the client and the client’s family while the case is pending. The mitigation specialist can advise counsel on lay and expert witnesses to call in the penalty hearing, as well as on other types of evidence to present, such as records, documents, timelines, genograms, photos, or physical evidence. If qualified, the mitigation specialist may testify regarding the results of the social history investigation and assessment. Citing the relaxed standard of evidence in the penalty phase, the Court in *Wiggins v. Smith* commented that the mitigation specialist’s social history report may have been admissible under Maryland law and the specialist could have testified to its results. The mitigation specialist can also play a role in developing and implementing a strategy to negotiate a settlement of the case that avoids the possibility of a death sentence.

Over the years, various models of providing the services performed by the mitigation specialist have developed, with practices varying from one jurisdiction to another. Sometimes, the mitigation specialist has the qualifications to do all the tasks specified above. In other cases, the mitigation specialist is primarily an information gatherer, and the results of the investigation are analyzed by another professional, such as a psychologist or clinical social worker. In some jurisdictions, particularly where capital defense services are primarily provided by defender programs, a mitigation investigator may collect records, locate witnesses, conduct some initial interviews, and then turn the product over to a more qualified and experienced mitigation expert to conduct further interviews and analyze and develop the information. Some organized defender programs have mitigation specialists on staff. In other cases, the mitigation specialist is retained on a case-by-case basis.

102. *See id.*
103. *See Russell Sterler, Why Capital Cases Require Mitigation Specialists, INDIGENT DEFENSE (Nat’l Legal Aid & Defender Ass’n), July/August, 1999; Affidavit of Jill Miller, prepared for the Nat’l Legal Aid & Defender Ass’n (1991) (on file with Hofstra Law Review); Assessment, supra* note 95.
Plans for providing representation in capital cases should allow for different models of performing the duties of the mitigation specialist, as long as the essential investigation and preparation is done and the team includes professionals with the necessary skills and expertise.

Mitigation specialists currently practicing in capital defense work have a variety of educational backgrounds. While a graduate degree in social work has come to be viewed as the most preferable training for mitigation work, there are many competent mitigation specialists who do not have a social work background, but who, by virtue of their training and experience, are able to capably provide most of the services discussed above.106 Recently, a number of lawyers who have worked as counsel on capital cases have chosen to focus on mitigation work. Any plan for the representation of capital defendants should not exclude these very capable mitigation professionals. However, the plan does need to assure that the defense team is comprised of persons able to perform the myriad of responsibilities required for effective advocacy in a capital case, including those specified for the mitigation specialist.107 Hence, the requirement that at least one member of the team be qualified by training and experience to screen clients for the presence of mental or psychological disorders or impairments.108

Capital clients present a host of impairments and/or life experiences that affect their development and behavior, including, for example: developmental, cognitive, and mental impairments and disorders; histories of physical, sexual, and psychological abuse; histories of neglect, trauma, and maltreatment; and alcohol and drug abuse or dependence.109 They may have physical conditions, manifesting symptoms that mimic mental illness or which affect behavior.110 They may have a history of toxic exposure, either in utero or during their developmental years.111 The mitigation specialist or another team member must be aware of the indicators of various conditions, have the expertise to detect and investigate these conditions, and be skilled at getting the client, family, and others to disclose information regarding these factors.112 For these reasons, if the mitigation specialist does not

108. See id. at Guideline 10.4(C)(2)(b).
109. See id. at Guideline 4.1, commentary.
111. See id.
112. See id. at Guideline 10.7, commentary.
have the necessary mental health training and skills, the team must include a person who does.113

**D. Experts and Other Professionals**

Virtually all capital cases require the involvement of other experts to assist in preparation for and presentation of evidence at both the guilt and penalty phases of the capital trial, including in rebuttal.114 The ABA Guidelines call for counsel in capital cases to have the assistance of all expert, investigative, and other professional services reasonably necessary.115 The principle of counsel’s right to expert assistance was established in *Ake v. Oklahoma*,116 in which the Supreme Court stated that “a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”117

In capital cases both the prosecution and the defense rely more extensively on experts than in other criminal cases.118 A wide range of experts may be needed in both phases of the trial, depending on the specifics of the case. In the guilt phase, the types of experts needed might include pathologists, medical examiners, serologists, fingerprint or ballistics experts, DNA experts, hair or fiber experts, etc.119 Testimony of mental health experts, such as psychiatrists or psychologists, may also be introduced in the guilt phase if mental status is an issue. In the penalty phase, again, a wide range of experts might be called upon by the prosecution and defense.120 While mental health experts—psychiatrists, psychologists, neuropsychologists, and clinical social workers—are the most common, many other types of experts, including non-traditional ones, might be needed by the defense to prepare and present the case in mitigation.121 Experts on such factors as alcohol and substance abuse, fetal alcohol syndrome, trauma and maltreatment, or risk assessment may be required.122 If the client was exposed to toxins, such as lead or agricultural chemicals, in utero or during the developmental years, a

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113. See id. at Guideline 10.4(C)(2)(b).
114. See id. at Guideline 4.1, commentary.
115. See id. at Guideline 4.1(B).
117. Id. at 77.
118. See FED. DEATH PENALTY CASES, supra note 30.
119. See id.
120. See GUIDELINES, supra note 23, at Guideline 4.1, commentary.
121. See id. at Guidelines 4.1 commentary & 10.4, commentary.
122. See id. at Guidelines 4.1, commentary.
toxicologist might be called.\textsuperscript{123} The effects of substance abuse or toxins on the brain might be addressed by a neuro-pharmacologist.\textsuperscript{124} Cultural experts may be needed as well as experts to address the psycho-social consequences of racism, poverty, exposure to violence, gang membership, the urban environment, incarceration or placement in juvenile institutions.\textsuperscript{125} This is just a sampling of the types of experts that might be called upon to explain the client's life history and behavior.

In recent years, counsel in capital cases have increasingly relied on the assistance of jury consultants and victim liaison consultants.\textsuperscript{126} The latter is a person specifically trained to work with victims of crime, who, on behalf of the defense, reaches out to the families of victims in capital cases.\textsuperscript{127} Jury consultants provide a range of services to counsel in capital cases, such as drafting and analyzing questionnaires for the jury panel, assisting in preparing voir dire questions, and advising counsel on challenges and strikes of jurors.\textsuperscript{128} Lawyers in federal capital cases view the availability of jury consultants as a top priority.\textsuperscript{129} The capital defense community has long known that jury selection—impaneling a jury that is likely to vote for life—is one of the most important duties of counsel.\textsuperscript{130} Since \textit{Payne v. Tennessee},\textsuperscript{131} defense attorneys have had to anticipate and prepare for victim impact evidence that is now allowed in the penalty phase.\textsuperscript{132} The families of victims can be a driving force in the prosecution's decision to seek the death penalty or the prosecution's willingness to offer a plea in exchange for a life sentence.\textsuperscript{133} Victim liaison consultants are a link between the client, the defense team and the victim's family.\textsuperscript{134} They can provide information to the family about

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\item \textsuperscript{123} See Michael Posnor, \textit{Life Death and Uncertainty}, \textit{Boston Globe}, July 8, 2001, at http://deathpenaltyinfo.org/article.php?scid=17&did=417 (citing the use of, among others, two toxicologists, a jury consultant, a venue analyst, two mitigation specialists, a statistician, a neuro-psychologist, a behavioral psychologist, a psychiatrist, and an endocrinologist in one Massachusetts capital case).
\item \textsuperscript{124} See id.
\item \textsuperscript{125} See id.
\item \textsuperscript{127} See \textit{GUIDELINES}, supra note 23, at Guideline 10.7, commentary.
\item \textsuperscript{128} See \textit{FED. DEATH PENALTY CASES}, supra note 30.
\item \textsuperscript{129} See id.
\item \textsuperscript{130} See \textit{GUIDELINES}, supra note 23, at Guideline 10.10.2, commentary.
\item \textsuperscript{131} 501 U.S. 808 (1991).
\item \textsuperscript{132} See id. at 827 (holding that there is no constitutional bar to the admission of victim impact evidence).
\item \textsuperscript{133} See \textit{GUIDELINES}, supra note 23, at Guideline 4.1, commentary.
\item \textsuperscript{134} See generally Grunewald & Nath, supra note 126.
\end{itemize}
the process, the role of defense counsel and team members, and the client’s circumstances and background.

Counsel’s need for investigative and expert assistance exists regardless of the source of funds for representation, whether that source be the courts, defender programs, or the client. The Guidelines make clear that even when counsel is retained, if the client is unable to afford such services, funds should be made available by the appointing authority, be it a court or defender program. The federal study on costs, citing a report on costs of the Defender Services Program of the U.S. Department of Justice, noted that prosecution resources are the driving force in capital representation costs. Prosecutors have virtually unlimited resources for investigation and experts. Law enforcement, crime lab, and other services are available to them. They do not have to request funds from the court or a funding authority as the defense does. In many jurisdictions, particularly in the “death belt” of the South, it remains very difficult for counsel to convince courts and appointing authorities to provide necessary resources. One author points out that “[t]he inexperience and resource-poor defense of the indigent capital defendant is in marked contrast to the experienced and resource-rich team of the prosecution.” Further, counsel should have the ability to seek and obtain funds for services independent of the government. Counsel should make all requests for experts and funds ex parte. Where this is not permitted, counsel should continue to litigate the issue. Requests for experts have the effect of revealing trial strategy. Counsel should not be forced to reveal this to the prosecution.

Guideline 4.1 makes reference to the need to provide counsel with other ancillary services reasonably necessary. This includes such persons as secretaries, paralegals, law clerks, and interpreters. These

135. See id. at Guideline 9.1.
136. See FED. DEATH PENALTY CASES, supra note 30, at I.B.(5).
137. See id.
138. See id.
139. See Kreitzberg, supra note 29, at 514.
140. The “death belt” refers to the southern states of America, particularly Florida, Georgia, Texas and Louisiana, those states carrying out nearly two-thirds of all executions in the United States in the early 1990s. See Death Penalty in the United States of America: A Summary, at http://www.abolitionnow.de/status-usa.htm (last updated July, 2002).
142. Kreitzberg, supra note 29, at 514.
143. See GUIDELINES, supra note 23, at Guideline 4.1, commentary.
144. See id. at Guideline at 10.4, commentary.
145. See id. at Guideline 4.1(B).
146. See id. at Guideline 9.1, commentary.
are often the forgotten people on the capital defense team whose work is essential to the provision of effective representation. It is important for counsel to make these professionals feel like they are valued members of the team. They should be kept informed about the facts and progress of the case so that they are invested in providing the best work they can in support of the representation of the client. Every person on the team provides necessary and valuable services.

In recent years, there appears to be an increase in the number of foreign nationals facing the death penalty in the United States. Counsel has special duties when representing foreign nationals, chief among them to make sure the client has the ability to communicate with the relevant consular office in compliance with Article 36 of the Vienna Convention on Consular Relations. When English is a second language or a language unknown to the client, counsel should seek to have at least one team member who is fluent in the primary language of the client. This is generally not difficult when that language is Spanish. It can be quite difficult for other languages. Thus, an interpreter may become part of the team. The interpreter is the team member through whom the rest of the team must then establish a relationship with the client, the client’s family, and possibly other interviewees or witnesses. Care should be taken in choosing the interpreter. Fluency in the language is only one consideration. The relationship skills of the interpreter and cultural considerations must also be taken into account in choosing an interpreter, so as to avoid barriers to obtaining information, especially private and sensitive information.

E. The Client

Finally, but very importantly, the client must be a key member of the defense team. It is the client whose life is at stake in the capital case. The client has important decisions to make in the process, including whether to plead or testify. Other decisions regarding the conduct of the case are the responsibility of counsel, but should be made with the knowledge and support of the client. Team members need to

148. See id. at Guideline 10.6(B)(1).
149. See id. at Guideline 10.5, commentary.
150. See id.
151. See id. at Guideline 10.5.
develop a relationship of trust and confidence with the client in order to gain cooperation in preparing and presenting the most effective case for life.\textsuperscript{152} Counsel has a duty to keep the client informed of the progress of the case, including the development of the strategies for both the guilt and penalty phases.\textsuperscript{153}

III. TEAMWORK: ENSURING EFFECTIVE ADVOCACY

Obtaining the necessary resources and assembling the team is only a first step for counsel in the representation of the capital client. Counsel must take steps to ensure that the members of the team work together in a constructive and productive manner to provide effective representation. It is counsel’s duty to assemble the team, clearly define roles and responsibilities of members, direct and monitor the work of the team—including all experts, and establish the communication and decision-making processes.\textsuperscript{154} There must be a process for resolving issues when consensus cannot be reached.\textsuperscript{155}

When choosing members for both the core team and the extended team, counsel should have an understanding of the specific needs of the client and the case. Both can differ in particular ways that affect the type of skills and expertise required by team members. Factors such as the cognitive and mental functioning of the client, racial and ethnic heritage of the client, and specifics of the homicide(s) being charged should be considered when choosing team members and experts. The particular skills and expertise of potential team members must be matched to the needs of the case.\textsuperscript{156} Counsel should obtain information from and about each person being considered. A frank discussion about training, experience, skills, and work styles should take place. For example, some mitigation specialists are able to testify, while others either are not qualified or have a policy of not testifying. Counsel needs to consider this in choosing a mitigation specialist.

Roles and responsibilities of each team member need to be clearly defined at the beginning of the case.\textsuperscript{157} The team should, however, be flexible and able to make adjustments as necessary. There must be ongoing and open communication among team members. Counsel

\textsuperscript{152} See id. at Guideline 10.5(A).
\textsuperscript{153} See id. at Guideline 10.5(C).
\textsuperscript{154} See id. at Guideline 10.4(B)-(C).
\textsuperscript{155} See generally, Adele Shank, Building the Defense Team (unpublished training handout for the Ohio Public Defender Commission, on file with Hofstra Law Review) (n.d.).
\textsuperscript{156} See GUIDELINES, supra note 23, at Guideline 4.1, commentary.
\textsuperscript{157} See Shank, supra note 155.
should establish the process of team communication. This could regular meetings, regular memos to team members, phone consultations, or any other methods, as long as regular communication occurs. Counsel should create an atmosphere which encourages open communication and the exchange of ideas and different perspectives on how to address various issues. Conflict or differences of opinion can be healthy and can produce new ideas and better ways of doing things. However, there has to be a decision-making process and means of resolving differences. Counsel is ultimately responsible for the conduct of the case and for making final decisions on strategy.

Counsel must make clear to all members of the team that they are agents of counsel in the representation of the client. The same privileges that exist between the attorney and client, and for attorney work product, extend to other team members. Counsel has a duty to explain this, particularly to extended team members such as experts or consultants who may not understand the privileges that apply in criminal cases. For team members who do not work in the same office as counsel, it is wise to have an agreement in the form of a contract or letter of retainer that specifies this along with the control of the product and what the team member should do if the prosecution requests any work product. All team members need to know the discovery rules governing the case, including under what circumstances persons may be required to turn over material from their file or reveal information they have learned. Counsel must know what information is in the possession of every potential witness, including the investigator, mitigation specialist, and other experts, in order to make informed decisions about who should testify, as the privileges are waived once someone becomes a witness. Counsel must also provide direction to every team member, including experts, about what information should be put in writing, the form of the writing, and when to do it.

Counsel has a duty to monitor and direct the work of the team. While other team members may possess knowledge and skills essential to the provision of effective advocacy in capital cases that the attorneys do not, it is counsel’s duty to make sure that each member of the team is fulfilling their responsibilities in a competent manner. Counsel must possess sufficient understanding of the roles and duties of other team members to supervise their work and ensure that each team member, including each expert, is performing their job effectively and in a timely

158. See GUIDELINES, supra note 23, at Guideline 4.1, commentary.
159. See id.
160. See id. at Guideline 10.4(B).
manner. Counsel should assess the progress being made by the investigator and mitigation specialist and provide feedback and direction on other sources or avenues to pursue. The investigator and mitigation specialist have a corresponding duty to keep counsel informed as to the progress of their work. Courts have not yet granted defendants in capital cases the right to the effective assistance of experts. It is counsel’s duty to be sure that experts retained are competent, and that they do their job in a thorough, professional, capable, and timely manner.

The involvement of a mitigation specialist from the inception of the case is critical for several reasons. The social history investigation should begin immediately, and the client should be screened for mental and emotional impairments as soon as possible. This can be done by the mitigation specialist, if qualified, or the team member with mental health skills. This is important because there may be issues relating to the client’s competency or mental functioning. Counsel needs information regarding the client’s cognitive, mental, and emotional functioning in order to assess conduct in the offense, during interrogation, and in custody, and to begin to develop the trial and penalty phase strategy.

All members of the team need to understand the client’s functioning in order to develop a relationship of trust and confidence with the client, and to secure the client’s cooperation in efforts to save his or her life. Attorneys generally do not have the training or expertise to assess clients’ cognitive and mental impairments. They expect these impairments to present themselves with obvious features. If the client “looks normal,” they assume that he or she is normal. Symptoms of mental illness are not always present or evident, nor are indications of low cognitive functioning. Persons who are mentally retarded learn to mask their impairment and strive to look normal. A team member who is skilled in recognizing indicators of impairments must see the client very early in the process. The team must then pursue other sources of information by obtaining records and conducting interviews in order to

161. See Assessment, supra note 95.
162. See id.
164. See GUIDELINES, supra note 23, at Guideline 10.7, commentary.
165. See id. at Guideline 4.1(A)(2).
166. See id. at Guideline 4.1, commentary.
167. See id.
168. See id. at Guideline 10.5, commentary.
169. See id. at Guideline 4.1, commentary.
170. See id. at Guideline 10.5, commentary n.181.
171. See id. at Guideline 10.7, commentary.
determine the nature of the presenting problem(s) and the possible types of expert assessments that might be indicated.\textsuperscript{172}

The mitigation specialist and/or member of the team with mental health skills can then advise counsel on the type of experts that should be retained in the case, and can assist in locating appropriate experts.\textsuperscript{173} Counsel should generally not retain other experts, including mental health experts, until sufficient social history investigation has been conducted to determine exactly what types of experts are needed. The traditional use of a psychologist or psychiatrist may not necessarily be appropriate. In a Ninth Circuit habeas case, the court, citing counsel’s “failure to investigate the combined effects of [the petitioner’s extraordinary exposure to neurotoxicants, neurological impairments, and personal background],” ruled that such a failure constituted ineffective assistance of counsel at the penalty phase, and further held that “[c]ounsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult.”\textsuperscript{174} Furthermore, the court stated that counsel must present experts with all relevant information to enable them to conduct competent and reliable evaluations.\textsuperscript{175} Experts need documented and corroborated social history information in order to do this.\textsuperscript{176}

Federal and military statutes, as well as those of several states, have formalized procedures for presenting mitigation evidence to the prosecution or authorizing authority early in the process to prevent the case from proceeding as a capital case.\textsuperscript{177} The early involvement of the mitigation specialist in conducting the social history investigation may provide counsel with information and arguments to present to the decision-making entity regarding why the death penalty should not be authorized or sought.\textsuperscript{178} Even where there are not such formalized procedures, it may be possible to convince the prosecution to forego seeking the death penalty based on information provided.\textsuperscript{179} The information may also be used in seeking a negotiated settlement of the

\textsuperscript{172}. See id. at 202-03.

\textsuperscript{173}. See id. at Guideline 4.1, commentary.

\textsuperscript{174}. Caro v. Calderon, 165 F.3d 1223, 1224, 1226 (1998). The client in Caro had been examined by four mental health experts, none of whom was a neurologist or toxicologist. See id. at 1226.

\textsuperscript{175}. See id. at 1226.

\textsuperscript{176}. See Stetler, supra note 69; Lee Norton, Toward a Better Understanding of the Importance of Psychosocial Histories in Forensic Evaluations, ADVOCATE, Sept. 1996, at 80.

\textsuperscript{177}. See GUIDELINES, supra note 23, at Guideline 10.9.1, n.244.

\textsuperscript{178}. See id. at Guideline 10.9.1, commentary.

\textsuperscript{179}. See id.
case prior to trial. Such strategies should be undertaken carefully and based on counsel’s knowledge and judgment regarding the process and persons exercising authority to authorize the death penalty, as they have the effect of revealing the case in mitigation to the prosecution.

The relationship between defense team members and the client can have a critical effect on the outcome of the case. It is essential that team members, especially counsel, establish a relationship of trust and confidence with the client in order to obtain the client’s cooperation in the efforts to save his or her life. Clients come to the situation with many vulnerabilities and impairments. They generally are poor, and, therefore, have no choice in who represents them in a matter in which their life is at stake. They feel powerless in the situation. Trust is often a significant issue. Clients may have trust issues that are derived from their life experiences. They may see the defense team as another arm of the government that is trying to kill them. The defense team must work hard to earn and maintain the client’s trust.

There are often many barriers to communication, understanding, and trust between the client and team members. Clients are generally from a different socio-economic background and environment than team members. There may be differences of race, class, ethnicity, language, religion, and culture. Cognitive and mental impairments interfere with the client’s ability to relate to others and to understand and accept guidance from counsel. Histories of trauma, maltreatment, deprivation, and substance abuse affect the emotional functioning of the client and create barriers to trust and cooperation. The fact of incarceration and facing the death penalty exacerbates existing impairments and creates anxiety and stresses of its own, further interfering with the client’s mental and emotional functioning.

180. See id.
181. See id. at Guideline 10.5(A).
182. See id. at Guideline 10.5, commentary.
183. See Stetler, supra note 69.
186. See Stetler, supra note 69.
187. See id.
188. See id.
189. See GUIDELINES, supra note 23, at Guideline 10.5, commentary.
190. See Kammen & Norton, supra note 184.
191. See id. at Guideline 10.5, commentary.
are often in denial about the seriousness of their situation and the very real possibility of the death penalty. They may want to focus primarily on winning the case in the guilt phase, and may want to avoid thinking about or preparing for the penalty phase. As one author put it, the team must understand the client’s behaviors as “diagnostic of the wounds they carry.”

Team members must make every effort to bridge the barriers between the team and the client. They must strive to understand the client’s experience and view of the world and then use this understanding to develop ways to communicate with the client and gain the client’s trust and cooperation. Research and consultation with mental health, cultural and community experts can aid the defense team in understanding the client’s experience and functioning. It may be advisable to add a consultant to the defense team to address these issues. These same lessons apply to the team’s communications and relationships, including those taking place during the investigation throughout both phases of the case, with family as well as others in the case and in the client’s life. Explaining the client’s functioning and behavior, in light of socio-economic, environmental, political, cultural, racial, ethnic, and religious factors is as important as addressing cognitive, mental, and emotional factors.

The theory of the case and trial strategy for both the guilt and penalty phases is developed based on the work of the members of the team. Counsel must strive to coordinate the strategy for the guilt phase with that for the penalty phase, and should incorporate penalty phase strategy into every aspect of the case. The paramount goal at all times is to save the life of the client. Research indicates that, despite instructions to the contrary, jurors have a tendency to make up their minds about punishment during the guilt phase. Efforts should be made to introduce evidence in mitigation of punishment during the first phase of the trial.

Counsel should consult with team members regarding the mitigation strategy, including challenges to aggravation, witnesses to call, and other evidence to present, as well as specific mitigators to include in verdict forms. While the case is pending, it is likely that the

192. See id. at 188.
193. See Norton, supra note 184 (italics omitted).
194. See GUIDELINES, supra note 23, at Guideline 1.1, commentary.
investigator and mitigation specialist will have spent the most time with potential witnesses, including the family of the client. Counsel cannot abdicate responsibility for maintaining relationships with the client, family, and witnesses to the investigator and mitigation specialist.\textsuperscript{196} It is counsel who must obtain the most compelling testimony from witnesses. Witnesses must be comfortable in disclosing information, particularly of a private and sensitive nature, to the person who conducts their examination at trial.

IV. CONCLUSION

The defense team in a capital case is charged with the responsibility of making the case for life on behalf of the client. Working together, the team develops and presents the client’s story in a compelling and persuasive manner which will both explain the client’s conduct in the offense and convince the jury of the value of the client’s life. The case for life must be presented in a manner which enables the jury to understand the mitigating value of the evidence and give it appropriate weight in determining punishment. The defense team’s job in persuading the jury to vote for life was perhaps best articulated by Clarence Darrow in his closing argument in the Leopold and Loeb trial:

If there is such a thing as justice it could only be administered by one who knew the inmost thoughts of the man to whom they were meting it out. Aye, who knew the father and mother and the grandparents and the infinite number of people back of him. Who knew the origin of every cell that went into the body, who could understand the structure, and how it acted. Who could tell how the emotions that sway the human being affected that particular frail piece of clay. It means more than that. It means that you must appraise every influence that moves them, the civilization where they live, and all society which enters into the making of the child or the man! If your Honor can do it you are wise and with wisdom goes mercy.\textsuperscript{197}

\textsuperscript{196} See GUIDELINES, supra note 23, at Guideline 10.5, commentary.
A NEW PROFESSION FOR AN OLD NEED:
WHY A MITIGATION SPECIALIST MUST BE INCLUDED ON THE CAPITAL DEFENSE TEAM

Pamela Blume Leonard*

In April 1999, “The Atlantic Online” highlighted the term “mitigation specialist” in Word Watch:¹

mitigation specialist noun, a member of a criminal-defense team who gathers detailed background material about the defendant in order to persuade a jury not to impose the death penalty: “Increasingly, lawyers defending death-penalty cases rely heavily on mitigation specialists” (U.S. News & World Report).

BACKGROUND: Though both the term and the job are probably no older than the current decade, printed evidence of both has steadily accrued, making the term a likely candidate for entry in future dictionaries. A mitigation specialist has been described as a kind of social historian who delves into the defendant's past to unearth circumstances—childhood abuse, for example—that might be used to paint a sympathetic picture and sway a jury toward leniency. A recent case in which a mitigation specialist was at work, seemingly with some success, is the trial of Terry Nichols in connection with the 1995 Oklahoma City bombing.

INTRODUCTION

In 1976, the United States Supreme Court approved the death penalty statutes of several states, ending a four-year hiatus from

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¹ Anne H. Soukhanov, Word Watch, THE ATLANTIC ONLINE, (Apr. 1999), at http://www.theatlantic.com/issues/99apr/9904wdwth.htm (compiling a selection of terms that have newly been coined, that have recently acquired new currency, or that have taken on new meanings).
executions in this country. These statutes sought to avoid the arbitrary and capricious use of the death penalty prohibited by Furman v. Georgia through the implementation of a bifurcated trial. In a separate sentencing trial that follows conviction, the state must prove at least one statutory aggravating circumstance beyond a reasonable doubt and the defendant is allowed to present mitigating circumstances, which are those factors that might lead jurors to choose a life sentence rather than imposing death. Over the last thirty years, the scope and admissibility of various types of mitigating evidence have been litigated at all levels of our courts. The resulting body of law calls for a comprehensive sentencing phase that requires a jury, in the course of making a reasoned moral judgment regarding punishment for a capital crime, to listen to and consider all evidence presented by the defendant regarding his character, upbringing and frailties, as well as the proportionality of the sentence to the offense. In this setting, the mitigation specialist, charged with identifying and developing mitigation issues, emerged as a critical member of the capital defense team.

8. See Simmons, 512 U.S. at 163 (“The defendant’s character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment.”) (citing Lockett v. Ohio, 438 U.S. 586; Eddings v. Oklahoma, 455 U.S. at 110; Barclay v. Florida, 463 U.S. 939, 948-51 (1983) (plurality opinion)).
9. See Eddings, 455 U.S. at 104.
10. See Caldwell v. Mississippi, 472 U.S. 320, 330-31 (1985) (“This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed ‘[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.’ [Woodson v. North Carolina, 428 U.S. 280, 304 (1980)]. When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.”).
12. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 4.1, commentary (rev. ed. 2003) [hereinafter GUIDELINES] (noting that the inclusion of mitigation specialists is now part of the standard of care in capital defense cases). Scharlette Holdman, Ph.D, is the Executive Director of the Center for Capital Assistance in San Francisco, California. She was an early leader in the training and development of mitigation specialists and in teaching attorneys how to make use of mitigation evidence.
The fundamental task of the mitigation specialist is to conduct a comprehensive social history of the defendant and identify all relevant mitigation issues. The 2003 revised edition of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases recognizes the mitigation specialist as an “indispensable member of the defense team throughout all capital proceedings.”

What are the particular responsibilities and contributions of a mitigation specialist and what makes them so essential to the capital defense team as to warrant this long overdue recognition by the ABA Guidelines?

I. ROLE

It is the role of the mitigation specialist to investigate and analyze the defendant’s background so that defense counsel is made aware of all potentially mitigating factors. As in all forensic investigations, the process is not complete until all material leads are exhausted and “the information uncovered becomes redundant and provides no new insight.”

A. Training and Responsibilities

All mitigation specialists have training and experience in the development and presentation of mitigating evidence in all stages of capital proceedings. Some mitigation specialists have training in social science and learn to apply it in forensic settings, perhaps providing testimony of their findings. Other mitigation specialists confine themselves to conducting the social history investigation and then assist in identifying necessary experts and in determining how to effectively present their findings.

B. Frequently Occurring Mitigating Factors

There is no comprehensive list of mitigating factors because mitigation encompasses any factor that significantly affected the

13. See GUIDELINES, supra note 12, at Guideline 4.1, commentary.
14. Id.
15. See id.
17. See GUIDELINES, supra note 12, at Guideline 4.1, commentary.
18. See id. at 145-46.
19. See id. at 146.
defendant’s character and his conduct related to the offense. Many of the following circumstances, however, frequently occur in the backgrounds, offenses and incarceration of capital defendants and should be considered in all cases:

- psychiatric illness;
- medical conditions with psychiatric consequences;
- mental retardation;
- neurological deficits;
- childhood maltreatment;
- family dynamics resulting in neglect or physical/emotional abuse;
- extreme poverty;
- community effects;
- dislocation and immigration;
- youth at the time of offense;
- duress;
- degree of participation by the defendant;
- circumstances of prior offenses;
- remorse;
- good character;
- good conduct while incarcerated;
- effects and conditions of incarceration;
- future dangerousness.20

The building blocks of the investigation are the collection of life history records and interviews of all significant persons in the defendant’s life.21 The developmental history of the client, including conditions affecting him in utero to the present must be tracked and documented.22 When there are signs of mental impairments, the social history should reach back at least three generations to establish patterns and effects of medical conditions, mental illness, substance abuse, poverty, environmental toxins and other factors that may have negatively influenced the health of the defendant and his family.23

All significant documentation related to the client and his family must be gathered, organized and analyzed.24 There can be no

20. See GUIDELINES, supra note 12, at Guideline 10.11(F).
21. See generally Russell Stetler, Why Capital Cases Require Mitigation Specialists, at http://www.nlada.org/DMS/Documents/998934720.005. Methods used by mitigation specialists in their investigations must produce data that can be relied upon in medical and psychological evaluations as well as in court. See id.
22. See GUIDELINES, supra note 12, at Guideline 10.7, commentary.
comprehensive list and the following is no more than a preliminary guide:

- school records, including special education evaluations and reports, psychological testing, health and disciplinary records;
- medical records, including birth, childhood illnesses and check-ups, immunizations, mental health, all accidents and injuries, psychiatric, substance abuse;
- psychological records, including mental health evaluations, substance abuse;
- social services records, including welfare, foster care, adoption
- criminal records, juvenile and adult;
- employment records;
- military records;
- immigration records.25

1. Psychiatric Illnesses

The mental illnesses of many criminal defendants, including capital defendants, are often overlooked by officials in the criminal justice system, including defense counsel, due to the growing tendency to criminalize persons with mental illness.26 Many mental illnesses have a gradual onset, making it even more important to acquire an accurate social history.27 The mitigation specialist is trained to identify signs of mental impairments in the defendant’s thinking and behavior, including modes of speech and mobility,28 that come to light during interviews with the defendant or in life history records and interviews.29

2. Mental Retardation

In light of the constitutional bar against executing mentally retarded persons,30 one of the major responsibilities of the mitigation specialist is to determine if signs of mental retardation are present. However, people

25. See id.
27. Sometimes early warning signs can be identified as far back as elementary school. For example, new research into paranoid schizophrenia, long thought to first appear in early adulthood, has identified subtle symptoms that were, in fact, present in children and adolescents. See generally Elaine F. Walker et al., The Developmental Pathways to Schizophrenia: Potential Moderating Effects of Stress, DEV. & PSYCHOPATHOLOGY 647 (1996).
29. See GUIDELINES, supra note 12, at Guideline 4.1, commentary.
in general, including capital defendants, are reluctant to admit they have mental impairments because they know and fear the stigmatization that will follow. This is especially true of defendants who are, or may be, mentally retarded. Persons with mental retardation often look normal, having learned to mask their deficits while suffering from a disability that delays learning, diminishes memory, curtails problem solving and distorts the understanding of cause and effect. The result is a person who, although he may appear normal, is in fact a very vulnerable person, particularly within the confines of the criminal justice system.

Mental retardation usually begins before or around birth, so signs and symptoms of mental retardation will be reflected throughout life. The mitigation specialist, who is familiar with the diagnostic criteria of mental retardation and the normal progress of developmental milestones, will provide critical data for an accurate and reliable evaluation regarding mental retardation.

3. Childhood Maltreatment and Victimization

Trauma and maltreatment are prevalent in the backgrounds of many capital defendants. Social science research continues to confirm the relationship between childhood victimization and violent criminal behavior. The special skills and sensitivities of a mitigation specialist

31. See GUIDELINES, supra note 12, at Guideline 10.7, commentary.
32. See id. at Guideline 10.5, commentary.
34. See Ellis & Luckasson, supra note 33, at 424.
36. See John Blume, Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination, THE ADVOCATE, Aug. 1995 at 6 (noting a five step forensic mental health assessment process:
1) An accurate medical and social history must be obtained.
2) Historical data must be obtained not only from the patient, but from sources independent of the patient.
3) A thorough physical examination (including neurological examination) must be conducted.
4) Appropriated diagnostic studies must be undertaken in light of the history and physical examination.
5) The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment.)
38. See id.
are needed to work with the defendant and his family members to avoid further trauma and to elicit all relevant mitigating evidence from them, especially when there are embarrassing and humiliating circumstances that may have been kept secret for many years. In such instances, trust and respect skillfully developed over time are necessary in order for stories of physical or sexual abuse to emerge.

4. Strengths of the Defendant

The defendant’s strengths should also be identified and documented. Positive contributions he has made to his family and community, as well as attempts to overcome his own impairments, are important mitigating factors that rebut the prosecutors’ characteristic attempts to “demonize” the offender. Awards, family photographs and prison records citing good conduct are among the life history records gathered by mitigation specialists to support testimony by mitigation witnesses.

5. Additional Mitigation Themes

Additional common mitigation themes are youth at the time of the offense, severe childhood poverty and its consequences—such as malnutrition, exposure to neurotoxins that led to neurological damage and the client’s good conduct while awaiting trial or during previous incarcerations—as well as remorse for the offense and its aftermath. No investigation of any matter that significantly influenced the defendant or the commission of the offense can be foreclosed without its relevance to the defendant’s character and culpability.

C. Identifying the Need for Expert Mental Health Evaluations

Analysis of life history information by mitigation specialists leads to the identification of issues requiring assessments by psychologists, psychiatrists and other experts who will potentially testify regarding their findings. The mitigation specialist helps defense counsel identify appropriate experts and provides reliable, well-organized life history

40. See id. at Guideline 4.1.
42. See GUIDELINES, supra note 12, at Guideline 10.11(F)(5).
43. See GUIDELINES, supra note 12, at Guideline 10.7, commentary.
44. See id. at Guideline 10.11, commentary.
data to those experts.\(^45\) This valuable tool reduces the amount of time experts would otherwise spend gathering and organizing background information that is necessary for an accurate and reliable mental health evaluation.\(^46\) Once an expert’s assessment is complete, the mitigation specialist assists counsel in determining whether the expert will testify and, if so, what documents and lay witness testimony have been identified to support his conclusions.\(^47\)

D. Assisting in Plea Negotiations

Capital cases often do not go to trial for several years, straining the stamina of even the most cooperative defendants and supportive families. The relationships between the mitigation specialist, the defendant and key members of his family can be instrumental in bridging the gap between their fear and distrust of the criminal justice system and the difficult realities of capital litigation.\(^48\) This is particularly true in plea negotiations when the defendant may resist accepting the long sentence—usually life without the possibility of parole—he will serve.\(^49\) The mitigation specialist can assist defense counsel in explaining the value of a negotiated plea and the risks of a capital trial to the defendant and his family.\(^50\)

II. NEED

In keeping with the ABA-advised standard of care,\(^51\) mitigating evidence must be developed and presented at a capital trial for at least three reasons:\(^52\) (1) the procedural protections of the Constitution require it;\(^53\) (2) capital jurors must consider the defendant’s character—his very

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\(^45\) See id. at Guideline 4.1, commentary.
\(^46\) See Blume, supra note 36 (noting a five step forensic mental health assessment process).
\(^47\) See GUIDELINES, supra note 12, at Guideline 10.11, commentary.
\(^48\) See id. at Guideline 4.1, commentary.
\(^49\) See id.
\(^51\) See GUIDELINES, supra note 12, at Guideline 4.1, commentary.
\(^52\) See id. at Guideline 10.11(G)-(J); Jonathan Tomes, Damned If You Do, Damned If You Don’t: The Use of Mitigation Experts in Death Penalty Litigation, 24 AM. J. CRIM. L. 359, 361-62 (1997).
humanness—in their sentencing decision-making;\textsuperscript{54} and (3) the defendant needs to rebut the state’s demand for death as the appropriate answer to the heinous nature of the crime.\textsuperscript{55}

The most compelling reason to include a mitigation specialist on the defense team is that a mitigation specialist possesses expertise in the monumental task of identifying, developing and presenting mitigating evidence that most attorneys do not have.\textsuperscript{56} Failing to include a mitigation specialist on the capital defense team will increase the risk that counsel will miss vital mitigating evidence. As a result, that evidence will not be presented at trial and will at best come to light during the appeals process, casting doubt on the reliability of the outcome of the trial and leading to a finding that trial counsel was ineffective.\textsuperscript{57}

The weight and breadth of the defense preparation for a capital trial have given rise to the need for an expert to identify, develop and coordinate mitigating evidence.\textsuperscript{58} Further, lawyers defending capital cases have found that developing and presenting mitigating evidence requires a broad, time-consuming investigation into the life history of the client and the client’s family, including medical and mental health issues as well as developmental, educational, community and cultural factors that influenced his conduct over time.\textsuperscript{59} In the capital trial setting, a social history is an in-depth investigation and analysis of the defendant’s life and character, including the genetic and environmental factors that shaped him.\textsuperscript{60} This type of investigation—a social history investigation—falls outside the expertise of the traditional fact investigator whose job is to assist the attorneys in determining “what” happened.\textsuperscript{61} In contrast, the mitigation specialist assists the defense team in identifying, understanding and presenting evidence that can reveal “why” the offense occurred and reasons why the death penalty is not the appropriate punishment for the defendant.\textsuperscript{62}


\textsuperscript{56} See GUIDELINES, supra note 12, at Guideline 4.1, commentary.

\textsuperscript{57} See id.

\textsuperscript{58} See id.

\textsuperscript{59} See id. at Guideline 10.7, commentary.

\textsuperscript{60} See id. at Guideline 10.11, commentary.

\textsuperscript{61} See Stetler, supra note 21.

\textsuperscript{62} In my work as a mitigation specialist, I have served on numerous capital defense teams and consulted on scores of cases. Several times, I have testified at hearings where defense attorneys were seeking funds to hire a mitigation specialist. Each time, the judge asked me why the attorneys
Mitigation specialists are trained to identify signs and symptoms of mental illnesses and impairments as well as medical conditions that have psychiatric consequences. Defense counsel, who are not trained in these areas, need the assistance of mitigation specialists because capital defendants often have serious mental health issues that impacted their conduct surrounding the offense. Like mental illnesses, neurological impairments and mental retardation of defendants are often overlooked or denied by the criminal justice system.

In addition to identifying mental health issues, mitigation specialists assist attorneys in developing a credible and comprehensive theory of the case throughout the merit and sentencing stages of capital proceedings. Mitigation, particularly when mental health issues are involved, is neither statutorily nor strategically confined to the sentencing phase of trial. For example, mental health issues affect a pre-trial determination of competency; evidence supporting a plea of insanity or diminished capacity goes to the state of mind of the defendant at the time of the crime and all waivers made by the defendant. Mental health issues that do not rise to the level of a defense—for example, absence of malice or no specific intent—may be presented during the merit phase of the trial.

Assistance in determining when and how to present mitigating evidence is crucial in death penalty cases because empirical studies show that jurors, contrary to the instructions given to them, are considering punishment from the outset of the trial process. Jurors tend to view defense experts negatively if their testimony is not supported by lay witnesses and other contemporaneous information that supports the

and their fact investigator need yet another expert to work on the case. It is essential to explain how a mitigation specialist is different from a fact investigator and to emphasize the greatly decreased likelihood of an appellate court reversing or remanding the case based on ineffective assistance of counsel when a mitigation specialist is a part of the capital trial team.

63. See Blume, supra note 36 (noting a five step forensic mental health assessment process).
64. See Blume & Leonard, supra note 26. Even though properly treated mentally ill persons are no more violent than the general population, untreated or improperly medicated illnesses can contribute to tragic and avoidable violent offenses. See generally Henry J. Steadman, et al., Violence by People Discharged from Acute Inpatient Facilities and by Others in the Same Neighborhoods, 55 Archives of Gen. Psych. 393 (1998).
66. See GUIDELINES, supra note 12, at Guideline 10.11, commentary.
67. See id.
68. See id.
expert’s opinion.\textsuperscript{70} Assisting attorneys in effectively interlocking documentary evidence with testimony by lay and expert witnesses is a crucial aspect of the mitigation specialist’s work.\textsuperscript{71}

A mitigation specialist is skilled at working with family members of capital defendants, who are often the source of critical mitigating evidence.\textsuperscript{72} After all, these are the people who have known the defendant over time and have seen various aspects of his character and living environments.\textsuperscript{73} If the client endured childhood maltreatment or had medical or psychological problems, family members are most likely to have witnessed or been aware of it.

Family members can also help the defense team determine why the defendant’s siblings, who grew up in the same family, were not involved in a capital crime. Yet, social convention, as well as fear of the criminal justice system, causes family and friends of the defendant tend to minimize, normalize or deny their own mental conditions as well as those of the defendant. Further, family members of the defendant have experienced the shock of the offense and the shame of being closely associated with an accused person whom the state seeks to execute.\textsuperscript{74} In many cases, family members have suffered profound blows to their physical health and emotional equilibrium.\textsuperscript{75} Enter the defense team—asking questions about personal matters rarely shared with any outsider—who want material for use in open court that will most likely be seen in the media.\textsuperscript{76} At this crucial point, family members must be persuaded that the investigation is necessary and that their full participation is vital. Failure to handle potential mitigation witnesses skillfully can mean missing critical information, a situation that will jeopardize the reliability of the trial altogether.

\section*{III. Benefits}

There are two primary benefits to having a mitigation specialist on a capital defense team. Most importantly, the identification, development and presentation of mitigating evidence will be greatly improved. In a report on the cost, availability and quality of defense

\textsuperscript{71} See \textit{GUIDELINES}, supra note 12, at Guideline 10.11, commentary.
\textsuperscript{72} See id. at Guideline 4.1, commentary.
\textsuperscript{73} See id. at Guideline 10.11, commentary.
\textsuperscript{74} See Beck, \textit{supra} note 50 at 399-400.
\textsuperscript{75} See \textit{GUIDELINES}, supra note 12, at Guideline 10.11(F)(4).
\textsuperscript{76} See id. at Guideline 4.1, commentary.
representation in federal death penalty cases, “[w]ithout exception, lawyers . . . stressed the importance of a mitigation specialist to high quality investigation and preparation of the penalty phase.” Defense attorneys rarely have the training, experience or time to gather social history records for several generations of a defendant’s family or to analyze those records. They also do not have the time to make the necessary repeat visits with crucial social history witnesses.

As a rule, neither the signs, symptoms and effects of mental retardation, mental illness, neurological impairments and childhood abuse nor the ramifications of community violence or non-mainstream cultural beliefs are familiar to defense attorneys. The assistance of a mitigation specialist supports an exhaustive investigation for mitigating evidence, thorough organization and analysis of that evidence, development of mitigation themes, identification of experts who can diagnose and explain the consequences of mental impairments, location of critical lay witnesses, adequate preparation of witnesses who will testify, and insight into the behavior of the defendant and his family. All of these contributions lead to increased effectiveness of defense counsel and, ultimately, promotes more reliable capital trial procedures.

Second, mitigation specialists are hired or employed at a lesser rate than that of lawyers with equal capital experience. In their absence, the work of a mitigation specialist must be done by lawyers rather than paralegals or investigators. However, since it takes hundreds of hours to conduct a thorough social history investigation, hiring a mitigation specialist generally results in a “substantial reduction in the overall costs of [capital] representation.”


78. See GUIDELINES, supra note 12, at Guideline 4.1, commentary.

79. In Wiggins v. Smith, the United States Supreme Court conducted a Strickland analysis and, reversing the Maryland Court of Appeals, held that trial counsel did not provide effective assistance of counsel. 123 S.Ct. 2527, 2538 (2003). Rather, Mr. Wiggins’ attorneys settled on a trial strategy without conducting an adequate investigation into mitigating factors and their “incomplete investigation was the result of inattention, not reasoned strategic judgment.” Id. at 2538.

80. See id.

81. See GUIDELINES, supra note 12, at Guideline 4.1, commentary n.107.

82. See id.

83. See Recommendations, supra note 77.
CONCLUSION

With a defendant before them, jurors cannot act on the abstract belief that the death penalty is an appropriate punishment in some circumstances. They must judge an individual defendant in light of his frailties, his fundamental humanity, the tragedy of murder and its ramifications as well as their own convictions about responsibility, remorse, retribution and mercy.

The Constitution, as well as the various statutes outlining the criminal procedures of death penalty trials and appeals, recognizes the legal and moral necessity of presenting a full picture of the defendant and any factors that reduce his culpability in the offense to the jurors who carry the burden of determining his punishment. It is the job of the mitigation specialist to identify all mitigating evidence that will assist defense counsel in persuading jurors that imprisonment is an appropriate punishment and that taking the life of the defendant is not a mandatory outcome of the trial. The ultimate goal, of course, is to avoid the imposition of a death sentence and save the life of the defendant.
COMMENTARY ON COUNSEL’S DUTY TO SEEK AND NEGOTIATE A DISPOSITION IN CAPITAL CASES

(ABA GUIDELINE 10.9.1)

Russell Stetler*

The size of today’s 3525-prisoner death row 1 might have been greatly diminished if a simple warning sign had been posted in the mid-1970s:

| WARNING: |
| CAPITAL TRIALS CAN BE HAZARDOUS TO YOUR CLIENT’S HEALTH AND MAY INVOLVE A GRAVE RISK OF DEATH. |

The ABA’s revised Guidelines have squarely addressed the importance of seeking and negotiating dispositions in capital cases as a core component of effective representation in matters of life and death.

Pleas have been available in the overwhelming majority of capital cases in the post-

_Furman_ era, including the cases of hundreds of prisoners who have been executed. There are no precise empirical data on this question. Plea negotiations are typically confidential, with both parties maintaining a posture of plausible denial if negotiations fail. The prosecutor may find it harder to argue to jurors that justice in a particular case requires a sentence of death if they know that he had offered the defendant a life sentence only weeks before. Defense counsel may not

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1. This figure is as of April 1, 2003. The Death Penalty Information Center maintains a list by year of the number of inmates on death row at http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#year (last visited Aug. 22, 2003).
want to advertise her willingness to plead to first-degree murder if the
case proceeds to trial and she is arguing to the jurors that the proof
supports only second-degree. In addition, there are cases where a plea
was acceptable to both sides, but negotiation never began because each
side waited for the other to initiate discussions. (“There was never an
offer,” says the defense attorney. “She never came to me with anything,”
says the prosecutor.)

We do know empirically that approximately half of all death-
penalty cases do not go to trial. In California, for example, where capital
punishment was reinstated in 1977, 2,866 death penalty cases had been
closed by the end of 1989—1355 (or 47 percent) without trial. In New
York, where capital punishment was reinstated in 1995, 41 death-noticed
cases had been closed by the end of 2002—23 by means of pleas. Three
death notices had been withdrawn and one defendant had died before
trial, so plea dispositions were reached in 23 of 37 cases (62 percent),
including two cases in which dispositions were reached after juries had
returned first-degree verdicts in the first phases of capital trials. But
these data merely establish how routine it is to resolve capital cases by
negotiated dispositions. They do not begin to capture the cases that could
have been so resolved.

There are four key players in resolving capital cases: victims’
surviving family members, prosecutors, defendants, and capital defense
counsel. The role of victims’ survivors is unofficial in most capital
jurisdictions. Most capital statutes do not invest these citizens with
explicit influence over dispositions. But the need to heal their pain had
become the principal rationale for capital punishment in the United
States by the dawn of the twenty-first century. Support for a negotiated

2. Data compiled by the Office of the State Public Defender of California. See California
Appellate Project, Investigating Habeas Corpus Claims: Syllabus (Summer 1994), at tab 7 (on file
with author and Hofstra Law Review).

3. Data compiled by the New York Capital Defender Office and available on its website,
www.nycdo.org. The cases resolved after first-degree murder convictions were in Kings County,
People v. Page (Ind. 9833/96, Judge Hall) and People v. Bonton (Ind. 4152/98, Judge Lott). The
Jermaine Page plea was reported by Joseph P. Fried, Brooklyn Killer Takes Deal for Life in Prison,
N.Y. TIMES, Oct. 29, 1998, at B8. Jerry Bonton’s plea was reported by Mike Claffey, Killer
Chooses Life over Death in Plea Agreement, N.Y. DAILY NEWS, Apr. 12, 2000, at 3.

confer with victim’s court-appointed representative prior to entering a plea agreement). Ordinarily,
a victim’s representative under § 15-23-61 would be a member or members of the victim’s
immediate family.

5. See Franklin E. Zimring, The Symbolic Transformation of American Capital
characterizes this change of rationale as the “degovernmentalization” of execution in the
United States from a state function for solely governmental purposes to a public service rendered for
disposition from the victims’ family members provides an ideal cover for an unpopular prosecutorial decision. In the Matthew Shepard case in Wyoming, for example, Shepard’s father gave his blessing to the decision to avoid a sentencing proceeding after Aaron McKinley was convicted of first-degree murder in a notorious gay-bashing hate crime. Dennis Shepard, Matthew’s father, addressed the defendant as follows:

Matt became a symbol, some say a martyr, putting a boy-next-door face on hate crimes. . . . [Y]our agreement to life without parole has taken yourself out of the spotlight and out of the public eye.

Best of all, you won’t be a symbol. No years of publicity, no chance of commutation, no nothing—just a miserable future and a more miserable end. It works for me.6

Prosecutors readily acknowledge that the opinion of the victim’s family “will always be considered,” even if it is not “dispositive” on the issue of settlement.7 Prosecutorial offices often have specialized staff or community volunteers to serve as liaisons to victims’ family members. Capital defense counsel have learned from hard experience that they, too, need to understand the needs of the surviving family members, rather than assume that victims’ families will automatically and uniformly desire execution.8 The spectrum of attitudes toward the death penalty is often mirrored within the extended families of homicide victims. The surviving families in notorious cases with large numbers of

the psychological benefit of those who have lost loved ones. See id. at 63. Professor Zimring traces the number of news stories that link the term “closure” to the subject of executions in a broad sample of U.S. print media from 1986 to 2001:

Prior to 1989, the term does not appear in death penalty stories in the United States. Its first and only mention in 1989 was followed by a year in which two stories use the term. By 1993, ten stories a year combine the topic “death penalty” and the word “closure,” and thereafter the combination of “capital punishment” and “closure” grows almost geometrically to more than 500 stories in 2001.

Id. at 60.


victims have demonstrated this broad range of attitudes, as demonstrated by the emergence of powerful voices in support of reconciliation, such as Bud Welch, whose daughter perished in the Oklahoma City bombing.9

Even when there is a vocal family member advocating for execution, the rest of the family may feel differently. The degree of anger does not automatically correlate with a desire for capital vengeance. Thus, approaching the victim’s family members must be part of counsel’s efforts toward resolution.10 Counsel should not forget that they always have something to offer the victim’s survivors, including finality, return of evidence, disclosure of information, remorse, dignity and understanding, punishment, protection, explanations of what happened and why, someone to talk to, and somewhere to vent their rage. Some victims’ families have sought explicit apologies from defendants. Others have sought an opportunity for a face-to-face encounter with their loved one’s killer as part of a negotiated disposition.11

Other capital defense efforts must be directed toward persuading the prosecution that disposition is the prudent course. Prosecutors change their minds over time. Even if the prosecutor has made an early declaration that no plea is being offered, counsel should not accept that declaration as a permanent bar to settlement. Counsel needs to demonstrate first of all that the case will be litigated tirelessly. Pleas are often won by dint of sheer hard work. A creative motion practice requires more than boilerplate responses from prosecutors. Original

9. See ROBERT JAY LIFTON & GREG MITCHELL, Murder Victims’ Families, in WHO OWNS DEATH? 197, 208-09 (1st ed. 2000). To learn about organizations that provide support and advocate reconciliation, see the web sites of Murder Victims Families for Reconciliation (www.mvfr.org) and Religious Organizing Against the Death Penalty (www.deathpenaltyreligious.org). Training in the concept of restorative justice is available at Eastern Mennonite University in Harrisonburg, Virginia, and the University of Minnesota School of Social Work.


11. See Richard Burr, Litigating with Victim Impact Testimony: The Serendipity That Has Come from Payne v. Tennessee, 88 CORNELL L. REV. 517, 528-29 (2003). Burr cites the plea agreement in a highly publicized federal death penalty case, United States v. Stayner, in which the plea agreement incorporated provisions specifically addressing the needs of the victim’s surviving family, including the desire that Stayner stop making public statements, that he be cut off from possible financial gain from film or literary rights to the story of the case and that, should they choose, they would have the opportunity to meet Stayner in the presence of a third-party facilitator. See id.
litigation raises novel issues and creates new risk of error. A plea can eliminate that risk. Aggressive defense investigation may expose proof problems and weaknesses in the state’s case. In some jurisdictions, prosecutors seek defense input before making a final decision to seek the death penalty in eligible cases.12 Early proffers about available mitigation evidence can create doubt about whether jurors will return a death sentence and can thus promote resolution even if the case is not decapitalized. Evidence of mental illness may favor resolution even if it does not constitute a legal defense to the crime, not only for its mitigating effect but also because the specter of competency could haunt the case at every procedural stage, including that of execution itself.13

Protracted litigation may lead to dispositions. There are numerous recent examples of resolution following conviction of first-degree murder,14 and an emerging tendency to resolve cases even during post-conviction proceedings.15

The client’s attitude toward a plea is likely to change over time. Variants of Patrick Henry’s “liberty or death” rhetoric (often

12. In New York, for example, prosecutors have 120 days from arraignment in the trial court to decide whether to seek capital punishment in first-degree murder cases and it is the norm to seek defense input in that period. See N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2002). The federal authorization procedure likewise provides for defense input locally and in Washington before a final decision is made to seek death. See U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-10.030 (input to local U.S. Attorney); id. § 9-10.050 (input to Washington), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm. The federal authorization procedure likewise provides for defense input locally and in Washington before a final decision is made to seek death. See U.S. Dep’t of Justice, United States Attorneys’ Manual § 9-10.030 (input to local U.S. Attorney); id. § 9-10.050 (input to Washington), available at http://www.usdoj.gov/usaوء/foia_reading_room/usam/title9/10mcrm.htm. Chicago-area prosecutor Joe Birkett recommended making this procedure the national norm in his capacity as president of the Association of Government Attorneys in Capital Litigation. See Lisa Olsen, 1 Killer, 2 Standards, SEATTLE POST-INTELLIGENCER, Aug. 7, 2001, at A1. Birkett and other experts recommend that prosecutors “eliminate knee-jerk decisions” and spot problems early to save time and money on appeals years later. Id. “Before deciding whether to seek the death penalty, prosecutors should require defense attorneys to submit mitigation packets—information on a defendant’s mental state and upbringing that could evoke sympathy at trial.” Id.

13. In the Unabomber case, a plea was accepted post-jury selection after the government’s examination found Ted Kaczynski competent to stand trial but suffering from major mental illness. See William Glaberson, The Unabomber Case: The Overview; Kaczynski Avoids a Death Sentence with Guilty Plea, N.Y. TIMES, Jan. 23, 1998, at A1.


15. Post-conviction resolution includes both cases which are resolved by plea after habeas relief has been granted and others which have been disposed of during the pendency of habeas proceedings. E.g., James S. Liebman, et al., A Broken System: Error Rates in Capital Cases, 1973-1995, apps. C & D (June 12, 2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/; see also GUIDELINES, supra note 10, at Guideline 10.9.1, text accompanying note 243.
paraphrased as “free me or fry me”) are normal for capital defendants at some stage of the litigation. Such speeches are no excuse for counsel to give up the hope of settlement. Denial and despair need not be permanent. Counsel should also take care not to broach the subject of plea prematurely. Waiver of constitutional rights and other legal remedies (such as the right to appeal or to seek parole or commutation of sentence), acceptance of responsibility and agreement to a life sentence involve the gravest decisions a client could ever be asked to make, and the discussion can only commence when counsel has established a relationship of trust. The barriers to trust between capital clients and counsel typically include race, class, age, gender, nationality, religion, social values, sexual orientation, political views, etc. Overcoming these barriers takes patience above all else.

In his article on plea bargains, Heart of the Deal, Kevin M. Doyle includes a section headed Take Off Your Watch, which explains the patience required of a capital defense attorney:

You earn the trust of your client primarily by working your case and, secondly, with patience. Be ready to spend hours and days with a client to persuade him to save his life, to make the right decision for himself and to own it fully.

Filibuster, plead, argue, cajole. Sometimes cry. Sometimes just sit and wait out your client’s angry silences. Don’t get frustrated. Don’t give up.

If you are in a rush, forget it. You’ll only confirm what your client suspects: that you don’t care, that you want the plea to save you work, not to save his life. 17

Steven Zeidman has referred to this patient process as “client-centered counseling,” noting that there is a counseling continuum from neutrality

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16. When confronted with statistical discrepancies suggesting that pleas were more available to white defendants than black in federal capital prosecutions, Attorney General Ashcroft’s Justice Department argued that “[i]t takes two to make a plea agreement.” U.S. Dep’t of Justice, The Federal Death Penalty System: Supplementary Data, Analysis, and Revised Protocols for Capital Case Review, June 6, 2001, Part III.B, available at http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm. As noted at the outset of this commentary, in my view dispositions involve not just two players, prosecutors and clients, but victim’s family members and capital defense counsel as well. Often, three of the four parties are white, while the client is more often than not a person of color. Diversity in the capital defense team is desirable for a variety of reasons, but it is essential to facilitate communication about plea decisions.

at one end to vigorous urging at the other.\textsuperscript{18} Professor Zeidman urges attorneys to offer their opinions about the advisability of pleas and to attempt to persuade clients to accept their recommendations, especially in view of “the prevalence of mental illness, drug and alcohol use and addiction, and other factors” which may impair clients’ abilities “to make a decision of this magnitude without the guidance and input of counsel.”\textsuperscript{19}

Winning trust by working the case means more than filing motions. Investigation resonates in the client’s world. His friends on the street know that his defense team is out there, whether it is checking out alibis or canvassing the crime scene. Pursuing the client’s leads and suggestions may prove futile, but it builds credibility nonetheless. Life-history investigation not only unearths mitigation evidence but also identifies the support system that may motivate a client to want to live, even behind bars. This investigation also provides counsel with insight into any mental disorders that may affect the relationship with the legal team and the client’s ability to come to terms with his case realistically. Clients often judge counsel by whether they keep small promises—to call a family member, bring a copy of a motion, or visit again on a certain date.\textsuperscript{20} Counsel should be mindful about keeping their word on the smallest details.

Building a relationship of trust helps counsel to understand what matters to the client—his hopes and fears. Many clients want dignity for themselves and their loved ones. Many fear prison violence (especially sexual violence) and most fear isolation and abandonment. Counsel should address the fears directly, with accurate information about prison life on and off death row. Counsel should also use the mitigation investigation to identify the long-term support that can sustain a life-sentenced prisoner, the friends and family members who will be there long into the future. These individuals can be positive influences during plea discussions. Many capital defenders have come to recognize that most of the influences outside the defense team and its identified allies are toxic. Clients are typically exposed to nothing but bad advice in their jail settings. Other inmates (including “jailhouse lawyers”) and staff

\textsuperscript{18} See, e.g., Steven Zeidman, \textit{To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling}, 39 B.C. L. REV. 841 (1998). Professor Zeidman also elaborates on the implications of \textit{Boria v. Keane}, 99 F.3d 492 (2d Cir. 1996), which held that counsel’s opinion as to the desirability of accepting or rejecting a proffered plea comprises constitutionally required advice. See id. at 882-94.

\textsuperscript{19} Id. at 909.

\textsuperscript{20} See \textit{GUIDELINES}, supra note 10, at Guideline 10.5, commentary n.180-82 and accompanying text.
often encourage them with false hopes and misleading comparisons to other cases. Clients need to be reminded that the other prisoners and correctional officers are not privy to the evidence in the case when they offer cavalier advice to roll the dice at trial.

Clients need a reality check about the evidence in their case and the serious risk of execution. They need to understand that the desire for life grows over time. Letters from older prisoners can sometimes help to explain this process. Clients need to know about the whole trial process and how it is weighted against them (especially the proneness of death-qualified jurors towards conviction). Clients need to understand how post-conviction safety nets have been removed and how rarely clemency powers are exercised. As Kevin Doyle has noted, counsel “is obliged to insist that his client make a decision that is informed and mature rather than blind, impulsive or stubborn.”21

Discussions of plea negotiations often neglect to mention how counsel themselves can be an obstacle to resolution. As the number of post-Furman executions approaches a thousand, counsel need to remind themselves that executions are real. Death-qualified juries return death sentences—often arbitrarily, often subject to momentary passions and abiding prejudices. It is self-deception to look at a death-authorized case and pretend that “it’s not a death case.” Congress and the courts have removed many of the safety nets. Capital trials involve a grave risk of death.

Nonetheless, every case is potentially negotiable at some point in time. No case is automatically destined for death, but every death-noticed case runs a grave risk of reaching a penalty phase and returning a death sentence. One of the great capital litigators from Illinois, Andrea Lyon, always reminds capital counsel facing a sentencing jury that “you can’t sell what you wouldn’t buy.”22 That maxim is equally true in the context of plea discussions. Counsel will not persuade anyone else—prosecutor, client, or victim’s family members—that a plea is appropriate unless sincerely convinced in her own heart.23

Risk aversion is not enough to reach the conclusion that a plea is appropriate. Counsel must confront the evidence of guilt directly, thoroughly and critically. Independent investigation must test this

21. Doyle, supra note 17, § 4 (“Do Not Take a Client’s Uninformed ‘No’ for an Answer”).
23. Cf. GUIDELINES, supra note 10, at Guideline 10.5, commentary n.183-85 and accompanying text (discussing the importance to effective capital defense advocacy of knowing the client well).
evidence, regardless of what the client has admitted or denied in confidence. Counsel must be able to tell the client her independent evaluation of how the evidence will come in. A client must never suspect that counsel is recommending a plea because he has told counsel he is guilty in the sacred trust of attorney-client confidences. Clients need to see the hard work, the meticulous investigation and the courage to advocate zealously in pretrial proceedings.

The defense team must speak with one voice. The client will often want to hear from all the team members before making a momentous decision about a plea. He may have greater trust in a nonlawyer who has had better success in building rapport and trust and overcoming divisive barriers. It is crucial that there be no mixed messages or inconsistent signals within the team. Sometimes it is helpful to go outside the team to enlist additional allies—a colleague who has lost a client, perhaps even witnessed an execution, or a member of the client’s family or community who will be supportive over the long haul.

The revised ABA Guidelines place proper emphasis on the need to take every possible step towards resolving capital cases for a sentence less than death, once counsel has independently evaluated the evidence supporting conviction. The capital defense bar, in turn, should honor the practitioners who excel in this highly specialized art. There is no glory and little personal satisfaction in standing beside a client who is allocuting to a guilty plea that will send him to prison for the rest of his days. It is important to honor the brilliant lawyering, tenacity, dedicated teamwork and humble honesty that win these resolutions in seemingly hopeless cases. One of the finest capital defense litigators of this generation was congratulated on winning a life sentence at a penalty proceeding, but he responded with great modesty that he had failed at his effort to resolve the case by means of a plea. The ABA has wisely given that perspective the recognition it deserves.
THE PROFESSIONAL OBLIGATION TO RAISE FRIVOLOUS ISSUES IN DEATH PENALTY CASES

Monroe H. Freedman*

[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.¹

[A] lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.²

I have acquired new wisdom . . . or, to put it more critically, have discarded old ignorance.³

Lawyers are generally familiar with the ethical rule forbidding frivolous arguments,⁴ principally because of sanctions imposed under rules of civil procedure for making such arguments.⁵ Not all lawyers are aware, however, of two ways in which the prohibitions of frivolous arguments are restricted in both the rules themselves and in their enforcement. First, the ethical rules have express limitations with respect to arguments made on behalf of criminal defendants,⁶ and courts are

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2.  MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, PREAMBLE (1986) [hereinafter MODEL CODE].


4.  See MODEL RULES, supra note 1, R. 3.1 (2002); MODEL CODE, supra note 1, DR 7-102(A)(2), EC 7-4; RESTATEMENT (THIRD) THE LAW OF GOVERNING LAWYERS § 110 (2000) [hereinafter RESTATEMENT (THIRD)].


6.  MODEL RULES, supra note 1, R. 3.1 cmt. 3; RESTATEMENT (THIRD), supra note 4, § 110, cmt. f.
generally loath to sanction criminal defense lawyers. Second, the term “frivolous” is narrowed, even in civil cases, by the way it is defined and explained in the ethical rules and in court decisions.

I. THE RARITY OF SANCTIONS FOR FRIVOLOUS ARGUMENTS IN CRIMINAL CASES

Criminal defense lawyers are rarely disciplined or otherwise sanctioned for asserting frivolous positions in advocacy. One reason is that criminal defense is different from other types of advocacy. As stated in the comment to Model Rule 3.1, which relates to frivolous arguments:

The lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Also, a comment in the Restatement of the Law Governing Lawyers notes that while the section on frivolous arguments applies “generally” to criminal defense lawyers, they may nevertheless take “any step” that is either “required or permitted” by the constitutional guarantee of the effective assistance of counsel.

Illustrating the rare cases in which criminal defense counsel have been sanctioned, the Restatement cites In re Becraft. There, the Ninth Circuit imposed a sanction against a lawyer in a criminal appeal who had repeatedly raised an argument that the court characterized as a “patent absurdity” and that the Eleventh Circuit had previously found to be “utterly without merit.” Even in such a case, however, the Becraft court emphasized its reluctance to sanction a criminal defense lawyer:

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7. See infra notes 8-15.
8. See RESTATEMENT (THIRD), supra note 4, § 110, reporter’s note to cmt. f (“Advocacy in a criminal-defense representation”); see also In re Becraft, 885 F.2d 547, 550 (9th Cir. 1989) (noting “the absence of authority imposing sanctions against defense counsel”).
9. MODEL RULES, supra note 1, R. 3.1, cmt. 3 (emphasis added).
10. RESTATEMENT (THIRD), supra note 4, § 110, cmt. f.
11. See id. at reporter’s note to cmt. f.
12. 885 F.2d 547 (9th Cir. 1989).
13. Id. at 548-49. In a number of tax evasion cases, Becraft had unsuccessfully contended that the Sixteenth Amendment does not authorize a direct non-apportioned income tax on resident United States citizens, and thus the federal income tax laws are unconstitutional with respect to such citizens. Id. at 548. It is difficult to contemplate the national chaos that would follow a decision that the collection of income taxes from resident citizens is unconstitutional, and that it has been so for almost a century.

Becraft had also argued that state citizens are not subject to federal jurisdiction on the ground that federal authority is limited to the United States territories and the District of Columbia,
We are hesitant to exercise our power to sanction under Rule 38 against criminal defendants and their counsel. With respect to counsel, such reluctance, as evidenced by the absence of authority imposing sanctions against defense counsel, primarily stems from our concern that the threat of sanctions may chill a defense counsel’s willingness to advance novel positions of first impression. Our constitutionally mandated adversary system of criminal justice cannot function properly unless defense counsel feels at liberty to press all claims that could conceivably invalidate his client’s conviction. Indeed, whether or not the prosecution’s case is forced to survive the “crucible of meaningful adversarial testing” may often depend upon defense counsel’s willingness and ability to press forward with a claim of first impression.14

The court added that because significant deprivation of liberty is often at stake in a criminal prosecution, “courts generally tolerate arguments on behalf of criminal defendants that would likely be met with sanctions if advanced in a civil proceeding.”15

II. SANCTIONS IN CIVIL CASES UNDER RULE 11 AND SIMILAR RULES

During the decade after the 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure, a dangerous tendency developed to impose severe sanctions against lawyers under various federal and state rules.16 This excessive use of sanctions for allegedly frivolous filings prior to the 1993 amendment of Rule 11 has left a misleadingly broad impression of the meaning of “frivolous.”

Rule 11 is similar to the ethical codes (discussed below) in permitting a claim or defense that is “warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”17 Giving added emphasis to the italicized language, the Advisory Committee’s Notes to the 1983 version of Rule 11 cautioned that the rule is “not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.”18 Nevertheless, there is significant evidence that creativity has been chilled by sanctions under Rule 11. In addition, judicial

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14. Id. at 550 (citing United States v. Cronic, 466 U.S. 648, 656 (1984)).
15. Id.
17. FED. R. CIV. P. 11 (emphasis added).
enforcement of the rule has had a disproportionate impact on plaintiffs’ attorneys in civil rights cases, impaired lawyer-client confidentiality, and has been the cause of serious conflicts of interest between lawyers and clients. 19

In an important article, Rule 11 in the Real World, Mark Stein explained, from his experience as a litigator, that lawyers are most inclined to threaten sanctions when an adversary’s position is “not frivolous, but [rather, when it] is simultaneously dangerous and vulnerable.” 20 That is, the unwarranted charge that an argument is frivolous has been used to distract the court from the merits of the argument. Moreover, even if the adversary lawyer is aware that his position is meritorious, “he may still be cowed by the threat of sanctions because of the unpredictable way in which courts award them.” 21

In response to broad criticism of the 1983 version of Rule 11, the rule was amended in 1993. 22 Since then, the volume of cases involving charges of frivolous filings has been substantially reduced. However, the reason for that decrease is not clear. One reason could be that the amendment made imposition of sanctions discretionary with the judge, rather than mandatory. Another possible reason is that a motion for sanctions can no longer be simply an afterthought to another motion (e.g., a motion for summary judgment), but must be made and supported


20. Mark S. Stein, Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments, 132 F.R.D. 309, 313 (1990). Another lawyer has commented that sanctions aren’t needed for claims that are truly frivolous, because “there has always been a sanction for frivolous claims, it’s called—losing.” Another lawyer has observed that “good judges don’t need Rule 11, and bad judges shouldn’t have it.” (quoted from conference attended by author).

21. Id.

22. See Joseph, supra note 5, at 21-34.
in a separate pleading. Also, the 1993 Rule 11 has a “safe harbor” provision under which a lawyer whose filing is challenged as frivolous has twenty-one days to withdraw the filing without sanction. In one respect, this “safe-harbor” can be a potent threat, coercing withdrawal of arguments that Stein characterizes as “not frivolous, but . . . simultaneously dangerous and vulnerable.” 23 A positive effect of the “safe-harbor” amendment, however, is that a motion for sanctions cannot be filed at the end of litigation, because at that point it is no longer possible to make use of the “safe-harbor” withdrawal.

There is still reason for concern, therefore, that Rule 11, and similar rules in state courts, are continuing to have a deleterious effect on creative lawyering in civil cases. This is so in part because of the abuse of the rule by some judges, especially prior to the 1993 amendments, and because of the continuing in terrorem effect of possible sanctions under Rule 11 and similar rules. Nevertheless, the reduction in Rule 11 sanctions in federal courts since 1993 is a salutary development.

III. DEFINING “FRIVOLOUS”

Despite the earlier abuses under Rule 11 and similar rules, the definition of “frivolous” has been an extremely narrow one. The traditional legal definition of frivolous is “obviously false on the face of the pleading,” as when something was pleaded that “conflicted with a judicially noticeable fact or was logically impossible, such as a plea of judgment recovered before the accrual of the cause of action.” 24 Surely, a lawyer could properly be subjected to sanctions for filing a pleading that is frivolous in the sense of being “obviously false on [its] face.” Moreover, lawyers can properly be punished for filing or maintaining pleadings that are “sham” or “baseless,” that is, those that appear to state proper claims or defenses, but that are known to the lawyer to be false in fact. 25

The Supreme Court has gone somewhat further, by unanimously defining a “frivolous” claim as one based on an “indisputably meritless” or “outlandish” legal theory, or one whose “factual contentions are clearly baseless,” such as a claim describing “fantastic or delusional scenarios.” 26 Elaborating on that definition, the Court held that

23. Stein, supra note 20, at 313.
25. See id. at 26-29.
frivolousness can be found when the facts alleged “rise to the level of the irrational or the wholly incredible.”

In addition to establishing this highly restrictive definition, the Supreme Court has cautioned judges against finding arguments to be frivolous. “Some improbable allegations might properly be disposed of on summary judgment,” the Court explained, “but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be ‘strange, but true; for truth is always strange, Stranger than fiction.’”

Nevertheless, some judges have tended to ignore that guidance, and have imposed sanctions against lawyers who file pleadings or make arguments that have proven to be unavailing. When that happens, zealous advocacy is not the only value that is placed at risk. The genius of our common law is also jeopardized.

For example, Justice Cardozo noted that nine out of ten, and perhaps even more, of the cases taken to the New York Court of Appeals during his time on that bench were “predetermined,” their fate “preestablished” by “inevitable laws” from the moment of their filing. MacPherson v. Buick Motor Co. appears to be a perfect example. In 1908, the Court of Appeals of New York had reaffirmed the long-established rule that a consumer cannot recover against the manufacturer of a product for negligence. Not long thereafter, MacPherson, who had been injured while driving a car with a defective wheel, sued the Buick Motor Company for negligent manufacture. Surely, MacPherson’s case was one of those that Cardozo called “predetermined.” The result of MacPherson’s appeal, however, was Cardozo’s most celebrated torts opinion, reversing long-established law by allowing a consumer to sue a manufacturer for a defective product, and demonstrating the creative common-law judging for which he has been so highly regarded.

As Professor Grant Gilmore observed, the MacPherson decision “imposed liability on [a defendant] who would almost certainly not have been liable if anyone but Cardozo had been stating and analyzing

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28. Id. (quoting LORD BYRON, DON JUAN, CANTO XIV, stanza 101 (Truman Steffan, Esther Steffand, & Willis Pratt eds., 1977)).
29. 217 N.Y. 382 (1916).
32. See G. EDWARD WHITE, TORT LAW IN AMERICA 120 (2003).
the prior case law.” At the time of filing the complaint, however, MacPherson’s lawyer could not have known that Cardozo would choose to reverse a century of unbroken precedent that had only recently been reaffirmed. Much less could he have known that Cardozo would be able to carry a majority of the court with him. Without that frivolous-appearing complaint, however, Cardozo could not have changed the common law of manufacturer’s liability as he did.

Even Cardozo, the great innovator, observed that “the range of free activity [for judges] is relatively small,” in part because judges are limited to the issues that are brought before them by counsel. Behind every innovative judge, therefore, is a lawyer whose creative (and, arguably, frivolous) litigating opened up that small range of judicial opportunity, thereby making the precedent-shattering decision possible.

Innovative judging (and lawyering) is not restricted to common law cases. Depending on how one counts the cases, the Supreme Court has overruled its own decisions 200 to more than 300 times. On at least sixteen occasions, this has happened within three years. At other times, the most venerable of precedents have fallen, including at least ten cases that were overruled after as many as 94 to 126 years. For example, in

34. BENJAMIN CARDOZO, THE GROWTH OF THE LAW 60 (1924).
Erie Railroad v. Tompkins, the Supreme Court overruled a precedent that had been applied every day in every federal trial court for nearly a century. On the occasion of one about-face by the Court, Justice Roberts protested that “[n]ot a fact differentiates [the overruled case] from this [one] except the names of the parties.” Indeed, the majority itself acknowledge in that case, “The District Court denied the relief sought and the Circuit Court of Appeals quite properly affirmed its action on the authority of Grovey v. Townsend,” which the Court then proceeded to overrule.

The Rehnquist Court has overruled prior authority in over forty cases. Most recently, in Lawrence v. Texas, the Court struck down state legislation outlawing private, consensual, homosexual conduct. In doing so, the Court overturned Bowers v. Hardwick, decided seventeen years before. In Bowers, a majority of the Court had described the legal argument that ultimately prevailed in Lawrence as “at best, facetious.” Since the dictionary definition of “facetious” is “not meant to be taken seriously or literally . . .,” the Court was characterizing that argument in a way that was perhaps even more pejorative than the word “frivolous.”

With specific reference to death penalty cases, the Rehnquist Court has overruled itself twice in relatively short periods of time. In Atkins v. Virginia, holding that the Eighth Amendment forbids the execution of a mentally retarded person, the Court overturned Penry v. Lynaugh, decided thirteen years before. In the same term, the Court held in Ring v. Arizona, that the Sixth Amendment requires that a jury, not a judge,
make the finding of any fact on which the death penalty depends; in doing so, the Court overruled Walton v. Arizona,\textsuperscript{49} decided twelve years before. In Ring, the Court candidly acknowledged that “[o]ur precedents are not sacrosanct.”\textsuperscript{50} As explained by Justice Scalia, concurring in Ring, “I have acquired new wisdom . . . or, to put it more critically, have discarded old ignorance.”\textsuperscript{51}

Recognizing how creative lawyering can dispel “old ignorance” and impart “new wisdom” to judges, the American Bar Association has taken care in its ethical rules not to discourage lawyers from challenging established precedent or otherwise seeking to make new law on behalf of their clients. For example, Model Rule 3.1 provides that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and in fact for doing so that is not frivolous.”\textsuperscript{52} Under such a rule, of course, MacPherson’s lawyer would be subject to professional discipline, along with countless other lawyers whose creative litigating helped to shape our law. However, a contention is not frivolous within the rule if it is made as “a good faith argument for an extension, modification or reversal of existing law.”\textsuperscript{53} Also, the Comment notes that “the law is not always clear and never is static.”\textsuperscript{54} Accordingly, “[i]n determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.”\textsuperscript{55} Moreover, filing an action or defense is not frivolous under the Model Rules “even though the lawyer believes that the client’s position ultimately will not prevail.”\textsuperscript{56} Model Rule 3.1 does say expressly that in criminal cases the defense can always put the prosecution to its proof. This is worth reiterating, although we are not aware that there has ever been any confusion about the point under the Model Code.

\begin{thebibliography}{99}
\item \textsuperscript{49} See 497 U.S. 639 (1990).
\item \textsuperscript{50} 536 U.S. at 608.
\item \textsuperscript{51} \textit{Id}. at 611.
\item \textsuperscript{52} \textsc{Model Rules}, supra note 1, R. 3.1.
\item \textsuperscript{53} \textit{Id}.
\item \textsuperscript{54} \textit{Id}.
\item \textsuperscript{55} \textit{Id}.
\item \textsuperscript{56} A related provision in the Model Code is DR 7-102(A)(1). In the Model Rules, the Model Code Comparison to MR 3.1 suggests that there are three noteworthy differences between MR 3.1 and DR 7-102(A)(1). However, these differences do not appear to be significant. Conduct is improper under DR 7-102(A)(1) if the purpose is “merely” to harass or maliciously injure another. Under MR 3.1 there must be “a” basis that is not frivolous (and frivolous is defined the same as under the Model Code), but if there is a non-frivolous basis, then there is ground for a good faith argument, and if there is ground for a good faith argument, then the purpose is not merely to harass or injure another. The comparison also says that the test under MR 3.1, unlike DR 7-102(A)(1), is an objective one. However, DR 7-102(A)(1) applies if the lawyer “knows or when it is obvious” that the litigation is frivolous. The emphasized language is an objective standard.
\end{thebibliography}
Similarly, DR 7-102(A)(2) of the Model Code begins by forbidding a lawyer to “[k]nowingly advance a claim or defense that is unwarranted under existing law.” Again, however, the exception to the rule is crucial: the lawyer is permitted to advance a claim that is unwarranted under existing law “if it can be supported by good faith argument for an extension, modification, or reversal of existing law.” EC 7-4 adds that “a lawyer is not justified in asserting a position in litigation that is frivolous.” The same Ethical Consideration says, however, that the advocate may urge any permissible construction of the law that is favorable to his client “without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.”

Further, if the advocate has doubts about the bounds of the law, she should resolve them in favor of the client’s interests. Thus, a lawyer contemplating a novel legal argument, or even one that has been rejected by the court in previous litigation, can nevertheless act ethically in presenting that argument despite her own professional opinion that the argument will be rejected. In other words, a lawyer can make an argument in “good faith” under DR 7-102(A)(2) even if the lawyer has no faith that the argument will prevail.

Thus, the Model Code encourages the litigating lawyer to foster growth and change in the law, urging the lawyer, “with courage and foresight,” to be “able and ready to shape the body of the law to the ever-changing relationships of society.”

The Restatement of the Law Governing Lawyers has almost identical language to the Model Rules and Model Code. In addition, the comment to Section 110 urges judges to exercise restraint in disciplining lawyers for frivolous advocacy, noting that “[a]dministration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement.”

Moreover, judges who have imposed sanctions against lawyers have typically ignored the constitutional limitations on sanctioning
lawyers for filing frivolous pleadings. As the Supreme Court has reiterated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, there is a First Amendment right to petition for redress of grievances by litigating civil cases. That right has, of course, been severely chilled by sanctions intended to discourage litigation.

A “sham” lawsuit is an exception to the constitutional right to petition through the courts. However, the “sham” exception does not apply unless the suit is “objectively baseless” or “objectively meritless.” To satisfy that test, the litigation must be “so baseless that no reasonable litigant could realistically expect to secure favorable relief.” All that is necessary to establish the constitutional right is an objective “chance” that a claim “may” be held valid. In that event, the First Amendment right is secure, even if the litigant has no subjective expectation of success and has a malicious motive for pursuing the claim.

IV. THE NECESSITY TO MAKE “FRIVOLOUS” ARGUMENTS IN DEATH PENALTY CASES

As we have seen, even in civil cases, lawyers have considerable range, both ethically and constitutionally, in raising issues that are arguably frivolous. With respect to criminal defense, moreover, courts are loath to impose sanctions against lawyers in any case in which the defendant’s liberty is at stake.

Furthermore, as serious as is loss of liberty, our jurisprudence recognizes that death is different. This is so not only as a fact of life and death, but also for the practical reason that appellate and post-conviction remedies are pursued in almost 100% of cases in which the death penalty is imposed. It is therefore crucial that in any capital case,
“any and all conceivable errors” be preserved for review.\textsuperscript{74} The alternative is that a client may be put to death by the state, despite reversible error, because counsel has waived the issue or defaulted on it.

An example is \textit{Smith v. Kemp}.\textsuperscript{75} This was one of two prosecutions for the same murder. In the case involving co-defendant Machetti, who was the “mastermind” in the crime,\textsuperscript{76} the lawyers timely raised the issue that women had been unconstitutionally under-represented in the jury pool.\textsuperscript{77} As a result, Machetti’s conviction and death sentence were overturned, resulting in a new trial and a sentence of life in prison.\textsuperscript{78} Co-defendant John Eldon Smith was tried in the same county, by a jury drawn from the same jury pool. However, Smith’s lawyers did not timely raise the constitutional issue, because they had overlooked authority that gave support to the argument.\textsuperscript{79} Since his lawyers’ failure to raise the issue was not adequate to overcome non-constitutional reasons of comity, finality, and agency, Smith was electrocuted.

The agency issue is an essential part of the jurisprudence of death. The Supreme Court, in an opinion by Justice O’Connor, expressly relied upon the Restatement of Agency Section 242, for the “well-settled principle of agency law” that a master is subject to liability for harm caused by the negligent conduct of a servant within the scope of the employment.\textsuperscript{80} Thus, the Court could “discern no inequity” in requiring a criminal defendant (“the master”) to “bear the risk of attorney error.”\textsuperscript{81} The error in that case was that the attorney (“the servant”) was 72 hours late in filing a “purely ministerial” notice of appeal in the state court.\textsuperscript{82} Accordingly, Roger Coleman was precluded from raising eleven constitutional challenges to his conviction, and he too was put to death by the state.\textsuperscript{83}

\begin{footnotes}
\item[74] \textit{Id.} at GUIDELINE 10.8, commentary (quoting Steven B. Bright, \textit{Preserving Error at Capital Trials}, THE CHAMPION, Apr. 1997, at 42-43).
\item[75] \textit{See} 715 F.2d 1459, 1476 (1983).
\item[76] \textit{Id.} at 1476 (Hatchett, J., concurring in part and dissenting in part).
\item[77] \textit{See id.}
\item[78] \textit{See id.} (Hatchett, J., concurring in part and dissenting in part).
\item[79] \textit{See id.} at 1470-71 (citing \textit{Taylor v. Louisiana}, 419 U.S. 522 (1975); \textit{Duren v. Missouri}, 439 U.S. 357 (1979)).
\item[81] \textit{Id.} at 754.
\item[82] \textit{Id.} at 742.
\item[83] Justice O’Connor also relied on federalism to support her opinion. Indeed, the first words of her opinion in a case involving whether a person will live or die are: “This is a case about federalism.” \textit{Id.} at 726. \textit{But see} Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (where Justice O’Connor chose to ignore the federalism issue (raised by her dissenting colleagues) to allow a cause of action for sexist harassment of a schoolgirl, an important issue, but not one as compelling as death by electrocution).
\end{footnotes}
A similar problem arises when a lawyer makes the tactical decision to omit an argument that appears to be weak (or when a lawyer claims to have done so when challenged with ineffective assistance of counsel). An illustration of that is *Smith v. Murray*. There the lawyer chose to forgo an argument that was contrary to an opinion that the Virginia Supreme Court had handed down only two years before. Writing for the United States Supreme Court, Justice O’Connor praised the lawyer for “winnowing out” the weak argument and focusing on those more likely to prevail, and lauded this practice as the “hallmark of effective appellate advocacy.”

As a result of this model of effective appellate advocacy in the state court, however, the client was precluded from raising a winning constitutional issue in the federal courts. As Justice O’Connor held, the lawyer’s “deliberate, tactical decision” to winnow out what appeared to him to have been a weak argument in the state appeal, made it “self-evident” that the client had lost the right to raise the issue on habeas corpus in the federal courts.

**V. Conclusion**

The conclusion is therefore clear. Counsel in a capital case must, as a matter of professional responsibility, raise every issue at every level of the proceedings that might conceivably persuade even one judge in an appeals court or in the Supreme Court, in direct appeal or in a collateral attack on a conviction or sentence. This is the essence of the ABA’s Guideline 10.8 in its new Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February, 2003). In addition, as noted in the commentary to Guideline 10.8(A)(3)(d), assertion of a claim (even a “frivolous” one) might increase the chances of a desirable plea agreement or might favorably

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84. 477 U.S. 527 (1986).
85. Id. at 536 (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)). This position is not universally accepted. See, e.g., Monroe H. Freedman, *Briefing and Arguing Federal Appeals, by Federick Bernays Wiener*, 30 GEO. WASH. L. REV. 146 (1961) (book review) (arguing that effective advocacy requires that the lawyer raise every issue that might conceivably attract even one vote on a multi-judge panel).
86. See Jones, 463 U.S. at 751-53 (Stevens, J., dissenting); see also, FREEDMAN & SMITH, UNDERSTANDING LAWYERS’ ETHICS 136-37 (2d ed. 2002) (discussing Estelle v. Smith, 451 U.S. 454 (1981)).
87. Jones, 463 U.S. at 534. Justice O’Connor also noted “the profound societal costs that attend the exercise of habeas jurisdiction,” but had nothing to say about the costs to society and to the individual when a hearing on a legitimate constitutional claim is denied in a death case. Id. at 539.
influence a governor or other official in making a decision regarding clemency.

In short, in a capital case, the lawyer for the accused has a professional obligation to assert at every level of the proceedings what otherwise might be deemed a frivolous claim.\footnote{The same is true, of course, in any case involving potential deprivation of liberty in which an appeal or collateral attack might be contemplated.}
MAKING THE LAST CHANCE MEANINGFUL: 
PREDECESSOR COUNSEL’S ETHICAL DUTY TO 
THE CAPITAL DEFENDANT

Lawrence J. Fox*

Walter Mickens is dead. He has been dead for a year now. It is hard to say who killed Walter Mickens. Some would say it was the United States Supreme Court. Others might say it was the Commonwealth of Virginia. I say it was in large part due to the ethical dereliction of Bryan Saunders.

Mickens was killed for the murder of Timothy Hall.¹ All murders are grisly, this one particularly so. Timothy Hall was found lying face down on a mattress naked from the waist down except for socks underneath an abandoned building in Newport News on March 30, 1992.² By Saturday, April 4, Walter Mickens had been picked up by the police,³ and on the following Monday, Walter Mickens stood before Judge Aundria Foster, accused of capital murder and in need of a lawyer.⁴ And a lawyer he got, in the person of Bryan Saunders, appointed by Judge Foster to defend Walter Mickens against these serious charges.⁵

Things did not go well from the start. Bryan Saunders did a positively mediocre job defending Walter Mickens.⁶ Perhaps that was part of the problem: was Bryan Saunders so convinced Walter Mickens would be acquitted he did not begin to prepare for the mitigation phase

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3. See id. at 682.
5. See id.
6. See Petitioner’s Brief at 7-8, Mickens v. Taylor, 227 F.3d 203 (4th Cir. 2000) (No. 00-04).
of the trial until after the jury surprised Mr. Saunders by returning a verdict of guilty of capital murder? 7

In any event, Bryan Saunders failed Walter Mickens completely in the penalty phase of the trial and the jury returned a verdict of execution against poor Walter Mickens. 8 Bryan Saunders continued to represent Walter Mickens, ultimately with no more success. 9 Walter Mickens’ appeal was denied, 10 and he languished on Virginia’s death row until Robert Wagner undertook his petition for habeas relief. 11

That is when Walter Mickens got the surprise of his life. Wagner went to the court in search of Walter Mickens’ juvenile records, something Bryan Saunders had not bothered to investigate. 12 As a result of a clerk’s error, Wagner was handed the otherwise sealed juvenile records of Timothy Hall. 13 He only had them for fifteen minutes when the clerk’s error was discovered. 14 However, in that time, Wagner learned one shocking fact: up until the moment of Timothy Hall’s death, Bryan Saunders had represented Hall on juvenile charges alleging assault and carrying a concealed weapon. 15

Subsequent investigation revealed that Bryan Saunders’ appointment to represent the victim had been terminated on Friday, April 3rd, by Judge Aundria Foster—the very same judge who appointed Bryan Saunders to represent Walter Mickens on the murder charge. 16

7. Cf. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.10.1, text accompanying notes 104-05, 257 (rev. ed. 2003) [hereinafter GUIDELINES] (“For counsel to gamble that there never will be a mitigation phase because the client will not be convicted of the capital charge is to render ineffective assistance.”).


9. The Supreme Court vacated Mr. Mickens’ sentence and remanded for further consideration in light of its then recent decision in Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (holding “where the defendant’s future dangerousness is at issue, and state law prohibits the defendant’s release on parole, due process requires that the sentencing jury be informed that the defendant is parole eligible”). See Mickens v. Virginia, 513 U.S. 922, 922 (1994). Upon remand, the Virginia Supreme Court granted Mr. Mickens a new sentencing hearing, see Mickens v. Commonwealth, 457 S.E.2d 9, 10 (Va. 1995), at which he was again sentenced to death. See Mickens v. Commonwealth, 478 S.E.2d 302, 303 (Va. 1996). Mr. Mickens’ appeal from that sentence was denied. See id. at 307.


13. See id.


16. See id. at 208.
Walter Mickens realize that his entitlement to one true champion in the defense of these charges had produced a champion with a glaring conflict of interest, a conflict of interest whose effect on Walter Mickens’ defense had to be profound.

When confronted with the undisclosed truth, however, Bryan Saunders was not only unrepentant, he insisted that (a) there was no conflict and (b) his performance was not affected in any way by his prior representation of Timothy Hall. Indeed, he asserted that his continuing loyalty to his former client ended with his death. This loyalty was apparently no greater than the loyalty he had shown to Walter Mickens in concealing a key fact, a concealment that permitted Saunders to retain this relatively lucrative appointment, one that paid far more than the juvenile cases, like Timothy Hall’s, that Bryan Saunders had been handling previously.

The uncovering of this astonishing information did not save Walter Mickens’ life. The idea that a lawyer, who up until the date of the victim’s death had represented the victim, could, consistent with the rules of professional conduct, represent the person accused of murdering his former client, is astonishing. Indeed, the representation presents one of the most disabling conflicts of interest, a conflict whose effect no one—not even Bryan Saunders—could appreciate.

Yet in the end, the Supreme Court, in a 5-4 decision, affirmed the en banc Fourth Circuit opinion, reversing the Fourth Circuit Panel’s granting of a new trial, concluding that while it certainly was a conflict, an undisclosed conflict, and a conflict known to the judge who appointed Bryan Saunders, Walter Mickens had failed to prove prejudice. Since Walter Mickens failed to prove the impossible to prove—that the result would have been different if he had been represented by an unconflicted lawyer—the Supreme Court affirmed the denial of habeas relief. In reaching this startling conclusion, the Court relied quite heavily on the district court’s findings in the habeas proceeding that Saunders’ representation of Timothy Hall did not affect his defense of Walter Mickens in any way. This rendered all of the evidence habeas counsel was able to point to as effects of the conflict

17. See Petitioner’s Brief at 10-11, Mickens v. Taylor, 227 F.3d 203 (4th Cir. 2000) (No. 00-04).
22. See id. at 174.
mere tactical decisions, decisions made by a lawyer who was so tone
dead he did not understand the ethical implications of his misconduct at
tall.

While it is clear that Bryan Saunders breached his ethical duties to
Walter Mickens at trial and first appeal, the case also raises, in a
disturbingly stark way, the question whether Bryan Saunders did not
also breach his ethical duties to Walter Mickens during the habeas phase
of the case. You might say he was then no longer Walter Mickens’
lawyer, and that would be a true statement. But the thesis of this paper—
after this long-winded introduction—is that lawyers who have
represented clients in capital murder cases at trial and appeal—not
unlike all criminal trial and initial appeal counsel, but more urgently
because of the circumstances—continue to owe important obligations to
their former clients.

These obligations have been just recently included in the latest
version of the American Bar Association’s Guidelines for the
Appointment and Performance of Defense Counsel in Death Penalty
Cases:

In accordance with professional norms, all persons who are or have
been members of the defense team have a continuing duty to safeguard
the interests of the client and should cooperate fully with successor
counsel. This duty includes, but is not limited to:

A. maintaining the records of the case in a manner that will inform
successor counsel of all significant developments relevant to the
litigation;

B. providing the client’s files, as well as information regarding all
aspects of the representation, to successor counsel;

C. sharing potential further areas of legal and factual research with
successor counsel; and

D. cooperating with such professionally appropriate legal strategies as
may be chosen by successor counsel.23

It is my hope that this article will demonstrate that these Guidelines
reflect not just best practice, but actual ethical mandates that trial

23. GUIDELINES, supra note 7, at Guideline 10.13 (emphasis added).
counsel, like Bryan Saunders, owe their former clients as those clients negotiate the jurisprudential maze known as habeas corpus.24

I. THE CONFLICTS FORMER COUNSEL MUST OVERCOME

Any realistic assessment of the duties of former counsel to a former capital client must begin with recognition of the conflicts that may well have developed between these two since the representation ended. Only an honest recognition of these conflicts can permit former counsel to treat the former client fairly as the client negotiates the next steps in the judicial process.

First, and in some ways the most important, is the conflict between predecessor counsel’s obligation to help the former client and the desire and inevitable reflex of predecessor counsel to wish to defend counsel’s conduct. No one wants to be accused of being ineffective.25 No one ever wants to be second-guessed. Everyone wants to defend his or her conduct by asserting that it was in fact effective and that the judgments that were made were defensible if not sound. Certainly the fact that the former client is questioning former counsel’s conduct will elicit scorned feelings. This human reaction is an overwhelming presence in the habeas context because of the likelihood that ineffective assistance will be raised both because it is a claim with important constitutional underpinnings and because this is often the first time it can be raised.26 Moreover, the state’s defense to the habeas claim, of course, will be that habeas counsel is simply second-guessing, with the benefit of hindsight, strategic decisions made by trial counsel.27

Second, the lawyer may feel that it is the client’s fault that the client is in this position. The lawyer may have urged the client not to testify, to plead guilty to a lesser charge, or accept life imprisonment without

24. In other words, on the issue of the duties of former counsel, as on all the issues they address, the Guidelines “set forth a national standard of practice.” Id. at Guideline 1.1(A). They are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.” Id. History of Guideline 1.1.

25. “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.” 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 (1998).

26. See generally Massaro v. United States, 123 S. Ct. 1690 (2003) (holding that failure to raise an ineffective assistance of counsel claim on direct appeal does not result in its procedural default).

27. See Strickland v. Washington, 466 U.S. 668, 689 (1984) (mandating “the wide latitude counsel must have in making tactical decisions . . . []judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence . . . .”).
parole. The client may have failed to cooperate in the preparation of the defense. The client and the lawyer may have had a general falling out or a personality clash. These occurrences are perfectly normal and that predecessor counsel has developed antipathy toward the former client is neither unusual nor something for which the lawyer should be condemned.

That having been said, it is critical that predecessor counsel put those feelings aside to determine how they can help with the habeas proceedings. After all, counsel has not been “replaced” for this proceeding necessarily because of a dim view of counsel’s performance. It is simply that the last person who can determine whether there is an ineffective assistance claim and then assert it is original trial counsel.

Third, there is another impediment to cooperation that cannot be ignored. Predecessor counsel probably was paid little enough to handle the trial and perhaps the direct appeal. He or she will be paid nothing for the time spent rehashing the prior experience. This is obviously a huge disincentive to cooperation, yet it is one more thing predecessor counsel must set aside. Of course, predecessor counsel can and will be compelled to testify as a witness with a $20 witness fee, the only remuneration for that time. One incentive predecessor counsel may have is that if he or she cooperates with successor counsel perhaps the deposition time may be shortened. That aside, the predecessor lawyer is an officer of the court and the former client faces the ultimate sanction. The predecessor lawyer simply must overcome this disincentive to help habeas counsel—who is also badly compensated or not compensated at all—to help cut down the time new counsel must devote to developing their case and to make successor counsel as effective as possible in preparing the habeas case.

II. PREDECESSOR COUNSEL’S OBLIGATION TO MAINTAIN CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE

A lawyer’s duty to maintain confidentiality and to protect the attorney-client privilege and the work product doctrine survives termination of the representation and, in fact, survives the death of the client. Predecessor counsel, in fact, has the same duties in this regard

28. See 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, 1161-64, text accompanying notes 15-21 (2003) (commenting that counsel must develop a trust relationship with the client in order to get him or her to follow the attorney’s advice on plea recommendations).

29. See Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998) (stating that it is “generally, if not universally, accepted . . . that the attorney-client privilege survives the death of the
with respect to his former client as he did when he was representing him in his capital trial.\textsuperscript{30} These duties impose specific obligations on the predecessor counsel.

Thus, predecessor counsel, it might surprise some to learn, may not consult with successor counsel at all unless the former client consents.\textsuperscript{31} This is because our rules governing confidentiality do not contain an exception covering that situation.\textsuperscript{32} Once that consent is obtained, however, former counsel can proceed to share everything with his or her successor and in my view is required to do so. Full cooperation should be the watchword of the relationship.

What former counsel may do if called as a witness requires a different analysis. If counsel is permitted to testify, this means that the former client has either voluntarily or been found to have waived the privilege. However, this does not mean counsel is free to tell all in the deposition conference room or from the witness stand. First, the client may have waived the privilege in a way that is circumscribed and therefore only some of the privileged information possessed by predecessor counsel is subject to proper inquiry.\textsuperscript{33} Second, even if the waiver is total, this only means that former counsel is permitted to testify in response to proper questions and no more.\textsuperscript{34} The waiver of the privilege does not permit former counsel to meet with the other side, nor does it permit former counsel to talk to the press or to volunteer any information when testifying.\textsuperscript{35} Moreover, counsel must conduct him or herself in a way that provides present counsel with the opportunity to raise all appropriate objections, including those addressing the scope of the waiver.\textsuperscript{36}

Too many lawyers fail to appreciate the critical difference between what is protected by the attorney-client privilege and what is

\textsuperscript{30} See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. (1999) [hereinafter MODEL RULES] (“The duty of confidentiality continues after the client-lawyer relationship has terminated.”).

\textsuperscript{31} See id. R. 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation.”).

\textsuperscript{32} See generally id. R. 1.6.


\textsuperscript{34} See MODEL RULES, supra note 31, R. 1.6, comment at 12; cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 5, top. 2, tit. C, introductory note (2000) (“Application of waiver or exception to a communication does not relieve a lawyer of the legal duty otherwise to protect the communication against further disclosure or use adverse to the client.”).

\textsuperscript{35} See id.

\textsuperscript{36} See id.
confidential: they confuse the fact that the former only applies when the lawyer is called to testify, and the latter governs how the lawyer conducts herself off the witness stand.\textsuperscript{37} As a result, when the privilege has been waived, too many lawyers are too quick to respond to informal inquiries—from the prosecution (of all people), the press, or others—failing to recognize that such uncompelled responses are only permissible when the former client has given his permission. Indeed, it is impermissible under our rules for the prosecution to seek privileged or confidential information from the former counsel. Rules 1.6 and 3.4 make it quite clear that this may not be done.\textsuperscript{38} And the case law is to the same effect.\textsuperscript{39} The rule governing the confidentiality that must be maintained by former counsel can be simply stated: even under oath, predecessor counsel may volunteer no information without the express consent of the former client or former client’s present counsel.

## III. WITHDRAWING AND PROTECTING THE CLIENT

By definition, former counsel has withdrawn from the representation. If one thinks about it in terms of the ethics rules, the lawyer has been forced to withdraw because the lawyer who represented the client at trial and first appeal, by definition, has a conflict of interest: the lawyer cannot argue his own ineffectiveness. Ineffective assistance of counsel is an issue that every habeas counsel must thoroughly explore,\textsuperscript{40} if not assert; even the mere exploration of such a claim is not an inquiry to which trial counsel can bring the necessary objectivity.

\textsuperscript{37} See \textit{Model Rules}, \textit{supra} note 30, \textit{R. 1.6} cmt. ("The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.").

\textsuperscript{38} See \textit{id.} \textit{R. 1.6}(a); \textit{id.} \textit{R. 1.6} cmt. ("The duty of confidentiality continues after the client-lawyer relationship has terminated."); \textit{id.} \textit{R. 3.4} (discussing counsel’s obligation to be fair to opposing party and counsel); \textit{see generally id.} \textit{R. 8.4}(d) ("It is professional misconduct for a lawyer to: engage in conduct that is prejudicial to the administration of justice.").


\textsuperscript{40} See \textit{Guidelines, supra} note 7, at Guideline 10.7(B)(1) ("Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.")
This is an institutional and inevitable conflict, and therefore it is one that gives particular meaning, in my view, to the obligation contained in Rule 1.16 for the lawyer to take steps to protect the client’s interest to the extent reasonably practicable.\(^{41}\) This rule requires, inter alia, reasonable notice to the client, surrendering the client’s papers and property, and returning unearned fees.\(^ {42}\) While the first and last are unlikely to be an issue in a capital representation, the duty to surrender the files springs from and is informed very much by the former lawyer’s original obligation to maintain the files during the representation.

### A. Maintaining Files During the Representation

The duties of trial counsel to his client when the client will become a former client start—as they do for every lawyer in every client relationship—on the very first day of the engagement. One of the fundamental duties under the general heading of competence enshrined in Model Rule 1.1 is maintaining the file in a way that will not only provide effective services during the representation, but also permits the file to be transferred to successor counsel at any time.\(^ {43}\) While no lawyer wants to begin a representation thinking of its timely or untimely demise, lawyers must recognize that: (1) no lawyer can carry it all in her head; (2) the client can switch lawyers at any time for any reason; (3) lawyers may terminate the representation at any time, even for no reason, so long as there is no material adverse effect on the client; (4) lawyers retire or pass away; and (5) the client may need the file long after the representation is terminated.

In capital cases, the foregoing is not simply a possibility. There is virtual certainty that if the capital representation ends in a sentence of death, new counsel will (one would hope) be obtained to press whatever avenues of relief a habeas proceeding might offer. Thus, the capital defense lawyer has an even heightened obligation beyond that in the run of the mill matter, to maintain an orderly file, permitting anyone who follows to know what steps the lawyer considered, what steps the lawyer took, what information was available, what motions were contemplated,

\(^{41}\) See generally Model Rules, supra note 31, R. 1.16 (“Declining or Terminating Representation”).

\(^{42}\) See id. R. 1.16(d) (“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.”).

\(^{43}\) Cf. id. R. 1.1 (“Competence”) (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).
what motions were filed, what areas of inquiry and research were suggested, which were pursued and which were rejected, who was interviewed (and who was not), how jury selection was conducted, and every other material step counsel undertook. 44 These files should not only be complete, they should be well-organized so that with little effort all of this can be accomplished.

This is undoubtedly a massive undertaking, but its scope is no excuse for its not being undertaken. Indeed, it is all the more reason why it must be done in a complete and orderly way. A former client and his habeas counsel start off with enough of a handicap in trying to overturn a sentence of death to have the representation further hampered by a sloppy and incomplete file.

To put a fine point on this obligation, just consider two of the most common habeas challenges and how they relate to maintenance of proper files. The first is the claim for ineffective assistance of counsel. While surely no one handling a capital case at trial wants to think about the need for such a claim, it is also not difficult to imagine how the failure to maintain a complete and well-organized file can make successor counsel’s task far more difficult. This file is the record of what has been considered and what has been done. If the file is deficient, successor counsel will be left with baffling question marks. The incomplete file will also arm the prosecution with an argument that in fact, though the file is silent, counsel surely was effective.

Second, the failure of the prosecution to share exculpatory information with the defense often leads to Brady claims by habeas counsel. 45 Oftentimes, the defense to such claims will be that the information was made available. 46 An incomplete or sloppily kept file will make it more difficult for habeas counsel to refute this assertion.

B. Former Counsel’s Duty When Files Are Incomplete

Let us assume that beleaguered counsel, underpaid and understaffed, did not maintain the files in a pristine condition. Successor

44. See GUIDELINES, supra note 7, at Guideline 10.13, commentary (“All members of the defense team must anticipate and facilitate the duty of successor counsel . . . to investigate the defense presentation at all prior stages of the case . . . [As] there may be issues as to whether the government produced certain evidence[,] counsel’s files should be maintained in a manner sufficient to enable successor counsel to answer questions of this sort through appropriate documentation . . . .”).


46. See, e.g., Castillo v. Johnson, 141 F.3d 218, 233 (5th Cir. 1998); Norris v. Schotten, 146 F.3d 314, 333-35 (6th Cir. 1998); Mills v. Singletary, 63 F.3d 999, 1015-16 (11th Cir. 1995).
counsel is confronted with unlabeled boxes, files haphazardly arranged, and stacks of disorganized papers randomly scattered in a conference room. Does this situation place any ethical obligation on former counsel? In my opinion, the former counsel has a clear ethical obligation to take whatever time is required to organize the files and help successor counsel understand what is available and what it reflects. Quite simply, trial counsel has violated a fundamental aspect of the duty of competence. Counsel was required to properly maintain the files under Model Rule 1.1. Counsel failed to do so, and no complaints about overwork and undercompensation can serve as an excuse for this dereliction.

What happens next? A malpractice action against predecessor counsel may be appropriate. Similarly, a meritorious disciplinary complaint could be filed. The problem is that neither of those provides any real relief to the death row defendant. What is needed, and what I believe is ethically mandated, is for predecessor counsel to spend all the time that is necessary to bring habeas counsel up to speed. The former client’s injury is being suffered right now and must be corrected immediately. It is no consolation to know the former client’s estate may have a cause of action three years from now.

IV. COOPERATION ON STRATEGY

Must predecessor counsel fall on his or her sword, admit ineffectiveness and suffer the ignominy and shame that follows? That is a great question. A couple of points are clear. First, counsel is required to communicate with a client or former client regarding legal malpractice. While it comes as a surprise to lawyers to learn this is so, in fact there is ample authority that concludes a lawyer, as a fiduciary, must put the client’s interest ahead of his or her own and inform the client of the failing, because in large part the differential in expertise between the lawyer and the client means that the client will rarely be aware that that is what has occurred. The conscientious lawyer must consider the extent to which his or her conduct fell below the standard of care and act accordingly.

Moreover, counsel, at least in a capital case, should consider how rare it is among all the homicides that take place each year in any given state that an accused actually ends up on death row. For example, in

2001, with 15,980 homicides,\textsuperscript{48} 155 condemned joined the population of
death row.\textsuperscript{49} Given that circumstance, it is fair at least to wonder why
that tragic result happened in this case and whether some soul-searching
is not in order to determine whether constitutionally cognizable error in
counsel’s performance did not play some role, particularly when a
recognition of one’s failings may not only make one a better lawyer next
time around but provide one’s former client with an opportunity to
escape a date with the executioner.

The question then arises whether this obligation to protect the client
does not mean something more in the context of a criminal prosecution
and in particular for a defendant under a sentence of death. Should this
requirement not be read to require full, not grudging, cooperation with
successor counsel? This may be what the California Bar was trying to assert when it concluded:

\begin{quote}
[T]he Rules of Professional Conduct impose a duty upon trial counsel
to fully and candidly discuss matters relating to the representation of
the client with appellate counsel and to respond to the questions of
appellate counsel, even if to do so would be to disclose that trial
counsel failed to provide effective assistance of counsel. This decision
is in accord with the general rule that the attorney owes a duty of
complete fidelity to the client and to the interests of the client.\textsuperscript{50}
\end{quote}

As one observer has noted, “the strategic thinking of the lawyer,
and learning this strategic thinking is absolutely critical to the thorough
presentation of a postconviction claim[,] . . . should be routinely and
openly presented to the postconviction counsel.”\textsuperscript{51}

This is not a plea for counsel to lie or make it up. Lawyers, of
course, are forbidden from that and indeed have a duty of candor to the
tribunal under Rule 3.3.\textsuperscript{52} It is, however, a plea to set aside natural

\textsuperscript{48} FBI, CRIME IN THE UNITED STATES 2001 UNIFORM CRIME REPORTS 19 (2002) (reporting
number of murders and non-negligent manslaughters, defined as “the willful (nonnegligent) [sic]
killing of one human being by another,” as reported to the Bureau’s Uniform Crime Reporting

\textsuperscript{49} TRACY L. SNELL & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS BULLETIN
CAPITAL PUNISHMENT 2001 9 (2002) (reporting number of prisoners under sentence of death


\textsuperscript{51} See Siegel, supra note 25, at 114 (“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.”)

\textsuperscript{52} See generally MODEL RULES, supra note 30, R. 3.3 (“Candor Toward the Tribunal”).
feelings and ego to help the former client and successor counsel in this difficult process.

Does this cooperation become an ethical mandate? It is hard to assert that a lawyer who honestly believes that he or she made the proper decision has some ethical or other obligation to confess to an error the lawyer did not commit. Indeed, Rules 3.3 and 4.1 require a contrary result. Short of that, a lawyer whose former client faces the ultimate sanction should cooperate fully, within the Rules’ limitations, in order to give real meaning to Rule 1.16’s injunction to protect the client upon withdrawal.

V. CONCLUSION

A lawyer represents a client in jeopardy of capital punishment. It all ends badly. Now the client’s last clear chance for relief lies in the granting of a writ for habeas corpus. Even if former counsel is not prepared to move heaven and earth to save the former client, the new ABA Guidelines officially recognize an idea that has already been commonly acknowledged in practice—that the former lawyer has a significant obligation to help extricate the former client from his present plight. And once it is understood that this long-standing obligation has a firm foundation in the mandates of our profession’s rules of professional conduct, the former counsel should recognize that what he or she has is not merely a hortatory goal, but a firm obligation. An obligation which, if left unfulfilled, might well result in a violation of the applicable rules, a disciplinary sanction, and guilt that the lawyer failed to do everything he or she could to save a former client.

53. See generally id.; MODEL RULES, supra note 30, R. 4.1 (“Truthfulness in Statements to Others”).
INTERNATIONAL LAW ISSUES IN DEATH PENALTY DEFENSE

Richard J. Wilson*

The American Bar Association adopted revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases in February 2003.¹ For the first time in any set of standards regarding the role of defense counsel in a criminal case, the new guidelines make reference to an obligation to raise issues involving the application of international law in our domestic courts. Guideline 10.6, entitled “Additional Obligations of Counsel Representing a Foreign National,” requires defense counsel to raise relevant issues under the Vienna Convention on Consular Relations (“Vienna Convention”).² As the treaty and title of the section imply, these obligations arise only when the client is a foreign national.

This short article will explore some additional issues regarding the relationship between international law and the death penalty. First, it will discuss some additional aspects of the representation of foreign nationals in capital cases. Second, it will discuss additional instances in which defense counsel can make international law arguments, regardless of the client’s nationality. Third, because international law issues are new to most lawyers in the United States, even those who are seasoned in capital litigation, it will suggest some alternative ways in which international law arguments can be made. The conclusion will put the United States experience with the death penalty into the broader context of world practice on the death penalty.

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¹ ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003) [hereinafter GUIDELINES].

I. SOME OTHER ASPECTS OF THE VIENNA CONVENTION

The Commentary to Guideline 10.6 notes that there is “considerable evidence that American local authorities routinely fail to comply with their obligations under the Vienna Convention.” Other commentators have noted that most domestic courts have thus far failed to provide an effective remedy for violation of the Vienna Convention. However, there are several good reasons why defense lawyers should continue to raise the issue in future cases, in addition to the imprimatur of the Guidelines themselves. First, there are positive signs from more recent decisions that the environment is shifting in favor of protection of the defendant when serious violations occur. Second, if the issue is lost, it may be as much from untimely or unpersuasive advocacy as from judicial hostility. Third, and closely related to the previous reason, the cutting edge of the battle for incorporation of international law into the domestic regime is being fought in the realm of the death penalty, but that fight must be seen as a long-term struggle to change the legal culture of the courts of the United States. Enforcing international treaties that protect individual human rights is not something that many courts in the U.S. are accustomed to doing, and the role of the defense bar is as much educational as it is persuasive.

The Commentary to the Guideline notes the favorable decision of the Oklahoma Court of Criminal Appeals in Valdez v. State. Another positive outcome in a capital case was achieved in United States ex rel. Madej v. Schomig, decided on a petition for habeas corpus relief by a federal district court sitting in review by writ of habeas corpus of a death sentence in Illinois. Although the court had granted relief on ineffective counsel grounds, it granted a motion to reconsider the Vienna Convention claim in light of a decision on the merits in the LaGrand case.

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3. GUIDELINES, supra note 1, at Guideline 10.6, commentary.
5. GUIDELINES, supra note 1, at Guideline 10.6, commentary n.194.
Case\(^7\) by the International Court of Justice ("ICJ"), which had been decided since the time of the petitioner’s original filing.

The Madej court noted at the beginning of its discussion that “[t]he ruling of the International Court of Justice in \textit{LaGrand} is certainly among the most important developments defining the treaty obligations of signatories to the Vienna Convention.”\(^8\) The court went on to find that “the ICJ ruling conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts (including the Seventh Circuit) have left open.”\(^9\) Finally, the court stated that the ICJ’s decision suggests that “courts cannot rely upon procedural default rules to circumvent a review of Vienna Convention claims on the merits.”\(^10\) Although the government asked the court to again reconsider its decision, it declined to do so, noting that consular assistance could have played a significant role in the capital sentencing hearing.\(^11\)

A second aspect of the Vienna Convention issues has to do with when and how the issue is raised by counsel. Guideline 10.6 implicitly suggests that the issue should be raised at the earliest possible time, in pre-trial proceedings if possible. The Guideline refers to “every stage of the case” in Section A, and, in Section B, urges counsel to act “immediately” if possible.\(^12\) These admonitions are consistent with the treaty provisions themselves, which call for detaining authorities to inform the detainee of consular rights, and to contact consular officials,


\(^8\) United States \textit{ex rel.} Madej, 223 F. Supp. 2d at 978.

\(^9\) Id. at 979.

\(^10\) Id.


\(^12\) GUIDELINES, supra note 1, at Guideline 10.6.
both “without delay.” 13 Although there have been a number of daunting decisions by domestic courts on the Vienna Convention issue, a good deal of the analysis by the courts is simply an erroneous reading of either domestic treaty obligations, the nature of international obligations, or both. Some of this comes about because the courts are unwilling to confront the issue, but much of the bad analysis arises from defense counsel’s failure to raise the issue in a proper and timely manner. Lawyers without significant international experience should consult helpful literature on raising Vienna Convention challenges, 14 or at the least, with their client’s permission, contact consular officials, who can frequently provide helpful legal advice. 15

Finally, effective protection under the Vienna Convention is particularly difficult to gain from domestic courts because recognition of the validity of international norms requires that the courts provide an effective remedy for their violation. Moreover, recognition of international norms could further undermine the already shaky validity of the death penalty itself in domestic law, since the overwhelming trend in international law and practice is toward abolition. The leading decisions of international tribunals, however, suggest that the reversal of the death sentence is required when there is a violation of the Vienna Convention, and that the defendant need not prove that there would have been a different outcome if the violation had not occurred.

13. Vienna Convention, supra note 2, at art. 36(1)(b). The U.S. State Department has drafted a helpful and thorough document on government obligations under the Vienna Convention which can be found on the web at http://travel.state.gov/consul_notify.html (last visited June 28, 2003).


15. This is particularly true with Mexican nationals who make up nearly a half of all known foreign nationals on death rows in the United States, and are now the subject of collective litigation before the ICJ in the Avena case, supra note 14. See Death Penalty Information Center, Foreign Nationals and the Death Penalty in the United States, at http://www.deathpenaltyinfo.org/article.php?did=198&scid=31#Reported-DROW (last visited July 31, 2003) (indicating that fifty-two out of 118 foreign nationals on death row were of Mexican nationality as of June 13, 2003).
First, the Inter-American Court of Human Rights, in its advisory opinion on application of the Vienna Convention in the Americas, held that:

[N]onobservance of a detained foreign national’s right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be ‘arbitrarily’ deprived of one’s life, in the terms of the relevant provisions of the human rights treaties . . . .16

Similarly, in the LaGrand decision, the ICJ concluded that, for the purposes of a violation of Article 36 notification requiring a remedy, it would not matter “whether a different verdict would have been rendered,”17 and that rules of procedural default that normally apply in both state and federal capital litigation “prevent[] [the U.S. courts] from attaching any legal significance” to violations of the Vienna Convention and therefore also give rise to Article 36 violations requiring an effective remedy.18

The death penalty decisions of the United States Supreme Court have traditionally considered international human rights norms and practice, until the 1989 decision in Stanford v. Kentucky,19 where, in a footnote, the majority opinion suggested that sentencing practices of other countries are irrelevant to interpretation of the Eighth Amendment because “it is American conceptions of decency that are dispositive . . . .”20 In its 2002 decision abolishing the death penalty for mentally retarded persons, however, the court returned to its well-established tradition of consideration of international law and practice in the determination of whether a punishment is “unusual” in violation of the Eighth Amendment’s prohibition on cruel and unusual punishments.21 Two decisions at the end of the U.S. Supreme Court’s

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16. Advisory Opinion OC-16/99, supra note 7, ¶ 137 (emphasis added). One of the relevant human rights treaties to which the court referred is the International Covenant on Civil and Political Rights, to which the U.S. is a party. Id.
18. Id. ¶ 91.
2002 term provide further evidence that the Court will look to international human rights norms and jurisprudence in its future decisions. First, in *Lawrence v. Texas*, the Court struck down a Texas statute criminalizing sexual intimacy by same-sex couples as violative of Fourteenth Amendment substantive due process. Justice Anthony M. Kennedy, writing for a five-member majority of the Court, made multiple references to decisions of the European Court of Human Rights (“European Court”) regarding the rights of homosexuals. Among the several useful references for defense counsel is the recognition by a majority of the court that the jurisprudence of the European Court expresses relevant views of “Western civilization” and “values we share with a wider civilization.” Relying on a series of European Court decisions, the majority concluded that “the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.” In the second landmark case, *Grutter v. Bollinger*, the Court upheld the use of affirmative action admission policies at the University of Michigan Law School. In her concurrence with the majority opinion, Justice Ruth Bader Ginsburg, joined by Justice Stephen G. Breyer, relied on two international human rights treaties, one to which the United States is a party and one to which it is not, as sources for “the international understanding of the office of affirmative action.” The court’s renewed interest in international practice opens the door to other potential challenges to the death penalty through international law.


23.  *Id.* at 2481.
24.  *Id.* at 2483.
25.  *Id.* It is also noteworthy that neither Justice Antonin Scalia nor Justice Clarence Thomas, who wrote lengthy dissents in *Lawrence*, challenged the majority’s use of international human rights law as a source of law or supportive authority, unlike the lengthy and vitriolic dissents of Justice Scalia and Chief Justice William H. Rehnquist in the *Atkins* decision, supra note 21, written in the death penalty context.
27.  *Id.* at 2347 (Ginsburg, J., concurring). The two treaties are the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the U.S. in 1994, and the Convention on the Elimination of All Forms of Discrimination Against Women, signed by the United States but not yet ratified. See *id.* Also noteworthy in both *Grutter* and *Lawrence*, however, was the conspicuous failure of Justice Sandra Day O’Connor to use, endorse or even acknowledge the use of international law as a source, given her position as a crucial swing vote in many capital cases.
II. OTHER INTERNATIONAL LAW CHALLENGES

A. Extradition and the Death Penalty

Along with foreign nationals on death row, special consideration must be given to those individuals who might face the death penalty after extradition to the United States. Although the United States Supreme Court has approved the practice of so-called “irregular rendition”—the forcible removal of persons to U.S. territorial jurisdiction without formal judicial process—28—that procedure normally should yield to a formal process of extradition under one of the more than one hundred bilateral extradition treaties between the United States and other countries.29 Increasingly, as in the new extradition treaties between the United States and both Paraguay and South Africa, completed in 2001, abolitionist countries can refuse extradition to the United States without assurances against the death penalty.30

Countries with close ties to the United States are tightening their extradition rules as a means of expressing their displeasure with our government’s aggressive use of the death penalty. Because of its disagreements with the United States over application of the Vienna Convention, for example, Mexico not only refuses persons facing the death penalty extradition to the U.S., but also any accused facing a potential life sentence.31 The strongest demonstration of this trend occurred when European Union members indicated that they would not

29. See Amnesty International, United States of America: No Return to Execution - The US Death Penalty as a Barrier to Extradition 5, (2001), available at http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMRS511712001ENGLISH/$File/AMRS5117101.pdf (last visited July 31, 2003). The United States is a party to both a multilateral treaty – the Vienna Convention on Consular Relations – as well as bilateral consular treaties with individual countries, as noted in the commentary to the ABA Guidelines, supra note 1, at Guideline 10.6, note 193. In all cases in which defense counsel has a death-eligible client facing extradition into the United States, counsel should fully explore potential defenses against the death penalty that might be extracted from the provisions of bilateral treaties on consular relations, extradition, mutual legal assistance, or even prisoner transfer. See, e.g., Alan Clarke, Justice in a Changed World: Terrorism, Extradition, and the Death Penalty, 29 WM. MITCHELL L. REV. 783 (2003) (discussing discernable movement toward a per se rule barring extradition absent assurances that the death penalty will not be imposed); Robert Gregg, The European Tendency Toward Non-Extradition to the United States in Capital Cases: Trends, Assurances and Breaches of Duty, 10 U. MIAMI INT’L & COMP. L. REV. 113 (2002); Kyle M. Medley, The Widening of the Atlantic: Extradition Practices Between the United States and Europe, 68 BROOK. L. REV. 1213 (2003).
extradite suspected terrorists to the United States after September 11, 2001 without assurances against the death penalty.\(^\text{32}\)

In at least two instances, foreign courts have reached out to bar possible capital punishment in stinging rebuke to the death penalty regime in this country. In *United States v. Burns*,\(^\text{33}\) the Canadian Supreme Court held that Canada’s Justice Minister had violated the Canadian Charter of Rights and Freedoms in his failure to seek assurances against the death penalty for Glen Sebastian Burns and Atif Ahmad Rafay, eighteen-year-olds charged with capital murder in Washington State. The young men were extradited only after those assurances were provided. And in South Africa, the Constitutional Court ruled, after the fact, that government officials had violated constitutional and statutory obligations by refusing to seek assurances against the death penalty before turning over Khalfan Khamis Mohamed to U.S. authorities for trial in the U.S., where he faced the death penalty for his alleged role in the U.S. embassy bombing in Tanzania.\(^\text{34}\) Although Mohamed was already at trial at the time of its judgment, the federal judge here permitted an instruction to the jury about the South African decision, and the New York City jury deadlocked on the issue of the death penalty, resulting in a sentence of life imprisonment without possibility of parole.\(^\text{35}\)

**B. Certain Categories: Mentally Retarded and Mentally Ill Persons, Juveniles, and Persons Tried by Military Commission**\(^\text{36}\)

As noted above, the United States Supreme Court has now banned the execution of mentally retarded persons in its 2002 decision in *Atkins v. Virginia*.\(^\text{37}\) However, the court has yet to bar capital punishment for the related categories of mentally ill persons and juvenile defendants, whose mental and emotional maturity is also significantly less than that of fully competent adults.

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36. See Susan M. Boland, *Walking the Edge of Death: An Annotated Bibliography on Juveniles, the Mentally Ill, the Mentally Retarded and the Death Penalty*, 21 N. ILL. U. L. REV. 131 (2001), for a comprehensive annotated bibliography on the first three categories. Although it predates some of the important new cases in this area, the article provides a comprehensive overview of both domestic and international sources.
37. See *supra* text accompanying note 21.
The issues with regard to juveniles are ripe for resolution, and every capital lawyer with a juvenile client should raise and preserve a challenge to the validity of the juvenile death penalty in the United States under international law and practice. The issue came very close to review on two occasions during the 2002 term of the Supreme Court, and on one occasion, the dissenters from denial of certiorari made explicit mention of the “apparent consensus . . . in the international community” on the issue. There are excellent recent materials that provide helpful information for practitioners on raising this issue.

A recent international decision broadly attacks the validity of the juvenile death penalty in the United States. In October of 2002, the Inter-American Commission on Human Rights (“Commission”) decided the case of Domingues v. United States. This is the same case that divided the Nevada Supreme Court over the question of the application of the International Covenant on Civil and Political Rights (“ICCPR”), a treaty to which the United States is a party, and which explicitly prohibits the execution of persons under the age of eighteen at the time of their alleged crimes. Treaties have the same status as federal law under the explicit language of the supremacy clause of the U.S. Constitution, and are thus part of “the supreme Law of the Land.” The Nevada court

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38. Patterson v. Texas, 536 U.S. 984 (2002) (Stevens, Ginsberg and Breyer, JJ., dissenting from denial of certiorari) (arguing that it would be appropriate for the court to revisit the issue of offenders below the age of eighteen in light of the “apparent consensus that exists among the States and in the international community” as to the impropriety of the death penalty for juveniles); see also In re Stanford, 123 S. Ct. 472 (2002) (Stevens, Souter, Ginsberg and Breyer, JJ., dissenting from denial of certiorari in juvenile death penalty case).


41. Article VI, Clause 2 of the U.S. Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added). The last clause is particularly important for the enforcement of treaties because most death sentences are imposed under the state law of the thirty-
narrowly upheld the juvenile death penalty based on an exception taken by the United States Senate to that provision in the treaty at the time of ratification, called a “reservation” in international law, and the U.S. Supreme Court denied review after inviting a submission on the issues by the Solicitor General’s office.  

The Commission directly challenged any ongoing validity for the juvenile death penalty in its Domingues decision. Its conclusion was that “bypersisting in the practice of executing offenders under age [eighteen], the U.S. stands alone amongst the traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community.” From this evidence, the Commission found that “a norm of international customary law has emerged prohibiting the execution of offenders under the age of [eighteen] years at the time of their crime.” Moreover, the Commission found that the rule against execution of juveniles “has been recognized as being of a sufficiently indelible nature to now constitute a norm of jus cogens.” Finally, it explicitly rejected the government’s claims that, as a persistent objector to the rule against juvenile executions, it is not bound by the customary norm.

Many domestic practitioners may not be familiar with the international law terms used by the Commission in the Domingues decision, so a short explanation is in order. First, customary international law is simply “a general practice accepted as law,” according to the Statute of the International Court of Justice. Another recognized definition for customary international law is “the general usage and practice of nations,” judicial decisions recognizing and enforcing that law, and the “works of jurists.” In a landmark decision on the issue of the applicability of customary law in the United States, the U.S. Supreme Court held, “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .” That decision also states

eight retentionist states. For arguments about the binding nature of international human rights norms on the states in a federal system, see Peter J. Spiro, The States and International Human Rights, 66 FORDHAM L. REV. 567 (1997).

44. Id. ¶ 85; see also id. ¶¶ 107-10.
45. Id. ¶ 85.
46. Id. ¶ 85.
49. The Paquete Habana, 175 U.S. 677, 700 (1900).
that international law, including customary international law, “is part of our law, and must be ascertained and administered by the courts of justice.”\(^{50}\) The leading treatise on the foreign relations law of the United States recognizes this as well, when it notes as follows: “Matters arising under customary international law also arise under ‘the laws of the United States,’ since international law is ‘part of our law’ . . . and is federal law.”\(^{51}\)

A \textit{jus cogens} norm is, as the Commission asserts, an “indelible” version of customary international law. It is a peremptory norm “accepted and recognized by the international community of States[,] as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”\(^{52}\) The persistent objector doctrine allows the objecting nation to assert its refusal to be bound by a customary norm, although there is a complex set of rules with regard to the invocation of persistent objector status, and obviously there can be no valid objection to a \textit{jus cogens} norm.\(^{53}\)

The last category of cases in which international law is especially relevant is conviction by the newly created military commission tribunals for alleged terrorists, followed by sentence of death. Military commissions have been used in the past, but the creation of such commissions at this time in the United States is a specific response to the September 11, 2001 terrorist attacks. No such trials have taken place at the time of this writing, but the authority to undertake them lies in the president’s Military Order of November 13, 2001.\(^{54}\) Recent press

\(^{50}\) \textit{Id.}  
announcements indicate that the final groundwork is being completed to begin trials by commissions at Guantanamo Bay, Cuba. The creation and scope of these tribunals themselves, as well as their imposition of the death penalty, will present complex issues at the intersection of domestic and international law, as well as humanitarian law and human rights. The commissions create a new “global death penalty jurisdiction” that many scholars and practitioners find deeply disturbing.

C. General Arguments Using International Human Rights Law

Many capital defense lawyers see international law as relevant only to their foreign clients, or in extraditions from abroad or particular categories of cases in which the penalty itself can be challenged. However, international human rights law now provides a rich body of decisions on due process and fair trial. Lawyers have applied those norms to issues in prisoner transfers and prison conditions, among other possible arenas in criminal law and process.

d20020321ord.pdf (last visited June 28, 2003). The amended procedures responded to a number of criticisms of the earlier presidential order, the most relevant for our purposes being a requirement, in Section 6(G), that the commission reach unanimity on the death penalty. The amended order also permits review within the military. See U.S. DEP’T OF DEF., MILITARY COMM’N ORDER NO. 1 § 6(G) (2002). The Defense Department changes may require amendment of the presidential order, an issue that has not been settled as of this writing.


58. One challenge that I have not developed here, among possible arguments that can only be imagined, is an argument that the death penalty is “inhuman” under the language of Article 6 of the International Covenant on Civil and Political Rights. See Manfred Nowak, Is the Death Penalty an Inhuman Punishment?, in THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH 27 (Theodore S. Orlin et al. eds. 2000). Although the U.S. reserved the right to impose capital punishment on any person other than pregnant women, including persons below eighteen years of age, there is no explicit reservation to Article 6 provisions. See 138 CONG. REC. 4781 (1992), cited in LOUIS HENKIN ET AL., HUMAN RIGHTS 75 (Supp. 2001).

The United States is a party to a number of important international human rights treaties. The relevant treaties, one of which has already been mentioned, the date of their entry into force in the United States, and the number of countries that have ratified the treaty as of this writing, are:

- The International Covenant on Civil and Political Rights, June 8, 1992, 149 countries;
- The International Convention on the Elimination of All Forms of Racial Discrimination, Oct. 21, 1994, 168 countries;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Oct. 21, 1994, 133 countries.61

These treaties are still relatively new to the United States, and advocates are only now beginning to read them closely and use their provisions, in combination with the many international decisions interpreting them, in ways to protect the rights of the accused in all criminal proceedings, not just those ending with a capital sentence.62

Finally, as noted above, treaties are not the sole source of international law. One of the most fertile interpretive sources of international human rights law as applied to the death penalty in the United States has been the American Declaration of the Rights and Duties of Man (“American Declaration”), an international instrument that embodies binding norms of customary international law.63 The Inter-American Commission on Human Rights, which sits in Washington, D.C., is one of the principal human rights bodies of the Organization of American States. Its seven members are independent experts in the field of human rights who can hear complaints by


61. All information on the number of treaty ratifications is current, from the UN Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General, at http://untreaty.un.org (last updated on May 8, 2003).

62. Space does not permit the development of examples of these arguments and sources for them. Interested readers can consult the now-extensive literature on the issue, including my own writings. See Richard J. Wilson, Defending a Criminal Case with International Human Rights Law, THE CHAMPION, May 2000, at 28; see also John Quigley, Human Rights Defenses in U.S. Courts, 20 HUM. RTS. Q. 555 (1998).

63. Sources for this conclusion can be found in Richard J. Wilson, The United States’ Position on the Death Penalty in the Inter-American Human Rights System, 42 SANTA CLARA L. REV. 1159, 1159, 1167 (2002).
individuals against any government in the Americas for violations of the American Declaration. The Commission has issued a number of favorable rulings in cases from the United States challenging the imposition of the death penalty.

III. APPROACHES TO INTERNATIONAL LAW ARGUMENTS IN DEATH PENALTY CASES

The structure of international law presents the three principal approaches to raising international law arguments against the death penalty. This section will more fully articulate those approaches.

A. International Law and Practice Should Inform or Interpret Domestic Law

This is the “softest” way to argue international law, and has proven to be one of the most persuasive ways to introduce international law and practice into the domestic courts. It avoids the harder arguments asserting the binding force of international human rights law, as the other two approaches require. It is essentially the approach taken by the U.S. Supreme Court in Atkins v. Virginia, in which the court concluded that the views of the international community are a relevant factor—not a binding source—for the interpretation of the U.S. Constitution.

64. The Commission and its companion body, the Inter-American Court of Human Rights, have treaty powers as well, but the United States has not ratified any of these treaties. See ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OAS/ser.L/V/I.4 rev. 9 (Jan. 31, 2003), available at http://www.iachr.org/basic.eng.htm (last visited Aug. 3, 2003).

65. These cases are reviewed in detail in Wilson, supra note 62. The most comprehensive treatment of the death penalty by human rights tribunals, including the Inter-American system, is William A. Schabas, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 311-54 (3d ed. 2002) [hereinafter Schabas, ABOLITION OF THE DEATH PENALTY]; see also generally William A. Schabas, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE (1996).

66. See supra discussion at text accompanying note 21. This was also the approach taken in the influential brief of the European Union as amicus curiae in the Atkins case. That brief and other helpful pleadings can be found in the brief bank of the International Justice Project, which works to challenge the death penalty in the United States through the use of international law. The Project’s website is http://www.internationaljusticeproject.org (last visited on Aug. 3, 2003). Another source of helpful information and assistance on international law issues in capital litigation is the British organization Amicus. They maintain a web site and publish a periodical providing assistance to lawyers in the U.S., at http://www.amicus-alj.org (last visited on Aug. 3, 2003).
B. Treaties are Expressions of International Law Which, as Federal Law, Trump Contrary State Law

This is a second way of making an international law argument. It is the position formally expressed in the supremacy clause of the U.S. Constitution. The dissenters in Domingues v. State, the Nevada case upholding the death penalty for juveniles in the face of a treaty challenge, followed this approach. It also came into play in all of the domestic cases interpreting the obligations of the Vienna Convention on Consular Relations, a self-executing treaty to which the United States is a party, and the subject of Guideline 10.6.

C. Customary and Jus Cogens Norms of International Human Rights Law are Binding in the Domestic Courts of the United States

The third approach to international law arguments avoids the difficulty of treaty reservations. It is the approach taken by the Inter-American Commission on Human Rights in its decision in Domingues v. United States, where the Commission found that U.S. application of the death penalty to persons under eighteen years of age at the time of their offense constitutes a jus cogens violation. Customary law has taken on increased importance in the U.S. in the context of the significant body of cases decided under the Alien Tort Claims Act, a federal statute that has been used extensively by foreign victims adjudicating customary international law and treaty claims of human rights violations in the U.S. federal courts.

67. See supra discussion at note 41 and accompanying text.
68. See supra text accompanying note 44. There are several sample briefs making treaty-based arguments in juvenile death penalty cases on the website of the International Justice Project, supra note 66.
69. Self-executing treaties are those that do not require the adoption of implementing legislation in order to take full domestic effect. See Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 50-51 (5th ed. 1998). The United States Senate has attached a declaration to each of the three human rights treaties discussed in the text asserting that the treaties are non-self-executing. The judicial effect of these declarations is subject to ongoing dispute. For a collection of arguments against non-self-execution, see Wilson, supra note 62, at 57-58.
70. See supra discussion at note 40 and accompanying text.
72. The Alien Tort Claims Act provides that federal courts have jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The “law of nations” is customary international law. Two extremely helpful texts on the Act are BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996) and THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D’Amato eds., 1999); see also, Joan
IV. CONCLUSION

Recent reports from the United Nations show that about two-thirds of the countries of the world have abolished capital punishment, and the trend in the last decade has been strongly toward abolition, not expansion or re-adoption. As Professor William Schabas concludes in his comprehensive treatment of the death penalty under international law, systematic review of international norms “shows an inexorable progress towards abolition.” In 2002, for example, only thirty-one of the world’s nearly two hundred countries carried out executions, and three countries—China, Iran and the United States—accounted for eighty-one percent of all known executions. Figures for the juvenile death penalty are even more startling. While the United States has carried out twenty-two executions of juvenile offenders since 1976, only six other countries in the world report having carried out juvenile executions since 1990—the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia and Yemen. As of this year, all of those countries have changed their laws to abolish the death penalty for juveniles, or have denied that juvenile executions took place, leaving the United States as the only country in the world to continue the practice. Moreover, the U.N.’s Convention on the Rights of the Child, a treaty that explicitly bars the execution of minors, has been ratified by every country of the world except the United States and Somalia, a country that is now emerging from almost complete anarchy.

All of the recently established international criminal tribunals created within the U.N. system have barred the use of capital punishment for the world’s worst crimes—genocide, war crimes and crimes against humanity. These include the temporary international criminal tribunals for the former Yugoslavia and for Rwanda, sitting in

73. See Schabas, supra note 14, at 445.
75. ABOLITION OF THE DEATH PENALTY, supra note 65, at 19.
76. See Amnesty International, supra note 74.
78. See id.
80. See U.N. Treaty Collection, supra note 61.
The Hague and Arusha, Tanzania, respectively, as well as the new International Criminal Court, which will also take up operations this year in The Hague. United States opposition to the new court by the current Bush administration is open and aggressive. It has not only attempted to “unsign” the treaty, which was signed in the closing days of the Clinton administration, but has also taken steps to obtain bilateral agreements with individual countries not to submit Americans to the Court’s jurisdiction if arrested in those countries. It has gone so far as to adopt domestic legislation that critics have called the “Hague Invasion Act” because it permits the use of military force to “liberate” any American held by the Court for trial.

Aside from pervasive problems in the domestic administration of the death penalty—problems that give rise to the need for the adoption of these Guidelines, among other measures—United States isolation in the world community for its use of the death penalty grows with each passing day. Yale Professor Harold Koh, a former Assistant Secretary of State for Democracy, Human Rights and Labor, has written that, “I can now testify that [actions of the U.S. government regarding the death penalty] are no longer minor diplomatic irritants.” It is only a matter of time before Americans will conclude, as did Justice Harry A. Blackmun in 1994, that they are “morally and intellectually obligated simply to concede that the death penalty experiment has failed.”

83. Koh, supra note 21, at 1105.
NOTE

THERE IS NO “RATIONAL BASIS” FOR KEEPING IT A “SECRET” ANYMORE: WHY THE FTDA’S “ACTUAL HARM” REQUIREMENT SHOULD NOT BE INTERPRETED THE SAME WAY FOR DILUTION CAUSED BY BLURRING AS IT IS FOR DILUTION CAUSED BY TARNISHING

I. INTRODUCTION

Under the Federal Trademark Dilution Act of 1995 (“FTDA”), Congress created a federal cause of action for trademark dilution. The term dilution encompasses two distinct recognizable harms—specifically, dilution by blurring and dilution by tarnishing. When a famous mark is blurred, its distinctive character is diminished in the minds of consumers, thereby impairing its effectiveness in distinguishing the goods bearing the famous mark from the goods of others. Tarnishing involves the disparagement of the famous mark by associating it with something distasteful. Conceptually, these forms of dilution are different, but both undermine the selling of a mark. The legislative history of the FTDA confirms that Congress intended to enact

2. See 15 U.S.C. § 1125(c)(1), (stating that: The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person’s commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection.).
3. See H.R. Rep. No. 104-374, at 8 (1995) (The statutory definition of dilution is “designed to encompass all forms of dilution recognized by the courts, including dilution by blurring, by tarnishment and disparagement, and by diminishment.”), reprinted in 1995 U.S.C.C.A.N. 1029, 1035; see also discussion infra Part IV.A-B.
5. See id. at 190.
a statute that provided a remedy for both forms of dilution. The FTDA imposes on the owner of a famous trademark the burden of proving that the junior user’s mark “causes dilution” of the famous mark. The question remained how the phrase “causes dilution” should be interpreted.

Almost all United States Courts of Appeals have addressed this issue and have adopted one of two standards of harm. Some circuits required the owner of the famous mark to demonstrate objective proof of “actual harm” to the economic value of its mark, while others have granted relief on a showing of a mere “likelihood-of-harm.” This disagreement, historically characterized as a “circuit split,” is the kind which the Supreme Court would be called upon to resolve. Indeed, the Supreme Court performed its familiar function when, on March 4, 2003, it decided *Moseley v. V Secret Catalogue, Inc.*, holding that the “causes dilution” element should be interpreted as to require a showing of “actual harm.” Yet, the Court did not go as far as some circuit courts did by expressly rejecting any requirement that the owner of a famous mark prove dilution by demonstrating loss of actual sales or profits.

At best the Court’s opinion can be viewed as providing two guideposts: one being that a mere “likelihood-of-harm” is insufficient, and the other being that proof of actual economic harm is not required. As far as providing guidance as to how “actual harm” should be interpreted, the Court did state that “the mere fact that consumers mentally associate the junior user’s mark with a famous mark” would not be sufficient proof to establish actionable dilution, at least where the marks at issue are not

7. See H.R. REP No. 104-374, at 2 (1995) (“The purpose of [the FTDA] is to protect famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it, even in the absence of confusion”), reprinted in 1995 U.S.C.C.A.N. 1029, 1029. The Supreme Court itself implied that it doubted that tarnishment was actually embraced by the statutory text. See *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 123 S. Ct. 1115, 1124 (2003). However, in Justice Kennedy’s separate concurrence, perhaps to reassure trademark owners that the FTDA does recognize tarnishment, he stated, “[t]he Court’s opinion does not foreclose injunctive relief if respondents on remand present sufficient evidence of either blurring or tarnishment.” Id. at 1126.


9. See discussion infra Part V.B.


12. See id. at 1124.

13. See id.
identical, and that “direct evidence of dilution such as consumer surveys will not be necessary if actual dilution can reliably be proven through circumstantial evidence.” Because the Court did not elaborate on what factors should be taken into consideration in adjudicating a claim of trademark dilution, much room in the middle was left for trademark practitioners, and in turn the lower courts, to determine and formulate the acceptable levels and forms of proof that will establish the requisite “actual harm.”

The purpose of this Note is to demonstrate why the “actual harm” requirement should not be interpreted the same for blurring and tarnishing under the FTDA based on the inherent differences between them. Part II of this Note will introduce the concept of trademarks and the trademark infringement cause of action. Part III outlines the history of dilution and the passage of the FTDA. Part IV examines the differences between blurring and tarnishing through examples found in case law. Part V discusses two decisions of the New York State Court of Appeals wherein it implicitly applied the dichotomous standard approach proposed by this Note in interpreting the New York anti-dilution statute. Additionally, Part V analyzes each of the major trademark dilution decisions where the circuit courts disagreed. The issue presented in this “circuit split” differed from others in that courts on both sides of the issue were technically correct; at least to the extent that they held different levels of proof of actual harm were applicable to the “causes dilution” requirement based on whether the facts presented blurring or tarnishing. The analysis of the cases will focus predominantly on the type of harm caused under the facts of the case, the standard/level of proof used by the court, and how the courts, without explicitly stating so, were also implementing the dichotomous standard approach proposed by this Note. Part V concludes by proposing an interpretation of the FTDA that would institute the lower level of actual harm for tarnishment and the higher level of proof of actual harm for blurring, including the relevant factors that could be used by the courts in determining whether that particular level of proof has been met. The interpretation of the FTDA proposed will provide sufficient protection to famous marks as contemplated by Congress when enacting the FTDA and will not grant owners of famous marks the ability to enjoin all uses of its mark on all products as if it owned a property right in the mark

14. Id.
15. Id.
16. See discussion infra Part V.C.
itself. This property-right-in-gross theory of trademarks has been appropriately rejected by courts on both sides of the issue and is not implicated by the interpretation proposed by this Note. The proposal suggests that a higher level of proof of “actual harm” is better suited for dilution caused by blurring, while a lower level of proof of “actual harm” should be applicable to claims of dilution caused by tarnishing, because tarnishing is more likely to cause damage to the senior user’s mark and will tend to occur more quickly than the harm caused by blurring.

II. TRADEMARK BACKGROUND

A. Trademark Protection: History and Purpose

Society has been using marks and symbols to denote ownership and origin of articles since well before the existence of the term “trademarks” and statutes regulating their use. Trademarks serve an important purpose in the production of goods by allowing the manufacturer to adopt a mark indicating either the origin or ownership of the goods produced and distinguishing them from a similar product made by another manufacturer. In addition to serving as an indicator of origin, trademarks function as an implied statement of quality, enabling consumers to distinguish the products they want from all others.

Today, the term trademark is defined as “any word, name, symbol, or device, or any combination thereof . . . [used] to identify and distinguish his or her goods . . . from those manufactured or sold by

17. See Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 459 (4th Cir. 1999) (“[W]e simply cannot believe that . . . Congress could have intended . . . to create property rights in gross, unlimited in time[,] . . . even in ‘famous’ trademarks.”); Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 224 n.6 (2d Cir. 1999) (agreeing with the Fourth Circuit that the dilution statutes do not create a property right in gross).

18. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5:1, at 5-1 (4th ed. 2002) (noting that humans have used symbols to identify ownership or origin of articles for thousands of years). McCarthy states that the earliest form of use of marks involved the branding of cattle and other animals as well as quarry marks and stone cutter’s signs found in Egyptian structures that have existed since as early as 4000 B.C. See id.; see also generally Frank I. Schechter, The Rational Basis of Trademark Protection, 40 HARV. L. REV. 813 (1927) (providing additional relevant history of the use of marks to identify goods).


20. See S. REP. NO. 79-1333, at 1 (1946) (stating that the purpose of the enactment in 1946 of the federal trademark statute, the Lanham Act, was “to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get”), reprinted in 1946 U.S.C.C.S. 1274, 1274.
others and to indicate the source of the goods . . . .”21 The protection of trademarks is not only important to protect the investment made by the owner of the mark, but also because of the benefits the use of trademarks confers on consumers in general. This dual purpose of the trademark function, specifically the promotion of competition and the maintenance of product quality, is important and has been recognized by the United States Supreme Court.22 Consumers rely on trademarks in many of their purchasing decisions.23 As long as consumers understand the mark as designating the origin of the product, it is unnecessary for them to know the name of the manufacturer.24 Trademarks greatly reduce the cost and time spent shopping, though many consumers may not realize it, by allowing them to make quicker purchasing decisions.25 Trademarks also serve an important function in the overall marketplace by encouraging manufacturers to strive to produce quality products.26 The manufacturers are ensured that they will reap the benefits of their own hard work by prohibiting subsequent users from “free riding” on the manufacturer’s mark and the goodwill associated with that mark.27 Therefore, the rationale for protecting trademarks is the equity concept of preventing

23. See McCarthy, supra note 18, § 24:68, at 24-120 (“[A] trademark is merely a symbol that allows a purchaser to identify goods or services that have been satisfactory in the past and reject goods that have failed to give satisfaction.”).
24. See Martin J. Beran, An Introduction to Trademark Practice 1 (1970) (A trademark exists when “the consumer immediately associates the product sold in the distinctive container [or bearing the same mark] as being of a consistent quality . . . from a particular single source, irrespective of whether the company name of that source is known to the purchaser.”); Frank I. Schechter, The Historical Foundations of the Law Relating to Trade-Marks 166 (1925) (“[T]he public is concerned with the trade-mark not so much as an indication of origin but as a guaranty of quality.”).
25. See Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163-64 (1995) (noting that “[T]rademark law, by preventing others from copying a source-identifying mark, reduce[s] the customer’s costs of shopping and making purchasing decisions. [Consumers are assured] that this item—the item with the mark—is made by the same producer as other marked items that he or she liked (or disliked) in the past. (citations and internal quotation marks omitted) (second alteration in original)).
26. See S. Rep. No. 79-1333, at 1 (1946) (stating that the purpose of the enactment in 1946 of the federal trademark statute, the Lanham Act, was to protect “the owner of a trade-mark [who] has spent energy, time, and money in presenting to the public the product . . . in his investment from its misappropriation by pirates and cheats.”), reprinted in 1946 U.S.C.C.A.N. 1274, 1274; McCarthy, supra note 18, § 2:3, at 2-3.
27. See Gerard N. Magliocca, One and Inseparable: Dilution and Infringement in Trademark Law, 85 Minn. L. Rev. 949, 958 (2001) (“Marks also encourage producers to invest in quality by ensuring that they will reap the benefit of a fine reputation. Without trademark protection, competitors could poach on the goodwill of a firm by putting that firm’s mark on their own goods.”) (footnote omitted).
someone from “reaping a harvest which others have sown.”28 The owner of a well-known trademark has the additional advantage of using the mark to advertise its product and the ability to license others to use it under certain circumstances—each resulting in the expansion of the overall business.29 Finally, a business can further expand into new product areas through the use of trademarks because consumers are more willing to try new products bearing an established trademark than a product from an unproven source.30

B. Trademark Infringement

When a trademark owner brings an infringement action, it is seeking to prevent a junior user from using the same or a confusingly similar mark on the same or closely related good or service, in the same geographical area, or within a natural area of expansion.31 The trademark owner’s primary concern is that it will lose revenue when a consumer mistakenly purchases the goods and services bearing the confusingly similar mark, while believing it to be originating from the source of the original mark.32 The owner is also concerned that consumers purchasing these other products, which may be of a shoddy quality, will attribute the lack of quality to goods of the original mark, and decline to purchase any

29. See Rudolf Callmann, The Law of Unfair Competition, Trademarks and Monopolies § 21.11, at 33 (Louis Altman ed., 4th ed. 1992) (“A trademark is part of the commercial equipment of a business, and may prove to be a singularly effective weapon in the competitive arsenal.”); Schechter, supra note 18, at 823 (“[O]nce a mark has come to indicate to the public a constant and uniform source of satisfaction, its owner should be allowed the broadest scope possible for ‘the natural expansion of his trade’ to other lines or fields of enterprise.”); see also William G. Barber et al., The Franchise Trademark Handbook: Developing and Protecting Your Trademarks and Service Marks 1 (Louis T. Pirkey ed. 1994) (noting that franchising is a multi-billion-dollar business and that the trademarks form the foundation of that industry. When corporations use marks in connection with their products, consumers recognize a system rather than a collection of distinct units, which makes the marks of the franchise powerful selling tools).
30. A product bearing the mark has the effect of alerting consumers that the origin of the goods is the same single source as of the high-quality goods they are familiar with and expect. See Schechter, supra note 18, at 819 (“[T]he trademark is not merely the symbol of good will but often the most effective agent for the creation of good will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions.”).
products bearing that mark. Worse yet, these same consumers could express their unhappiness to others who have not yet been confused by the mark, but may discontinue use of the products bearing the same mark based on that information. Trademark owners are also concerned that while the confusing mark is not being used on a good or service it currently produces or offers, it is being used in an area the owner's business may logically expand into over time.

There are three factors analyzed by courts in a trademark infringement action, specifically, the distinctiveness of the mark, the priority of the marks and the “likelihood of confusion.” The second factor, the priority of the competing marks, is less relevant for the purpose of discussing dilution because the FTDA specifies that the junior use of the mark must begin after the senior mark becomes famous. While in infringement, depending on which mark has priority, it is possible that an otherwise infringing mark will be permitted to remain in existence in a limited area. The final factor, whether there is a “likelihood of confusion,” is the linchpin of the infringement cause of action. When determining whether there is a likelihood of confusion courts attempt to “balance the equities” by weighing the interests of the senior user, the junior user, and the public consumer.

The first factor in analyzing infringement, the distinctiveness of the mark, is the very cornerstone of the dilution claim—specifically, claims of blurring—and therefore merits greater explanation. Trademarks can

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33. See Magliocca, supra note 27, at 1000 (“If the junior user’s goods are lousy . . . the quality information conveyed by the mark is also affirmatively diminished by the negative associations consumers might make with the senior user’s products.”).

34. See Ralph S. Brown, Jr., Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 YALE L.J. 1165, 1186 (1948) (“[T]he disappointed expectations of buyers will presumably be vented against any article bearing the symbol. Thus the [mark owner] loses present and perhaps future sales.”).

35. See Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 497 (2d Cir. 1961). For example, using the same or similar mark found on pancake mix and placing it on a bottle syrup is more likely to confuse consumers than if that same or similar mark was placed on clothing. See, e.g., Aunt Jemima Mills Co. v. Rigney & Co., 247 F. 407, 409-10 (2d Cir. 1917).

36. See generally McCarthy, supra note 18, § 16:1-48 (discussing the element of priority, specifically, how it is established and how it can be lost).

37. See id.


40. The greater degree of uniqueness the mark has, the stronger the mark is considered and because the blur “lessen[s] the uniqueness of the [famous senior mark],” there is a need for
be classified into four categories: fanciful, arbitrary, suggestive, and descriptive. How a particular trademark is classified will determine if it is worthy of trademark protection, when it will be received, and how much protection it will be afforded. Those marks classified as fanciful, arbitrary and suggestive are considered inherently distinctive and are therefore regarded as capable of functioning immediately upon adoption as a symbol of origin. Marks that are descriptive—that is, marks that describe a quality, characteristic, function or ingredient of the good or services in connection with which it is used—as well as geographically descriptive marks and surnames—are not initially eligible for trademark protection because they lack inherent distinctiveness (i.e., the capability of identifying a particular source from the first use.) Despite lacking inherent distinctiveness, these marks can receive protection upon the acquisition of secondary meaning, which attaches when a significant number of prospective purchasers understand the term as an indication of association with a particular source, when used in connection with a particular good, service, or organization.

There are also marks that are classified as generic. These marks are not capable of serving the trademark function because they are used as the common name of the product or service, such as the use of word “salt” on a box of table salt. Consequently, such marks cannot be protected. It is important to point out that generic marks encompass not only those that consumers would recognize immediately as being generic, but include marks that once enjoyed full trademark protection which have lost all of their distinctive quality because consumers use the trademark as the name of the product. This unfavorable outcome can occur in various ways, the first being where the owner of the trademark protection from such junior users. Safeway Stores, Inc. v. Safeway Discount Drugs, Inc., 675 F.2d 1160, 1168 (11th Cir. 1982).

42. See McCarthy, supra note 18, § 15:1, at 15-5.
43. See Beran, supra note 24, at 7.
45. See id. § 1052(e)(4).
47. See id.
48. See id. at 766 n.4.
49. See Abercrombie & Fitch Co. v. Hunting World, Inc. 537 F.2d 4, 9 (2d Cir. 1976).
50. See, e.g., Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) (“Marks that constitute a common descriptive name are referred to as generic. A generic term is one that refers to the genus of which the particular product is a species. Generic marks are not registrable [as trademarks].”).
51. See McCarthy, supra note 18, § 12:1, at 12-6.
fails to police the mark, thereby allowing widespread usage by competitors, which in turn leads consumers to believe that the mark is the common descriptive name of the good. 52 A trademark can also become generic where the manufacturer of a product is the first to market such a product, and because there is nothing to compare it to, consumers refer to this new product by the name the manufacturer intended to serve as its trademark. 53 The latter path to generic-ness can be avoided from the onset if the manufacturer listens to counsel, instead of its marketing executives, by using the trademark properly—that is, as a proper adjective, not as a noun—by including its own generic term for the product after the word or phrase the manufacturer considers to be its trademark. 54

For dilution purposes, the distinctiveness of the mark is particularly relevant, specifically the type caused by blurring, which is the reduction of a mark’s distinctiveness, because if the famous mark is sufficiently blurred it could become generic resulting in the cancellation of the mark. 55 Therefore, it is imperative for the owner of a famous trademark to attempt to prevent the use of the same or very similar mark by others on both competing and non-competing goods because even if the mark does not become technically generic, widespread uses of a same or similar mark will undoubtedly cause the mark to lose its uniqueness. 56

III. HISTORY OF DILUTION LAW

“If you allow Rolls Royce restaurants, and Rolls Royce cafeterias and Rolls Royce pants, and Rolls Royce candy, in [ten] years you will

52. See, e.g., Haughton Elevator Co. v. Seeberger, 85 U.S. PAT. Q. 80, 81 (1950) (holding that the mark “ESCALATOR” had become the generic name for the device).

53. Examples of marks that have now become generic because of this second reason include “aspirin,” “cellophane,” and “escalator.” McCarthy, supra note 18, § 12:1, at 12-6.

54. See McCarthy, supra note 18, § 12.27, at 12-79. When the trademark “JELL-O” was in danger of becoming a generic term because of many years of the use of the phrase “Everyone loves JELL-O,” the manufacturer had to change the public perception, thus the use of “JELL-O ® brand gelatin.” The use of the phrase “make a Xerox of this” became so prevalent that the Xerox Corporation placed numerous advertisements basically pleading with consumers to stop using its trademark in that fashion. See id. § 12.26, at 12-70.


56. See Callmann, supra note 29, § 21.11, at 34-35.

Id.
It appears to be well-settled among the courts and commentators that the introduction of the concept of trademark dilution in the United States is attributable to a Harvard Law Review article written by Frank I. Schechter. Though Schechter never referred to his idea as trademark dilution, he stated “the preservation of the uniqueness of a trademark” was the only rational basis for the mark’s protection. Schechter was concerned that the use of certain marks on goods, while not actionable as trademark infringement because the subsequent use of the mark on a product would not cause consumers to believe the product originated from the same manufacturer, would cause the senior user’s mark to become diluted. He reasoned that the trademark would lose its “uniqueness,” thereby relegating it to the commonplace of words of the language. According to Schechter, protection from trademark dilution was warranted because of the large capital expenditures made by owners of trademarks to introduce the mark to consumers “as a symbol and guarantee of the excellence of the quality of the product” bearing the mark.

Usually the owner of a trademark has a limited property right in his trademark—that is, merely the right to exclude others from using the same or similar mark in any manner that would cause harm to consumers as a result of source confusion. Dilution—the idea that there should be...
protection afforded to the owners of a select group of trademarks—is dramatically different from the primary focus of traditional unfair competition law. At least one commentator has described the dilution cause of action as similar to the tort of trespass to property. It is the change from the traditional idea of trademarks combined with the precise and subtle nature of dilution that has puzzled courts from the outset as to just exactly what interest dilution statutes seek to protect. Nonetheless, Schechter’s reasoning that dilution is a specific and distinct claim from infringement and therefore requires an adequate remedy remains true to this day.

Long before the enactment of the FTDA, there were failed attempts to enact a dilution statute on the federal level—first by separate legislation and again at the time of the passage of the 1946 Lanham Act. The decision not to create a federal claim for dilution left it to individual states to enact statutes to provide an adequate remedy for dilution. The first such state statute was enacted by Massachusetts in 1947. By the time the FTDA was enacted in 1996, about half of the states had enacted similar anti-dilution statutes. The source of all but one of those states’ antidilution provisions is section 12 of the Model State Trademark Bill, promulgated by the United States Trademark Association (now the International Trademark Association), which reads:

Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark registered under this Act, or a mark valid at common law, or a trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition

65. See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 157 (1989). This statement is probably more accurate for blurring than for tarnishment because, as will be shown, tarnishment may be actually found somewhere in the middle. See discussion infra Part V.C.1.
66. See Oswald, supra note 38, at 262.
68. See I.P. Lund Trading ApS Kroin Inc. v. Kohler Co., 163 F.3d 27, 48 (1st Cir. 1998) (“Dilution laws are intended to address specific harms; they are not intended to serve as mere fallback protection for trademark owners unable to prove trademark infringement.”).
69. See Oswald, supra note 38, at 265.
70. See id.
71. See id.
72. See id. at 266 n.59 (listing each state’s respective anti-dilution statute).
between the parties or the absence of confusion as to the source of goods or services.

Initially, the state courts were hesitant to apply these statutes “because of their fear that the uncertain boundaries of dilution theory would in effect grant the trademark holder a monopoly in the mark and would restrict free competition.”\(^{75}\) In fact, there were very few cases decided under these anti-dilution statutes prior to 1977, when the New York Court of Appeals decided Allied Maintenance Corp. v. Allied Mechanical Trades, Inc.\(^{76}\) As the use of trademarks increased nationally, the need for a federal statute to bring uniformity to the dilution cause of action became apparent for two reasons.\(^{77}\) First, forum-shopping became prevalent because only half of the states recognized a claim for trademark dilution.\(^{78}\) Second, there was reluctance on the part of the state courts to grant nationwide injunctions for violation of state anti-dilution law.\(^{79}\) The foregoing resulted in Congress finally attempting to remedy these inconsistencies by enacting a federal cause of action.\(^{80}\)

It was not until January 1996, almost seventy years after the publication of Schechter’s article and approximately fifty years after the enactment of the first state anti-dilution statute, that Congress finally recognized a cause of action for trademark dilution. In a House Report, it was acknowledged that a federal anti-dilution statute was necessary “because famous marks ordinarily are used on a nationwide basis and dilution protection is currently only available on a patch-quilt system of protection, in that only approximately twenty-five states have laws that prohibit trademark dilution.”\(^{81}\) The FTDA, as enacted, varied slightly from the state statutes, with a stricter requirement that the senior mark be famous\(^{82}\) rather than just distinctive or well-known.\(^{83}\)

74. Id.
75. Oswald, supra note 38, at 267.
76. See id. at 267-68.
77. See id. at 269.
78. See McCarthy, supra note 18, § 24.75.
79. See H.R. Rep. No. 104-374, at 3 (1995), reprinted in 1995 U.S.C.C.A.N. 1029, 1030; see also Oswald, supra note 38, at 269 (noting that state courts were concerned with the extra-territorial effect of the injunctions they issued — with some uncertainty surrounding their enforceability in states without dilution statutes); Jerome Gilson, Trademark Protection and Practice, § 5.12, at 5-229-30 (2001) (noting that the courts that issued nationwide injunctions forced owners of famous national marks to file multiple suits in order to protect their marks from dilution).
80. “Attempting” is the operative word, since there is still inconsistency among the jurisdictions as a result of the varying application of the FTDA by the circuit courts.
82. In determining whether a mark is distinctive and famous, a court may consider factors such as, but not limited to:
A successful claim for dilution begins with finding the marks sufficiently similar.\textsuperscript{84} Though most examples of dilution are given with the identical trademark being used on other goods and services, it is not necessary for the marks to be identical.\textsuperscript{85} The owner of the famous mark must demonstrate that the marks are “very or substantially similar,” as opposed to “confusingly similar,” which is the standard for trademark infringement.\textsuperscript{86} Even if the marks are similar enough, the FTDA requires the trademark owner to prove its claim of dilution by presenting sufficient evidence that: (1) the mark is famous, (2) the mark is distinctive,\textsuperscript{87} (3) the allegedly diluting use of the mark was adopted after its mark became famous, (4) the other party’s use is in commerce, and (5) the other party is causing dilution to the famous mark.\textsuperscript{88} It is the interpretation of this last element that caused the split among the circuit courts, and the primary reason the Supreme Court weighed in on the issue.

\begin{enumerate}
\item \textit{the degree of inherent or acquired distinctiveness of the mark;}
\item \textit{the duration and extent of use of the mark in connection with the goods or services with which the mark is used;}
\item \textit{the duration and extent of advertising and publicity of the mark;}
\item \textit{the geographical extent of the trading area in which the mark is used;}
\item \textit{the degree of recognition of the mark in the trading areas and channels of trade used by the marks’ owner and the person against whom the injunction is sought;}
\item \textit{the nature and extent of use of the same or similar marks by third parties; and}
\item \textit{whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.}
\end{enumerate}

\textsuperscript{83} \textit{See Oswald, supra} note 38, at 271.
\textsuperscript{84} \textit{See Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.,} 875 F.2d 1026, 1030 (2d Cir. 1989) (concluding that the marks were not sufficiently similar enough to find dilution).
\textsuperscript{85} \textit{See Luigino’s, Inc. v. Stouffer Corp.,} 170 F.3d 827, 832 (8th Cir. 1999) (“To support an action for dilution by blurring, ‘the marks must be similar enough that a significant segment of the target group of consumers sees the two marks as essentially the same.’”).
\textsuperscript{86} \textit{Nabisco, Inc. v. PF Brands, Inc.,} 191 F.3d 208, 218 (2d Cir. 1999) (quoting \textit{Mead Data,} 875 F.2d at 1029, \textit{overruled in part by Moseley v. V Secret Catalogue, Inc.,} 537 U.S. 418, 123 S. Ct. 1115 (2003)).
\textsuperscript{87} This factor has not been adopted by all circuits. \textit{Compare Nabisco,} 191 F.3d at 215 (“Distinctiveness in a mark is a characteristic quite different from fame. It is quite clear that the [FTDA] intends distinctiveness, in addition to fame, as an essential element.”), \textit{with Times Mirror Magazines, Inc. v. Las Vegas Sports News,} 212 F.3d 157, 167 (3rd Cir. 2000) (“[W]e are not persuaded that a mark be subject to separate tests for fame and distinctiveness.”).
IV. THE HARSMS CAUSED BY DILUTION

A. Blurring

“Blurring” is considered the classic or “traditional” form of dilution, and the type that most closely resembles the theory of dilution advanced by Schechter in his influential article. The harm caused by blurring is the diminution in the capability of the famous mark to identify and distinguish the source of goods and services. Blurring occurs when the junior user’s goods and services are identified by a mark that is the same as, or at least strikingly similar to, the mark used by the senior user. This causes the famous mark to lose its ability to serve as a unique identifier of the senior user’s goods. The classic examples used to illustrate famous marks being blurred are Dupont shoes, Buick aspirin, Schlitz varnish, and Kodak pianos.

State statutes (and now the FTDA) protect that unique and distinctive link between the famous mark and a particular line of goods or services. While most of the cases involving dilution by blurring involve a junior user using the mark on different products, resulting in the diminution of the consumer’s mental association between the trademark and goods, some blurring cases involve competing goods that involve what might properly be classified as a “failed trademark infringement” cause of action. The inherent difference between trademark infringement and dilution caused by blurring was illustrated

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89. See McCarthy, supra note 18, § 2:3, at 2-3.
91. See 15 U.S.C. § 1127 (Supp. V 2000) (defining “dilution” as the “lessening of the capacity of a famous mark to identify and distinguish goods or services”) Though this is the definition of “dilution” as defined in the FTDA, it seems to be closer to blurring than tarnishment. See also Schechter, supra note 18, at 825 (describing blurring as “the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods.”).
92. See Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 43 (2d Cir. 1994).
94. See Luigino’s, Inc. v. Stouffer Corp., 170 F.3d 827, 832 (6th Cir. 1999).
95. See Jordache Enters., Inc. v. Hogg Wyld, Ltd., 625 F. Supp. 48, 56 (D.N.M. 1985) (“The paradigmatic dilution case involves the situation where the same or very similar marks are being used on vastly different products.”).
by the Eighth Circuit Court of Appeals in *Viacom Inc. v. Ingram Enterprises, Inc.* 97 In the hypothetical scenario offered by the court, a parent says to her children “‘[l]et’s go pick something out at Blockbuster tonight,’” and while the parent means the video store, the “youngest child assumes they will be buying fireworks made by Viacom,” and the older child asks the parent “‘[w]hich Blockbuster?’” 98 The younger child’s response is evidence of the confusion that is essential to a claim of trademark infringement 99 while the older child’s question evidenced dilution caused by blurring. 100

This injury materially differs from tarnishment because of the speed at which tarnishment occurs and its initial impact on the famous mark. 101 Though the injury caused by blurring is just as palpable as that caused by tarnishment, the need for the higher level of proof of actual harm is necessary to prevent a highly undesirable result. That is, allowing the owner of the famous mark to gain a monopoly over the use of that mark on all products and services. 102 Finally, the reason that the use of marks that actually cause blurring to famous marks needs to be enjoined is best explained by the following quote:

[T]he erosion of the distinctiveness and prestige of a trademark caused by the sale of other goods or services under the same name . . . or simply a proliferation of borrowings that, while not degrading the original seller’s mark, are so numerous as to deprive the mark of its distinctiveness and hence impact[]. 103

**B. Tarnishing**

“Tarnishing” can best be differentiated from blurring by expounding on the “Blockbuster” hypothetical. 104 Assume that the father of the two children is in the car when the mother says “‘[l]et’s go pick something out at Blockbuster tonight.” The father responds by saying he refuses to patronize an establishment that is behind the production of “BLOCKBUSTER” brand-name adult themed paraphernalia. Though he

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97. 141 F.3d 886 (8th Cir. 1998).
98. *Id.* at 891 n.9.
99. This is not meant to say that trademark infringement is presently based solely on evidence of actual confusion. As previously stated, the court must balance the “likelihood of confusion” factors which include evidence of actual confusion. See discussion supra Part II.B.
100. See *Viacom*, 141 F.3d at 891 n.9.
101. See discussion infra Part IV.B.
102. See discussion infra Part V.C.2.
103. Ill. High Sch. Ass’n v. GTE Vantage Inc., 99 F.3d 244, 247 (7th Cir. 1996) (dicta).
104. See discussion supra Part IV.A.
has no affirmative proof that the owner of the famous mark, whoever it may be, is in any way connected with this new business enterprise, he “believes” there must be some connection because he saw an advertisement on late-night television. It is important that in this hypothetical scenario the father first made the connection with the senior user’s famous mark and then proceeded to attribute the unsavory characteristics of the subsequent use with it. That is the fundamental attribute of tarnishment.

The harm inflicted upon a famous mark by tarnishment “generally arises when the [famous] trademark . . . is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner’s product.” Other ways a famous mark can be tarnished include the linking of a famous trademark to products considered to be of shoddy quality or grossly inconsistent with the senior user’s image.

105. See Kellogg Co. v. Exxon Mobil Corp., 192 F. Supp. 2d 790, 807 (W.D. Tenn. 2001) (“On the other hand, dilution ‘by tarnishment’ entails more than merely associating two marks together. This type of dilution only occurs if the junior mark is used in a context that degrades or debases the senior mark associated with it.”).

106. See Hormel Foods Corp. v. Jim Henson Prods., Inc., 73 F.3d 497, 507 (2d Cir. 1996) (“The sine qua non of tarnishment is a finding that plaintiff’s mark will suffer negative associations through defendant’s use.”).


108. See Deere, 41 F.3d at 43 (noting that tarnishment can be found where the plaintiff’s famous trademark is linked to products of shoddy quality).

109. See Steinway & Sons v. Demars & Friends, No. 80-04404, 1981 U.S. Dist. LEXIS 15169, at *14-15 (C.D. Cal. Jan. 28, 1981) (claiming that the prestigious Steinway (piano) mark had been tarnished by the maker of the “Stein-way” clip-on beer handles). The court held that it was inevitable that the defendant’s use of the mark, unless enjoined, would “inevitably tarnish plaintiff’s reputation and image with the public of manufacturing and/or sponsoring only products and activities of taste, quality and distinction.” Id. (emphasis added). The Court came to this conclusion because the defendants’ use of the designation STEIN-WAY in connection with its business and on its products [would tend to make consumers] associate or tend to associate plaintiff’s high quality pianos and plaintiff’s business and cultural activities with defendants’ inexpensive, mass-produced products and with the retail liquor stores, supermarkets and similar merchandising concerns which sell defendants’ products.

Id. at *14. It should be noted that this type of tarnishment is not without its limitations. See, e.g.,
or where a manufacturer’s own mark and product is being sold by
others, though it was established that the products failed to comply with
the manufacturer’s quality control standards for freshness. The
immediacy of the harm caused by tarnishment and the gravity of that
harm is best understood by parsing examples found in case law. It has
been stated, “[t]he speed at which single acts of tarnishing can affect
consumers makes tarnishing significantly more dangerous than blurring
to a mark’s commercial value.” The immediate harm inflicted upon
business reputation and corporate good will that results from tarnishment
was emphasized by the United States District Court for the Eastern
District of New York in Coca-Cola Co. v. Gemini Rising, Inc.
when it stated:

[A] strong probability exists that some patrons of [the senior user] will
be ‘turned off’ rather than ‘turned on’ by [the junior user’s] so-called
‘spoof,’ with resulting immeasurable loss to [the senior user] . . . . [The
senior user’s] good will and business reputation are likely to suffer in
the eyes of those who, believing it responsible for [junior user’s mark],
will refuse to deal with [the senior user’s] company . . . .

In general, most courts have recognized the gravity of the harm by
finding the existence of tarnishment where the famous mark has been
used by the junior user in the context of sexual activity, obscenity, or
illegal activity. The ever increasing use of the Internet has produced

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Exxon Corp. v. Oxxford Clothes, Inc., 109 F.3d 1070 (5th Cir. 1997) (rejecting claim of dilution
based upon Exxon’s poor corporate image). Oxxford argued that certain past acts of the Exxon
Corporation caused tarnishment to its mark “OXXFORD,” because of the use of “EXXON.” The
court observed:

[This argument] ignore[d] the distinction between the use of the appellation ‘EXXON’
as a device of corporate identity and its use as a trade name or trademark, i.e., as an
indicator of origin and/or quality of particular goods and services. The ‘acts’ which
comprise the basis of Oxxford’s claim, such as the Exxon Valdez spill and resulting jury
verdict, bear no relationship to the quality or reputation of the products sold or services
provided under cover of Exxon’s marks (or to the quality or reputation of products sold
or services provided under Oxxford’s marks).

Id. at 1083.

(“Distribution of a product that does not meet the trademark holder’s quality control standards may
result in the devaluation of the mark by tarnishing its image.”). Though this was not a trademark
dilution case, it is important because it shows that tarnishment can occur in many different ways.

111. Recent Cases, Trademark Law-Federal Trademark Dilution Act- Sixth Circuit Holds That
Plaintiffs Need Not Show Actual Harm To Prove Dilution. – V Secret Catalogue, Inc. v. Moseley,


113. Id. at 1190, 91.


Although courts have stated that tarnishment can occur whenever ‘the goodwill and
many examples of dilution caused by tarnishment where the junior user adopts a famous trademark for use on an adult-themed website.\footnote{115} In cases involving dilution by tarnishment, as it relates to the use of the Internet, it has not been necessary for the junior user to have used the famous mark in the domain name so long as the mark was being used somewhere in connection with the website.\footnote{116}

In Helm, the court held that the mark “KING VELVEEDA” used on the junior user’s website to advertise his artwork, tarnished the famous “VELVEETA” mark used on Kraft’s cheese products. The junior user’s website depicted graphic sexuality and nudity alongside images of drug use and paraphernalia.\footnote{117} The court noted these images “conflict with the image that [the owner of the famous trademark] has successfully cultivated for more than [seventy-nine] years as a wholesome, family oriented product.”\footnote{118} The immediate harm being caused to the senior user’s famous mark is this very idea of conflicting images in the minds of consumers. The harm is of the corrosive type because the association the consumer makes between the owner of the famous mark and the tarnishing use causes the former to lose the reputation and good will it once enjoyed.\footnote{119} It is the court’s ability to observe and appreciate the gravity of the harm being inflicted on the famous mark that has resulted in owners of famous marks having greater

reputation of a plaintiff’s trademark is [sic] linked to products which are of shoddy quality or which conjure associations that clash with the associations generated by the owners lawful use of the mark,’ . . . they usually find tarnishment only in cases where a distinctive mark is depicted in an obviously degrading context, often involving a sexual activity, obscenity, or illegal activity.\footnote{Id. (citations omitted) (alteration in original).}


\footnote{117} See Helm, 205 F. Supp. 2d at 949.

\footnote{118} Id. at 949-50 (“The two similar marks would cause consumers to associate [the famous mark] with [the defendant’s] arguably offensive product, thereby tarnishing the . . . mark.”).

\footnote{119} See id. at 950.
success enjoining uses that tarnish their mark rather than blur it.  
Therefore, for all the reasons stated above, it might be better to refer to this harm as a “lethal injection” rather than a “cancer,”121 which might imply damage that takes place over a longer period of time. The instantaneous nature of the harm caused by tarnishing is the very reason that a lower level of actual harm is more appropriate—and indeed necessary.122

V. THE NEED FOR TWO LEVELS OF “ACTUAL HARM”

A. The Beginning of the Dichotomous Approach

There is reason to believe that courts, prior to the enactment of the FTDA, were already applying a dichotomous standard approach to dilution, though never explicitly stating so, and despite statutory language that appeared to contemplate a single standard was to be applied to both forms of dilution.123 This is best illustrated by the Second Circuit’s opinions in Mead Data and Deere where it interpreted New York’s anti-dilution statute.124 Though the New York statute expressly establishes a likelihood-of-harm standard, where the FTDA does not,125 it appears at least arguable that the court in these two decisions was applying a more stringent standard to the blurring claim. The legislative history accompanying the New York statute indicates that the purpose of the statute was to prevent “the whittling away of an established trade-

120. See McCarthy, supra note 18, § 24:104, at 24-221 (“[Tarnishment] has had relatively consistent success when defendant has used plaintiff’s mark in an unwholesome or degrading context.”); Oswald, supra note 38, at 271 (The determination of whether a junior mark places a senior mark in an unwholesome or unsavory light is necessarily heavily fact-dependent. The subjective evaluations engaged in by courts, whether they are applying state statutes or the federal Act, work well in this context.); see also id. at 278 (noting that junior user’s use of the mark in question “is more likely to damage the senior user’s business reputation (because customers may mistakenly believe that the senior user promotes or condones illegal drug use) than it is to diminish the ability of the senior mark to identify and distinguish the senior user’s carbonated beverage”).

121. Allied Maint. Corp. v. Allied Mech. Trades, Inc., 369 N.E. 2d 1162, 1165 (N.Y. 1977) (describing dilution in general as a “cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trade-mark or name.”).

122. See discussion infra Part V.C.1.


mark’s selling power and value through its unauthorized use by others upon dissimilar products.126 It is not surprising that this purpose is very similar to that underlying the enactment of the FTDA, since the FTDA was patterned after the language and enacted for the same purpose, as the state statutes.127

In *Mead Data*, the court was asked to determine whether the use of the trademark “LEXUS,” as used on luxury cars, blurred the distinctive quality of the trademark “LEXIS,” as used in connection with a computerized legal research service.128 Though the court concluded that there was no substantial similarity between the two marks, which would have been enough to defeat the blurring claim, the court noted that there were additional factors that mitigated against a finding of blurring.129 For instance, the “LEXIS” mark, though well-known within the legal community, had very little selling power outside that limited market.130 The court made a point of stating that “it does not follow that every junior use of a similar mark will dilute the senior mark in the manner contemplated by the [statute].”131 The court could not conceive of a scenario where the use of the “LEXUS” mark would cause harm to the “LEXIS” mark, specifically because the “LEXIS” mark “circulate[d] only in a limited market [making] it . . . unlikely to be associated generally with the mark for a dissimilar product circulating elsewhere.”132 Finally, the court took into account that the users of the service bearing the “LEXIS” mark were highly sophisticated.133 Based

126. *Mead Data*, 875 F.2d at 1028 (quoting legislative history of N.Y BUS. LAW 368-d) (citation omitted).
127. See discussion supra Part III.
128. See *Mead Data*, 875 F.2d at 1027.
129. See id. at 1030. While the majority held that the two marks were not substantially similar because each sounded different when properly pronounced, Judge Sweet in his concurrence expressly disagreed. See id. at 1032. This is important because the majority could have ended its analysis after concluding that the marks were not substantially similar. See id. at 1029. Instead, the court went on to further analyze the facts of the case and appears to focus on the fact that there does not appear to be any harm to the owner of the trademark “LEXIS” by the use of the trademark “LEXUS.” See id. at 1030-32.
130. See id. at 1031.
131. Id. This statement is equally applicable to both tarnishment and blurring, but may be more relevant to blurring because of the need for the junior user’s mark to cause actual harm to the senior mark, the standard proposed by this Note. This statement is equally applicable to the FTDA and apparently has been followed, though not explicitly stating so, in *Ringling Bros. and Westchester Media*. See discussion infra Part V.B.1, 3.
132. *Mead Data*, 875 F.2d at 1031. As stated in the discussion of *Nabisco*, infra Part V.B.2, because both products were very similar and would be advertised and sold nationally, the court could have been persuaded that there was actual harm and therefore requiring judicial intervention.
133. See *Mead Data*, 875 F.2d at 1031. It is interesting to note that this same court in *Nabisco* looked to the sophistication of children, the predominate consumers of the product, and decided that
on the latter, the court held that it was “unlikely that, even in the market where [the senior user] principally operates, there will be any significant amount of blurring between the [two marks].”\footnote{134. Mead Data, 875 F.2d at 1032.}

In \textit{Deere}, the Second Circuit was confronted with the question of whether an advertiser’s use of an altered form of its competitor’s famous trademark to identify the competitor’s product in a comparative advertisement constituted tarnishment.\footnote{135. See \textit{Deere} \& Co. v. MTD Prod., Inc., 41 F.3d 39, 40 (2d Cir. 1994). The altered form of the Deere logo was similar to that used by Deere in its trademark logo except in this case it was depicted as a smaller deer, apparently running in fear, and being chased by a dog and the defendant’s Yard-Man lawn tractor. See \textit{id.} at 41.} After discussing the alterations the junior user made to the senior user’s famous trademark, the court did not discuss the factors considered by the majority in \textit{Mead Data}, particularly, the substantial similarity of the marks in question, the size of the relevant markets of the respective products, and the sophistication level of the consumers.\footnote{136. See \textit{Mead Data}, 875 F.2d at 1030-31 (discussing the limited market in which the “LEXIS” mark is used and the sophistication of the parties using the service bearing the mark).} Instead, the court held that the Deere trademark had been tarnished simply because the type of alterations made to it “risk the possibility that consumers will come to attribute unfavorable characteristics to the mark and ultimately associate [it] with inferior goods and services.”\footnote{137. \textit{Deere}, 41 F.3d at 45 (emphasis added).}

Though the court initially understood its decision to create a completely new form of dilution,\footnote{138. See \textit{id.} at 44.} in a later case it observed that its \textit{Deere} decision is better understood as adopting a broader view of tarnishment than had been previously recognized.\footnote{139. See \textit{Hormel Foods Corp. v. Jim Henson Prods., Inc.}, 73 F.3d 497, 507 (2d Cir. 1996).} Besides failing to discuss any of the factors weighed by the majority in \textit{Mead Data}, the court did not have, nor did it require, any survey evidence to demonstrate that a significant percentage of the relevant population actually viewed the junior user as having a tarnishing effect on the well-known senior mark.\footnote{140. \textit{But cf. Mead Data}, 875 F.2d at 1031 (noting that, while seventy-six percent of attorneys associated the mark “LEXIS” with the plaintiff’s service, only one percent of the general adult population recognized the mark “LEXIS,” half of that percentage being attorneys and accounts).}

This fact further supports the view that the \textit{Deere} court established a lighter burden for proving tarnishment. The significance of the court’s holdings in \textit{Mead Data} and \textit{Deere} as it sought because their sophistication was low there was a greater chance of harm. Once again this fact tends to show that while \textit{Nabisco} may state that a likelihood of harm standard is applicable, the court really did apply a more stringent test. See \textit{discussion infra} Part V.B.2.
to define the “likelihood-of-harm” standard is not fully appreciated until these decisions are viewed together. The senior user in *Mead Data* had to meet a higher burden to prove its mark had been blurred than the plaintiff in *Deere* had to in order to prove its tarnishment claim. This again may be attributable to the court’s ability to recognize the severity of the harm caused by tarnishment.\(^{141}\) Therefore, without ever stating so, the Second Circuit was applying the dichotomous approach suggested by this Note, even though it was interpreting a statute contemplating that the same standard would be applied to either form of dilution.

**B. The “Split” Among the Circuits**

1. **Ringling Bros.-Bardeen & Bailey Combined Shows, Inc. v. Utah Division of Travel Development\(^{142}\)**

In this case, the United States Court of Appeals for the Fourth Circuit was asked to decide whether Ringling Brothers’ (“Ringling”) registered trademark, “THE GREATEST SHOW ON EARTH” had been diluted by use of the phrase “THE GREATEST SNOW ON EARTH” by the State of Utah to advertise its winter sports program.\(^{143}\) In 1961, Ringling obtained federal trademark registration for the mark it had used since 1872 in connection with its traveling circus.\(^{144}\) Utah had been using the “THE GREATEST SNOW ON EARTH” mark consistently since as early as 1962, and actually received federal trademark registration for it despite Ringling’s opposition to its application.\(^{145}\) Since there was no dispute either as to the fame of the mark used by Ringling or its widespread use,\(^{146}\) the court and the parties acknowledged that the only issue to be decided was whether blurring had occurred.\(^{147}\) After a thorough analysis of the dilution cause of action and its history, the Fourth Circuit affirmed the decision of the lower court that held Ringling failed to demonstrate through proof of actual economic harm to

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141. *See discussion supra* Part IV.B.
143. *See id.* at 451.
144. *See id.*
145. *See id.* at 451-52.
146. Ringling performed approximately one thousand shows annually to an estimated twelve million people in ninety-five cities. More importantly, Ringling’s mark was observed by more than seventy million people each year. The revenues derived from the goods and services bearing or using the mark exceeded $103 million, and Ringling’s spent approximately $19 million on advertising for the fiscal year ending January, 1997. *See id.*
147. *See id.* at 452 & n.1.
the mark’s “selling power” that its mark had been blurred by Utah’s use of a similar mark.\textsuperscript{148} Though the court itself acknowledged that proof of economic harm to the selling power of a famous mark would be difficult, it observed that means of proof were available, such as proof of actual loss of revenues, carefully constructed, and consumer impressions from which actual harm economic harm could be inferred, as well as other indirect evidence that might complement the latter two forms of proof.\textsuperscript{149}

Despite the Supreme Court’s holding in \textit{V Secret Catalogue}, the holding in this case would remain unchanged under the dichotomous approach proposed in this Note, which would require Ringling to satisfy the higher level of proof of actual harm. Although before it established its definition of “actual harm,” the Fourth Circuit did discuss the possibility of inferring actual harm from circumstantial evidence, it later rejected this method as the use of “long leaps of inference” and “judicial presumption[s to find] future harm.”\textsuperscript{150} Not only did the Fourth Circuit decline to presume that the junior mark caused economic harm to the famous mark, but the court further suggested that some junior uses would not affect the economic value of the senior mark at all, perhaps because of lack of exposure or general lack of consumer interest in both marks’ products, and that some junior uses might even enhance the value of a senior mark by drawing renewed attention to it.\textsuperscript{151} While this is arguably true in some cases, the relevance of those conclusions made by the court is questionable, given that it could have reached the correct result even by applying the non-economic definition of “actual harm” stated in \textit{V Secret Catalogue} and requiring the higher level of proof of actual harm proposed by this Note.

It is the opinion of this author that the Fourth Circuit’s decision is best understood as an extension of the majority’s reasoning in \textit{Mead Data}, that is, the Fourth Circuit appears to be stating the same factors examined in that Second Circuit decision in its search for some form of recognizable harm. First, there is little doubt that the Fourth Circuit did not take into consideration that the two marks at issue had been used concurrently for well over thirty years.\textsuperscript{152} Second, not only was the use

\textsuperscript{148} See id. at 451.
\textsuperscript{149} See id. at 464-65.
\textsuperscript{150} Id. at 464.
\textsuperscript{151} See id. at 460.
\textsuperscript{152} See Stephen W. Feingold et al., \textit{Circuits Struggle with Dilution Law’s Lack of Clarity,} Nat’l L.J., May 1, 2000, at C8 (“[I]t is reasonable for a court to require a showing of actual dilution when two marks have co-existed for a long time.”).
of the similar mark not novel, the survey evidence introduced by Ringling negated any chance it had to prove that, in fact, that the two marks at issue were being blurred in the minds of consumers. 153 The survey showed that zero percent of those surveyed outside of Utah completed the statement “THE GREATEST [blank] ON EARTH” with the word “snow” and less than one percent actually completed the statement with “show” and associated the result with Ringling, while also completing the statement with “snow” and associating the completed statement with Utah. 154

While the Fourth Circuit disagreed with the lower court’s use of the “Mead Data factors” in connection with a claim under the FTDA, the lower court’s interpretation of the sophistication level of consumers is relevant to the Fourth Circuit’s decision. 155 While finding that Ringling’s consumers were generally unsophisticated, a finding that would usually weigh in favor of finding blurring, 156 the lower court had found that Utah’s mark was used in a very limited market and that within that market, only targeted to highly sophisticated consumers. 157 This is relevant in finding a lack of blurring because these consumers are part of the select group that would potentially come into contact with both marks and therefore, based on its high degree of sophistication, the existence of blurring would be very unlikely. 158 Therefore, it appears that by simply following the more stringent standard used by the majority in Mead Data, the court could have arrived at the same conclusion—there was no real potential of harm to Ringling’s mark. 159

Though this decision was reached before Nabisco, the Fourth Circuit appears to agree that blurring is a very fact-sensitive claim and that factors elaborated in one case may be totally inappropriate in

153. The problem was that Ringling’s survey was used to prove only an “instinctive mental association” of the two marks, the only requirement Ringling thought was necessary to prove blurring. Ringling Bros., 170 F.3d at 462 (internal quotation marks omitted). Ringling’s reasoning was patently wrong even by the standard courts used in interpreting state statutes, which would have required more evidence of actual harm. See, e.g., Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1031-32 (2d Cir. 1989).

154. See Ringling Bros., 170 F.3d at 462. The evidence Ringling submitted for those surveyed in Utah was slightly more favorable to its claim. See id.

155. See id. at 463-64.


158. See id. at 621-22.

159. See discussion supra Part V.A.
An important distinction between *Ringling* and *Nabisco*, in which blurring was found to exist, is that in *Ringling* the respective trademarks were being used on non-competing goods, a factor that undoubtedly plays an important role. Also, the Fourth Circuit was not dealing with two nationally advertised products that could potentially be sold on the same shelf in the grocery store. While in *Ringling*, the owner of the famous mark did not present sufficient evidence of blurring, the court established an unnecessarily higher burden for an owner of a famous trademark to meet to satisfy the actual-harm standard, which was due in part to its concern that creating a lower burden would in effect grant a property-right-in-gross to a famous mark. That concern was addressed in *Nabisco* and the Second Circuit agreed that allowing blurring to be proven by establishing the substantial similarity of the marks would in effect award a property-right-in-gross to the famous mark. Finally, though proof of economic harm is no longer required, it is important to note the Fourth Circuit’s decision would have led to an undesirable result if it had been adopted as the correct standard, at least from the viewpoint of an owner of a famous mark who desires to bring a tarnishing claim. Because the court did not explicitly limit its holding to blurring, it evidently would have required the same level of proof for tarnishment where the harm inflicted on the famous mark is readily recognizable.

2. *Nabisco, Inc. v. PF Brands, Inc.*

In this case, the United States Court of Appeals for the Second Circuit found that Nabisco’s use of orange, bite-sized, cheddar cheese-flavored, goldfish-shaped crackers would dilute the distinctive quality of Pepperidge Farm’s similarly produced crackers. Nabisco had contracted with the Nickelodeon Television Network to develop a snack product based on “CatDog,” a popular Nickelodeon children’s
program.\textsuperscript{167} About seventy-five percent of the small orange crackers
used by Nabisco were in the shape of the two-headed “CatDog”
character and a bone.\textsuperscript{168} Pepperidge Farm was only concerned with the
similarity of the remaining one quarter of the crackers which bore close
resemblance to its famous “GOLDFISH” brand crackers in color, shape,
size and taste,\textsuperscript{169} even though the “CatDog” fish was visibly larger and
flatter with markings on one side.\textsuperscript{170} After receiving a cease-and-desist
letter, Nabisco filed a complaint seeking a declaratory judgment that its
product did not violate any of Pepperidge Farm’s rights in the
“GOLDFISH” trademark.\textsuperscript{171} Pepperidge Farm counterclaimed, asserting
that Nabisco’s use diluted the “GOLDFISH” trademark under the
FTDA.\textsuperscript{172}

This case involved only dilution by blurring, rendering it
unnecessary for the Second Circuit to discuss and differentiate harm
caused by tarnishment. While Pepperidge Farm originally alleged that it
had to “protect its wholesome, ‘family-oriented’ product and image from
tarnishment by association with the ‘coarse and/or unsavory elements’ of
Nickelodeon’s CatDog program,”\textsuperscript{173} the district court emphasized
skepticism about the possibility that Nabisco’s use tarnished its mark.\textsuperscript{174}
The Second Circuit, acknowledging that a valid claim for blurring was
presented, stated that Nabisco’s production of the “CatDog” crackers
“strikes at the heart of what [anti-] dilution law is intended to prevent:
the ‘gradual diminution or whittling away of the value of the famous
mark by blurring uses by others.’”\textsuperscript{175} The district court further reasoned,
and the Second Circuit agreed that “the presence of Nabisco’s goldfish-

\textsuperscript{167} See id. at 213.
\textsuperscript{168} See id.
\textsuperscript{169} In this case, the famous status of Pepperidge Farm’s trademarked “Goldfish” design was
not disputed. See id. at 215.
\textsuperscript{170} See id. at 213.
\textsuperscript{171} See id.
\textsuperscript{172} See id.
\textsuperscript{173} Nabisco, Inc. v. PF Brands, Inc., 50 F. Supp. 2d 188, 205 n.26 (S.D.N.Y. 1999), aff’d, 191
F.3d 208 (2d Cir. 1999), overruled in part by Moseley v. Victoria’s Secret Catalogue, Inc., 537 U.S. 418,
\textsuperscript{174} See id. (noting that while Pepperidge Farm might cringe at CatDog’s depiction of
“garbage and sewers” or its cartoon violence, these elements of the program do not rise to the
level of tarnishment”). Also relevant for the purposes of discussing “tarnishment” was the fact that
the district court observed that there was no evidence that Nabisco’s use depicted obscene, sexual,
or illegal activities. See id.
\textsuperscript{175} Nabisco, 191 F.3d at 214 (quoting Nabisco, 50 F. Supp. at 209-10) (internal citation
omitted in original).
shaped cracker within the CatDog mix is likely to weaken the focus of consumers on the true source of the Goldfish.”  

While the Second Circuit affirmed the district court’s holding that found that Nabisco’s use blurred the “GOLDFISH” mark, it did not agree to its use of the Mead Data factors as a fixed test for claims brought under the FTDA. Instead, it promulgated a new non-exhaustive list of ten factors, which included such criteria as: 1) distinctiveness of the mark; 2) similarity of the marks; 3) proximity of the products and likelihood of bridging the gap; 4) interrelationship among the distinctiveness of the senior mark, the similarity of the junior mark, and the proximity of the products; 5) shared consumers and geographic limitations; 6) sophistication of consumers; 7) actual confusion; 8) adjectival or referential quality of the senior use; 9) harm to the junior user and delay by the senior user; and 10) effect of senior’s prior laxity in protecting the mark. After balancing these factors, the court concluded that Pepperidge Farm had demonstrated a sufficient likelihood of harm to its mark.

Though the Second Circuit’s holding would remain unchanged under the dichotomous approach proposed by this Note, characterizing the Second Circuit’s analysis as a “likelihood-of-harm” standard in Nabisco was inaccurate. Designating that it was applying a “likelihood-of-harm” standard may have resulted from its disagreement with the Fourth Circuit’s characterization of what constituted “actual harm” under the FTDA. The court disagreed with the Fourth Circuit’s requirement that actual harm be shown through evidence of actual loss of revenues or the carefully constructed consumer survey. These requirements were considered “an arbitrary and unwarranted limitation on the methods of proof.” The court also disagreed with the broader

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176. Id.
177. The “Mead Data factors” are not the factors relied upon by the majority, but were promulgated by Judge Sweet in his concurrence, and so were not technically followed in Mead Data. These factors are the similarity of the marks; similarity of the products covered by the marks; sophistication of consumers; predatory intent; renown of the senior mark; and the renown of the junior mark. See Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1035 (2d Cir. 1989) (Sweet, J., concurring).
178. See Nabisco, 191 F.3d at 227.
179. See id. at 217-22.
180. See id. at 222-23.
181. See discussion supra Part V.B.1.
182. See Nabisco, 191 F.3d at 224. The Nabisco court characterized this as the narrow position adopted by the Fourth Circuit in requiring actual dilution. See id.
183. Id. at 223. The court also observed that even if diminished revenues could be proven, “it would be extraordinarily speculative and difficult to prove that the loss was due to the dilution of
interpretation of the Fourth Circuit’s decision, which would have required the same forms of evidence of actual harm, but would have required that the junior user be already currently operating in the marketplace.\(^\text{184}\)

According to the Second Circuit, the Fourth Circuit’s interpretation of the FTDA would subject the owner of a famous mark to an injury that had no remedy because, while the FTDA could only be invoked when the senior mark suffered harm, it would only provide the senior user with injunctive relief since damages were not obtainable absent willfulness.\(^\text{185}\) The court reasoned that interpreting the FTDA in that manner would be harmful to the junior user because it would be prevented from seeking declaratory relief and would be forced to invest in advertising and product promotion without knowing if it will be permitted to use its mark.\(^\text{186}\)

Now that it has been decided that the Fourth Circuit’s definition of what constitutes “actual harm” is not the law, the Second Circuit’s concerns with that decision can be discarded. Once that is done, it is clear that, in deciding \textit{Nabisco}, the Second Circuit did employ an actual-harm standard, and that Pepperidge Farm was able to satisfy the higher level of proof as required by the proposition set forth in this Note. The Second Circuit appropriately began its analysis by observing that:

[In the future, courts] considering [this] new federal statutory right . . . would do better to feel their way from case to case, setting forth in each those factors that seem to bear on the resolution of that case, and only eventually to arrive at a consensus of relevant factors on the basis of this accumulated experience.\(^\text{187}\)

This statement acknowledges that blurring cases are very fact-sensitive and need to be decided based on those facts, and not a rigid set of factors.\(^\text{188}\) Some factors the court took into consideration resemble those relied upon by the majority in \textit{Mead Data}, in that court’s search for evidence of harm to the senior mark.

\(^{184}\) See id. This sound reasoning by the court was acknowledged when Congress later amended the Lanham Act to allow owners of famous marks to intervene in trademark registration proceedings by filing a notice of opposition with the Patent and Trademark Office based on the belief that the mark would cause dilution. See 15 U.S.C. § 1063(a) (Supp. V 2000).

\(^{185}\) See \textit{Nabisco}, 191 F.3d at 224.

\(^{186}\) See id.

\(^{187}\) Id. at 227.

\(^{188}\) See id.
First, the Second Circuit looked to the sophistication of the consumers purchasing the products—that is, the adults, and not the children to whom the marketing of the products is directed. The court reasoned that adults purchasing these products would be less sophisticated in recognizing the differences between the two types of fish-shaped crackers, let alone have an awareness of Nickelodeon’s CatDog. Second, the court noted that the two products would be direct competitors and in fact, were substitutes for each other. Third, these products were not sold in limited markets, but would be nationally advertised and sold in grocery stores throughout the world. This evidence, including the characterization of Pepperidge Farm’s mark as arbitrary, was sufficient to prove the necessary level of actual harm as that proposition is set forth in this Note. For that reason, it is more likely that the court was continuing to apply the same analysis it did in Mead Data, except that this time there was sufficient evidence to pass the more stringent test for blurring.

3. **Westchester Media v. PRL USA Holdings, Inc.**

The United States Court of Appeals for the Fifth Circuit addressed the question of whether the use of the “POLO” mark, which had become famous in connection with the merchandise sold by Ralph Lauren, had been blurred by the use of that same mark on an equestrian magazine. Ralph Lauren has built his multi-billion dollar fashion empire (“PRL”) with the help of his famous “POLO” trademark used on various merchandise from men’s apparel to bed sheets. PRL originally alleged

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189. See id. at 220-21.
190. See id.; cf. Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1031-32 (2d Cir. 1989) (noting the high level of sophistication of the users of service bearing the “LEXIS” mark would preclude any significant amount of blurring).
191. See Nabisco, 191 F.3d at 220.
192. See id. (“If the consumers who buy the products of the senior user never see the junior user’s products or publicity, then those consumers will continue to perceive the senior user’s mark as unique, notwithstanding the junior use.”); cf. Mead Data, 875 F.2d at 1031 (noting that “LEXIS” mark circulated only in a limited market and was unlikely to be associated with a mark on a dissimilar product marketed to different consumers).
193. See Nabisco, 191 F.3d at 218 (“In sum, because the use of the goldfish shape has no logical relationship to a bite-sized cheese cracker . . . we believe that Pepperidge Farm’s senior mark is reasonably distinctive.”). Marks that are classified as arbitrary are inherently distinctive, thus entitling them to a greater degree of protection. See discussion supra Part II.B.
194. See discussion supra Part V.A.
195. 214 F.3d 658 (5th Cir. 2000).
196. See id. at 669.
197. Westchester Media did not contest the mark’s famous status. See id. at 670.
198. See id. at 661.
that the use of “POLO” on the magazine both blurred and tarnished its “POLO” mark, but the district court observed that “[t]he crux of PRL’s argument is that its mark is diluted by a blurring of identification between its goods and the one currently produced by [the junior user].” 199 The district court appeared to be well aware of the distinction between the two separate harms and actually observed that the application of the Mead Data factors tended to favor PRL, yet it did not elaborate on that conclusion. 200 In the end, the district court declined to rule on PRL’s dilution claim after finding infringement. 201

Despite the district court’s reluctance, the Fifth Circuit decided the merits of the dilution claim anyway because of its potential to afford owners of famous trademarks a distinct basis of equitable relief. 202 As the issue of the applicable standard of harm to be applied in dilution cases was one of first impression, the Fifth Circuit decided to adopt the actual-economic-harm standard promulgated by the Fourth Circuit in Ringling because that “standard best accords with the plain meaning of the statute.” 203 This case is distinguishable from all other United States Circuit Court dilution cases in that the court found trademark infringement. 204 While the court’s holding would be unaffected by applying the dichotomous approach, its adoption of Ringling’s high standard of proof to establish actual harm is flawed for the same reasons it was in that case. 205 As in Ringling, the Fifth Circuit could have evaluated the relevant blurring factors and reached the same conclusion, i.e., that there was no presence of or potential for actual harm.

If the Fifth Circuit in this case had weighed the same relevant factors used by the majority in Mead Data, it would nonetheless have found a lack of a sufficient level proof of actual harm to the PRL’s “POLO” mark. First, PRL provided no conclusive survey evidence that tended to prove its mark was blurred. 206 Second, it is arguable that the purchasers of both products bearing the “POLO” mark had a high sophistication level. Consumers purchasing the magazine may be more
sophisticated given the exclusivity of the sport of polo and the fact that there are very few magazines devoted to it. The sophistication level of consumers purchasing merchandise bearing the “POLO” marks also tends to be high, given the pricing structure of that merchandise and the propensity of others to produce so-called knock-offs. Third, though the producers of the magazine and PRL market and distribute their respective products nationally, they undoubtedly operate in a limited market for the same reasons stated for the high sophistication levels of the relevant consumers, i.e., the exclusivity of the sport and the price of “POLO” brand merchandise.

Additionally, the marks in this case had been used concurrently for many years, a fact relevant in Ringling, and there was also a continuing relationship between the magazine and PRL before a formal objection was made by PRL. Another factor that weighed against a finding of “blurring” was the character of the “POLO” mark itself. This mark would be classified as arbitrary when used as a source indicator of merchandise. In most cases, that would mean that it is entitled to a greater degree of protection, but that reasoning is offset for a number of reasons. The “POLO” mark, though properly classified as arbitrary when used on PRL’s merchandise, is not so when used on this specific magazine. The word “polo” was first used as the name of the sport before it was ever adopted by PRL as its trademark, but PRL was attempting to own it for all uses, which is undoubtedly an undesirable result by all accounts, presenting an interesting issue unique in blurring cases decided under the FTDA thus far. If the court held that dilution by blurring was present, there was significant potential for a violation of Westchester Media’s First Amendment rights.

207. See Westchester Media, 214 F.3d at 674.
208. See id.
209. See Westchester Media, 103 F. Supp. 2d at 955-56.
210. See discussion supra Part V.B.1.
211. See Westchester Media, 214 F.3d at 661-63.
212. There is no logical connection between the mark POLO and items of clothing. See discussion supra Part II.B.
213. Given that the magazine originally covered the subject of equestrian sports and lifestyles, and arguably continued to do so even after the change in ownership, the mark properly describes the contents of the magazine and therefore should be designated as descriptive for trademark purposes. See discussion supra Part II.B.
214. See Westchester Media, 214 F.3d at 673 (stating that:
PRL products became famous by basking in the reflected glow of an elegant sport. PRL now asserts that it, not the sport, is the source of the glow....[W]e cannot be blind... to the fact that PRL is arrogating the very name of a sport...[and, i]n a sense...biting the hand that fed it.).
215. See id. at 664-65.
The court was able to avoid the First Amendment issue on the infringement claim by directing the lower court, on remand, to consider requiring Westchester Media to attach a disclaimer to its magazine.\textsuperscript{216} Although the disclaimer might have served the purpose of alleviating any consumer confusion as to PRL’s affiliation or sponsorship of the magazine, it would not have provided an adequate remedy for blurring since that sort of protection does nothing to protect the distinctiveness of the mark. Finally, given the distinct factual nature of this case and that found in \textit{Ringling}, it is not surprising that these courts decided that such a high level of proof of actual harm was necessary, even though as suggested by this Note the level of proof of actual harm required is unnecessary.\textsuperscript{217}

4. \textit{V Secret Catalogue, Inc. v. Moseley}\textsuperscript{218}

The United States Court of Appeals for the Sixth Circuit had to decide whether V Secret Catalogue, Inc.,\textsuperscript{219} the owner of the federally registered trademark “VICTORIA’S SECRET,” had established a valid claim for both blurring and tarnishing against Victor and Cathy Moseley, owners of a “mom and pop” adult novelty store in a small strip mall in Elizabethtown, Kentucky,\textsuperscript{220} called “VICTOR’S LITTLE SECRET.”\textsuperscript{221} Though the Supreme Court reversed the Sixth Circuit’s decision based on lack of sufficient evidence of the Court’s definition of “actual harm,” it is important to recount the facts and proceedings below since it is the opinion of this author that the owner of the famous trademark will succeed on remand with its tarnishing claim by being able to satisfy the lower level of proof of actual harm required by the proposition set forth in this Note.

As with most FTDA claims heard by the circuit courts, there was no issue as to the famous status of the senior mark, “VICTORIA’S

\textsuperscript{216} See id. at 675.
\textsuperscript{217} See discussion supra Part V.C.2.
\textsuperscript{218} 259 F.3d 464 (6th Cir. 2001), rev’d and remanded, 537 U.S. 418, 123 S. Ct. 1115 (2003).
\textsuperscript{219} V Secret Catalogue, Incorporated is the owner of the federally registered trademark “VICTORIA’S SECRET,” which it then licenses the use of to plaintiffs Victoria’s Secret Catalogue, LLC and Victoria’s Secret Stores, Inc. See \textit{V Secret Catalogue}, 259 F.3d at 466.
\textsuperscript{220} See id. at 466-67. The Moseleys’ original name for the store was “Victor’s Secret” and changed it to “Victor’s Little Secret,” after receiving a cease and desist letter from Victoria’s Secret. After finding this change to be unsatisfactory, Victoria’s Secret commenced an action in the district court. See id. at 476-77.
SECRET.”222 The district court, with very little discussion of its reasoning, found that the Moseleys’ use both blurred and tarnished the “VICTORIA’S SECRET” mark.223 The Sixth Circuit, after analyzing the decisions in Ringling and Nabisco,224 adopted and applied the “likelihood-of-harm” standard in affirming the district court’s holding.225 The court reasoned that while consumers would not go to the Moseleys’ store looking for products known to be made by Victoria’s Secret, “consumers who hear the name ‘Victor’s Little Secret’ are likely automatically to think of the more famous store and link it to the Moseleys’ adult-toy, gag gift, and lingerie shop.”226 Therefore, the court stated that the facts of this case presented a classic example of dilution caused by tarnishing (associating the Victoria’s Secret name with sex toys and lewd coffee mugs) and by blurring (linking the chain with a single, unauthorized establishment).227

Instead of seizing an opportunity to formulate a framework for determining the level of harm necessary for each form of dilution, given that the facts of this case presented potentially valid claims of both blurring and tarnishing,228 the Sixth Circuit simply adopted the standard used by Nabisco and the list of ten factors that court used to determine dilution, though it did not discuss the factors individually in holding that the “VICTORIA SECRET” mark had been diluted.229 Although the court’s holding, enjoining the use of the Moseleys’mark, would remain unchanged under the dichotomous approach, the court was only correct in issuing an injunction because of the tarnishing effect the Moseleys’ mark has on the “VICTORIA’S SECRET” mark, since the argument that blurring was present was not substantiated by the level of proof presented by the owner of the famous mark. While the Sixth Circuit stated that the facts presented a classic example of dilution by blurring (linking the chain with a single, unauthorized establishment), it would have been more accurate to classify this as a potentially valid claim of

222. See id. at 467. There are over 750 Victoria Secret stores throughout the world and over four hundred million of the store’s catalogues are distributed each year, thirty-nine thousand of which were distributed in Elizabethtown, Kentucky. The court also noted a recent consumer survey that rated Victoria’s Secret as the ninth most famous brand in the apparel industry. See id. at 466.


224. See V Secret Catalogue, 259 F.3d at 475-77.

225. See id. at 477.

226. Id.

227. See id.

228. See Recent Cases, supra note 111, at 731.

229. See V Secret Catalogue, 259 F.3d at 475-76.
blurring. If the court would have discussed some of the more important factors set out in Nabisco, it is possible that it would have had a difficult time finding the presence of the necessary level of actual harm to establish blurring. The Sixth Circuit, at least as it pertains to the blurring claim, appeared to presume that mental association alone was enough to establish dilution, but that was never a presumption made in any other dilution case heard by the circuit courts, and now that presumption has been expressly rejected by the Supreme Court.230

By simply analyzing just a few of the relevant blurring factors, the Sixth Circuit could have decided that blurring was not present on the facts of this case. Specifically, the court did agree with the district court’s characterization that the sophistication level of consumer shopping at Victoria's Secret was high.231 The high sophistication level combined with the fact that the “VICTORIA’S SECRET” mark is usually found in upscale malls and is marketed on a national level, while in reality it caters to a slightly more limited market given the expensive nature of the merchandise, tends to negate the finding of blurring when viewed with facts about the mark adopted by the Moseleys.232 The Moseleys use their mark on a store that is located in a strip mall in a small town in Kentucky that also advertises the sale of pagers in their storefront window.233 In addition, their mark would have very little selling power outside the small Kentucky town in which they operate their store considering the Moseleys did not intend to expand beyond their current location.234 Thus, the foregoing translates to a negligible amount of direct competition and most importantly few, if any, consumers being exposed to both marks outside this limited area, a fact relevant in most cases where blurring was not found to exist, including Ringling.235

Turning to the tarnishing claim, it is conceivable that to the Sixth Circuit the tarnishing was so apparent that it relied predominantly on that claim in its decision to enjoin the further use of the Moseleys’

231. See V Secret Catalogue, 259 F.3d at 477.
233. See id. at *8.
234. See id. at *11.
235. See discussion supra Part V.B.1.
Indeed, it is important to note that Victoria’s Secret, Inc. had been informed of Moseleys’ use of the mark by a letter wherein the writer expressed some concern over the use of the mark by the Moseleys and actually declared that he was “personally offended by [their] use of a bona fide, reputable company’s trademark to promote [their] unwholesome, tawdry merchandise.” This is significant for two reasons. First, it tends to show how quickly a consumer can become offended as a result of a tarnishing use of a famous trademark. Second, it shows that blurring, while it may be present, is not always readily identifiable by consumers, especially as in this situation, where the junior mark is used in such a limited market.

The Supreme Court did state that tarnishing is not a necessary consequence of mental association, but that statement, while completely accurate for blurring, does not appear to be as strong in light of the fact that someone was offended enough by the Moseleys’ use of a similar mark to write a letter expressing that feeling after making that mental association. The Supreme Court further noted that the writer of that letter did not form any different impression of Victoria’s Secret, and that while offended by the use of the name “VICTOR’S SECRET” (the name of the Moseleys’ store at the time he wrote the letter), his offense was directed at the Moseleys, not Victoria’s Secret. But the latter does not change the fact the writer of the letter was offended, apparently because he felt that the Moseleys’ mark was used in a way that was grossly inconsistent with the famous mark’s image. It should be noted that the writer of that letter was Colonel John Baker, Staff Judge Advocate for the U.S. Army Center, and is arguably more sophisticated than the general public, at least within the realm of legal matters. While this Note makes a point of stating that the sophistication level of consumers is not a necessary factor to be considered in adjudicating tarnishing claims, it can be relevant. It might be better to view Colonel Baker’s letter as a warning to Victoria’s Secret, wherein he advises them...
that while he knows that Victoria’s Secret, Inc. has nothing to do with the Moseley’s store or choice of name, other less sophisticated individuals may attribute the Moseley’s use of their mark to Victoria’s Secret.

Compare the above situation with *NBA Properties v. Untertainment Records, LLC*,\(^{243}\) where the junior user’s mark, used in advertisement to promote a rap album, altered the famous National Basketball Association’s (“NBA”) trademark, which depicts a basketball player dribbling a basketball with his left hand, by placing “a gun in [the right] hand alongside the words ‘SDE SPORTS, DRUGS, & ENTERTAINMENT.’”\(^{244}\) In that case, the NBA commenced a lawsuit soon after receiving calls from distressed residents and representatives of school, community and church groups who all expressed their outrage at what they thought was the NBA’s sponsorship of such a use of the NBA’s trademark.\(^{245}\) Surely in that situation, where the consumers have made the mental association between the two marks and have followed that by attributing the unsavory characteristics of the junior mark to the famous mark, there is sufficient proof of “actual harm” caused by tarnishing. Therefore, on remand, if Victoria’s Secret can present any evidence of individuals directing their displeasure entirely at them, including relevant survey evidence, the Moseleys should be enjoined from further use of their mark.

In conclusion, these types of cases do pose a special challenge to application of the dichotomous level of harm approach, as the facts present potentially valid claims for both blurring and tarnishing. Applying the standard proposed by this Note in such cases, satisfying the lower level of proof of the “actual harm” standard would not be insufficient to prevent any use of the diluting mark by the junior user later. In other words, if the junior user discontinued the use of the mark that caused tarnishing, but arguably still caused blurring, the owner of the famous mark should have to satisfy the higher level of proof of actual harm.\(^{246}\) For this reason, the owner of a famous trademark, in cases involving both forms of dilution, should try to prove the higher level of “actual harm” the first time as to avoid further litigation.


\(^{244}\)  *Id.* at *2.*

\(^{245}\)  *See id.* at *5.*

\(^{246}\)  Using *V Secret Catalogue* as an example, if the Moseley’s had discontinued selling those adult products, which Victoria’s Secret claimed tarnished its mark, and continued selling only those products “acceptable” to Victoria’s Secret, the only possible form of dilution present would be blurring. Therefore, Victoria’s Secret would need to prove actual harm to its mark to enjoin Moseley’s use of “Victor’s Little Secret.” *See discussion supra* Part V.B.4.
illustrative purposes, if the Moseleys had ceased the sale of the “offending” goods, leaving just the lingerie, Victoria’s Secret would have to prove the higher level of actual harm according to the proposition set forth in this Note. 247

C. A Rational Proposal

Despite the inconsistency in the application of the FTDA, the fact that it was meant to serve as a remedy for both blurring and tarnishing is a settled matter. 248 Therefore, because courts will continue to recognize both blurring and tarnishing, it is important that courts interpret the FTDA in light of these two forms of dilution. 249 Courts should begin by interpreting the phrase “causes dilution” by replacing “dilution” with the specific form of harm presented. 250 Then, the court can proceed with its analysis to determine whether on the facts presented the junior users mark “causes tarnishment,” “causes blurring,” or both. This interpretation of the phrase “causes dilution” will make it easier for courts to recognize the inherent differences between the two forms of dilution, particularly the point at which the harm occurs and its rate of speed, thus necessitating this dichotomous level of proof-of-actual-harm approach.

247. See discussion infra Part V.C.2.
248. See, e.g., Kellogg Co. v. Exxon Mobil Corp., 192 F. Supp. 2d 790, 797 (W.D. Tenn. 2001) (noting that while typical antidilution statutes proscribe ‘dilution’ in general, without distinguishing between blurring and tarnishing in their statutory language, courts have nonetheless consistently held that these statutes encompass both within their reach). But see V Secret Catalogue, Inc., v. Moseley, 537 U.S. 418, 123 S. Ct. 1115, 1124 (2003) (“Whether [tarnishment] is actually embraced by the [FTDA] . . . is another matter.”).
249. See Oswald, supra note 38, at 279.
This proposal also takes into consideration that the FTDA requires only a “lessening of the capacity of a famous mark to identify and distinguish goods or services”\(^\text{251}\) and since the word “capacity” connotes an ability to dilute, no actual dilution in the marketplace is necessary.\(^\text{252}\)

In Justice Kennedy’s concurrence, in \textit{V Secret Catalogue}, he wrote separately from the Court to mention that

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[C]onsiderable attention should be given . . . to the word ‘capacity’ . . . [because it] imports into the dilution inquiry both the present and the potential power of the famous mark to identify and distinguish goods, and [that] in some cases the fact that this power will be diminished could suffice to show dilution.\(^\text{253}\)
\]

Finally, this proposal takes into account that the only relief afforded by the FTDA, absent willfulness, is injunctive relief. Again, Justice Kennedy appropriately highlighted this fact when he noted, “[e]quity principles encourage those who are injured to assert their rights promptly. A holder of a famous mark threatened with diminishment of the mark’s capacity to serve its purpose should not be forced to wait until the damage is done and the distinctiveness of the mark has been eroded.”\(^\text{254}\)

1. The Lower Level of Proof of Actual Harm for Tarnishment

The injury inflicted on a famous mark by tarnishment is immediate and therefore makes it essential that a court demand only the lower level of proof of actual harm. Proposing that tarnishment requires only such level of proof to enjoin the use of a mark that tarnishes is based in part on arguments made by some commentators that tarnishment, which has a likelihood-of-confusion aspect, should not be considered a form of dilution.\(^\text{255}\) This argument is not without merit since by definition for a famous mark to be tarnished it is necessary for consumers to make the


\(^{252}\) \text{See Courtland L. Reichman, \textit{State and Federal Trademark Dilution}, 17 \textit{FRANCHISE L.J.} 111, 132 (1998); McCarthy, supra note 18, 24-94 at 24-181 (“[T]he [FTDA] does not require proof of an actual lessening of the strength of the famous mark: only that there is a lessening of the capacity or the ability of the mark to be strong as a commercial symbol and identifier.”).}

\(^{253}\) \text{\textit{V Secret Catalogue}, 537 U.S. 418, 123 S. Ct. at 1125 (Kennedy, J., concurring).}

\(^{254}\) \text{Id.}

\(^{255}\) \text{See generally Nelson, supra note 73 (arguing that because tarnishment is analyzed and applied by courts according to the principle of likelihood of confusion its proper position in the law of unfair competition is not under trademark dilution); see also Beverly W. Pattishall, \textit{Dawning Acceptance of the Dilution Rationale for Trademark-Trade Identity Protection}, 74 \textit{TRADEMARK REP.} 289, 307 (1984) (“[A]ny genuine affinity, legal or logical, between the dilution concept and [tarnishment] seems doubtful.”).}
mental association and then link the use by the junior user to the senior user.\(^\text{256}\) As the argument goes, “[t]his link allows consumers to channel a tarnishing mark’s bad reputation over to the senior user [and] . . . is essentially the same as that effecting a likelihood of confusion,”\(^\text{257}\) which is the essential element of a trademark infringement action.\(^\text{258}\)

While that argument tends to focus more on the general concept of dilution rather than on the specific wording of any statute, another argument has been made that while state anti-dilution statutes may have provided a remedy for the type of harm caused by tarnishment, the FTDA does not,\(^\text{259}\) which again was also implied by the Supreme Court in \textit{V Secret Catalogue}\.\(^\text{260}\) While it is true that many state statutes did include the wording “likelihood of injury to business reputation,”\(^\text{261}\) that argument fails for two reasons. First, it is not certain whether the phrase “likelihood of injury to business reputation” is the foundation of the tarnishment theory.\(^\text{262}\) Second, and perhaps more importantly, that argument fails to recognize that the legislative history makes it abundantly clear that the FTDA was enacted for the purpose of preventing both forms of dilution.\(^\text{263}\) Therefore, because “tarnishment is

\(^{256}\) See \textit{McCarthy}, supra note 18, § 24:70, at 24-123. (for dilution to occur, the relevant public must make some connection between the mark and both parties).

\(^{257}\) See \textit{Nelson}, supra note 73, at 163.

\(^{258}\) See \textit{Oswald}, supra note 38, at 259 (“‘[L]ikelihood of confusion’ is the key [element] to an infringement claim.”).

\(^{259}\) See Robert C. Denicola, \textit{Some Thoughts on the Dynamics of Federal Trademark Legislation and the Trademark Dilution Act of 1995}, \textit{59 Law \& Contemp. Probs.} 75, 88-90 (1996) (“Unlike broader state dilution acts with their references to ‘injury to business reputation’ as well as to ‘dilution of the distinctive quality of a trademark,’ the federal dilution statute is limited to uses that blur the source significance of the mark.”) (footnote omitted).


\begin{quote}
Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.
\end{quote}

\textit{Id.}


While it is possible that the tarnishment concept of dilution arose out of the language of the model statute that provided a separate remedy for “likelihood of injury to business reputation,” such distinction has generally not been made. As has been argued, the injury to business reputation is simply that injury which occurs when a mark is diluted.

\textit{Id.} (footnote omitted).

\(^{263}\) See 141 \textit{Cong. Rec. H} 14,317 (daily ed. Dec. 12, 1995) (“‘[T]his bill [HR 1295] is designed to protect famous trademarks from subsequent uses that blur the distinctiveness of the
not readily amenable to any other type of analysis in the absence of a wholesale revision of the doctrine by either the courts or the legislature—either of which appear at all willing to engage in such an undertaking,”264 the focus and attention should not be on taking tarnishment out of dilution and finding a place for it in the general field of unfair competition, but rather on finding a solution under the current framework of dilution.

The first argument for removing the tarnishment claim out of the dilution cause of action, which is that tarnishment has a likelihood-of-confusion aspect, supports the use of a lower level of proof of actual harm. The “confusion” fostered by tarnishing is similar to the type found in trademark infringement claims in that both cause an “immediate injury.”265 Therefore, the statement that the dilution theory begins where the likelihood-of-confusion test leaves off may be true for blurring, but is not true for tarnishment.266 If infringement protects the consumer from deception, and blurring protects the value of the trademark to the trademark holder, it would not be a stretch to state that the protection from tarnishing meets these two claims somewhere in the middle.267 With trademark infringement the owner is concerned that competitors may be trying to pass off their products for his and that in turn consumers would be induced to purchase his competitor’s products.268 The owner of a trademark is also concerned that if a confused consumer has an unpleasant experience with those other products, they will attribute this to his own mark.269 With tarnishment, the owner of the mark is concerned with consumers attributing the unsavory use or any other inconsistent use of the junior mark to his company.270 In that context, the injury caused by tarnishment does not differ materially from that arising out of confusion of source or sponsorship.271

mark or tarnish or disparage it, even in the absence of a likelihood of confusion.”) (statement of Rep. Moorhead) (emphasis added).

264. Oswald, supra note 38, at 279-80.


266. See generally McCARTHY, supra note 18 § 24:70 (discussing the difference between dilution and likelihood of confusion).

267. See Brownlee, supra note 262, at 477 (“[T]arnishment not only blurs a mark’s distinctiveness, but can also mar a mark’s positive associational value.”).

268. See discussion supra Part II.B.

269. See id.

270. See discussion supra Part IV.B.

271. See CALLMANN, supra note 29, § 21.11, at 34 (noting that both dilution by tarnishment and dilution by blurring exist, but then stating that the injury caused by dilution, without separating the two forms, differs materially from that arising out of confusion of source or sponsorship).
The risk of harm caused by tarnishing necessitates the lower level of proof of actual harm. The harm includes not only the possible alienation by the relevant public, but could also jeopardize the business relationships the owner of a famous mark has with other companies, because those other companies could become reluctant to be affiliated with a mark that has come under suspicion. The owner of a famous mark also risks the possibility that the public will not identify its mark with “a product or service of a type incompatible with the quality and prestige previously attached by the public to the [famous mark].” Therefore, requiring the same level of actual harm for tarnishment claims as for blurring claims is not only inappropriate for these reasons stated above, but will also fail to compensate the owner of the famous mark for the permanent injury already sustained. If a mark has been diluted by tarnishing to the point of economic injury, a court cannot simply enjoin the consumers who now have a distasteful association with the mark to alter that association. Accordingly, the only appropriate solution to avoid this undesirable result from the beginning is for a court to enjoin the tarnishing use at the very outset. Hence, while tarnishment and infringement may each take its own separate and distinct path, they both end up at the same unfortunate destination—the land of lost revenues and harmed reputations—and therefore the lower level of proof of actual harm for tarnishing is required.

Before specifying the factors that should be considered by a court when determining whether actual harm caused by tarnishment exists, it

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272. See L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 31 (1st Cir. 1987) (“[T]he risk may be that of detracting from the plaintiff’s good will by the possibility that a defendant’s use of plaintiff’s unique mark will tarnish plaintiff’s trade name by reason of public dissatisfaction with defendant’s product and a resultant holding of this dissatisfaction against plaintiff.”) (citing Tiffany & Co. v. Boston Club, Inc., 231 F. Supp. 836, 844 (D. Mass. 1964)) (alteration in original); see also NBA Props. v. Untertainment Records, LLC, 99 Civ. 2933 (HB), 1999 U.S. Dist. LEXIS 7780, *5 (S.D.N.Y. May 25, 1999) (noting that the NBA commenced the lawsuit soon after receiving calls from distressed residents and representatives of school, community, and church groups expressing outrage at what they thought was the sponsorship of the tarnishing use of the famous mark by the NBA).


274. L.L. Bean, 811 F.2d at 31 (citing Tiffany & Co., 231 F. Supp. at 844); see also NBA Props., 1999 U.S. Dist. LEXIS 7780, at *22 (agreeing with the senior user that the junior user’s use of its mark linked the famous mark with violence and drugs and therefore adversely colored the public’s impression of the owner of the famous mark). “The NBA is bound to suffer negative associations from the juxtaposition of the distorted NBA logo containing the basketball player with a gun in his right hand and the words ‘SPORTS, DRUGS, & ENTERTAINMENT.’” Id. at *22-23.


276. See L.L. Bean, 811 F.2d at 31.

277. See id.
should be noted that the protection afforded to famous trademarks by the FTDA does not go so far as to chill the free expression of speech. It is still possible that a junior use of a famous mark, which would ordinarily constitute tarnishment if used in a commercial setting in connection with the sale of a good or service, will be exempted if it constitutes fair use, is used in a noncommercial setting, including a parody, or is used in news reporting or commentary. Therefore, the only junior uses that will be enjoined, even by satisfying this lower level of proof of actual harm, will be those uses that tarnish the image of the famous mark where the junior user is seeking to profit commercially from the connection it hopes consumers make between its mark and the famous mark.

The question remains: What factors should the court take into consideration when adjudicating a tarnishing claim? When considering the answer to this specific question, the rejection by some courts, as being improper in assessing a claim under the FTDA, of the use of those factors considered by the majority in *Mead Data*, the factors known as the “*Mead Data* factors,” and some of the *Nabisco* factors becomes more appropriate. The courts’ criticism that some factors, such as the level of consumer sophistication or the size of the market, have very little relevance when discussing dilution under the FTDA, while not completely accurate for blurring, is well taken when discussing the existence of tarnishment.

The size of the market in which the junior mark is being used and the sophistication of the consumers are less important factors, though not completely irrelevant, with tarnishing because the creation of a “tawdry association” between the senior mark and junior mark occurs immediately. This is because a consumer, like the courts, can easily

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282. If the same alterations to the NBA’s trademark had been made to comment on the current status of the NBA, specifically those current and former players whose problems have been spotlighted in the media, there is a much stronger case for allowing its use, than where it is being used to advertise and promote a rap album, which were the facts of that case.
284. See id. at 31-32.
observe the harm caused by tarnishment.\textsuperscript{285} The foregoing can be best exemplified by departing from the facts of \textit{V Secret Catalogue}. Though the junior user is using the mark in a small market and the consumers are arguably sophisticated,\textsuperscript{286} both factors that may decrease dilution by blurring, nothing would stop a consumer from telling a friend in another part of the same state or a completely different state how he is appalled by the use of the famous mark on such distasteful products. The resulting effect is similar to that in infringement because there is potential for consumers who have not been exposed to the junior mark to become offended and attribute the tarnishing use to the famous mark.\textsuperscript{287} By comparison, there is little chance that a consumer would tell that same friend that the junior user’s mark in his hometown is driving down the distinctiveness of the famous mark. Thus the blurring, if any, is limited to that small area of the country.

Based on the foregoing, it should have been no surprise to the court in \textit{Nabisco} when it noted that the Second Circuit has sometimes declined to apply the “\textit{Mead Data} factors,” some of which were incorporated in the \textit{Nabisco} factors, by citing to \textit{Deere}, a tarnishment case.\textsuperscript{288} With tarnishment, the two most relevant factors are those adopted by the United States Court of Appeals for the Fifth Circuit in \textit{Eli Lilly v. Natural Answers, Inc.}\textsuperscript{289} those being “renown of the famous mark” and the “similarity of the marks.”\textsuperscript{290} While direct evidence of tarnishing, such as consumer surveys, might be necessary to demonstrate that consumers are in fact attributing the use of the junior user’s mark to the owner of the famous mark,\textsuperscript{291} these two factors are the most significant,

\textsuperscript{286} See discussion supra Part V.B.4.
\textsuperscript{287} In a hypothetical trademark infringement scenario, a consumer will purchase a product from a manufacturer bearing a mark that is confusingly similar to that of the mark used by a manufacturer the consumer has purchased the same product from in the past. This time though the consumer is not satisfied because of the shoddy quality of the junior user’s product. Believing this product originated from the first manufacturer, the consumer may express his unhappiness to other potential consumers. This information may prevent those other consumers from purchasing products bearing the senior mark though they themselves have not been confused or ever received shoddy quality products from that manufacturer. See discussion supra Part II.B.
\textsuperscript{289} 233 F.3d 456 (7th Cir. 2000).
\textsuperscript{290} See id. at 469.
\textsuperscript{291} See Larry C. Jones & Jason M. Sneed, “\textit{Moseley}” Is First Take on Dilution, NAT’l L.J., Apr. 28, 2003, at C1 (noting that a survey measuring the impact of the accused mark on the consumer’s perception of the famous mark or the products associated with that mark could be useful in proving actual dilution or the absence thereof). With tarnishment, a consumer survey can be
given the nature of the harm. Therefore, as long as the senior mark is famous, so that consumers know of it, and the marks are similar enough, so that consumers will be able to link them together, and consumers are attributing the use to the owner of the famous mark, there is sufficient proof of “actual harm” for a court to find the existence of tarnishing. These factors take into consideration that there is already some intent incorporated in tarnishing uses of a famous mark, since most tarnishing uses do not originate by chance.292 It is this intentional reminding that further necessitates the lower level of proof of actual harm since the tarnishment injury is impossible to undo if not enjoined from the very beginning.293

2. The Higher Level of Proof of Actual Harm for Blurring

The harm caused by blurring differs so greatly from both infringement and tarnishment that it should require a higher level proof of some actual harm, lest we offer property-rights-in-gross to trademarks. To differentiate the level of actual harm proposed for blurring from the level of actual harm applicable for tarnishing claims, the owner of a famous mark will have to rely on more evidentiary proof than simply the “renown of the famous mark.” and the “similarity of the marks.” The level of proof of the actual-harm standard proposed herein would require an owner of famous mark to establish blurring through circumstantial evidence that will justify a court’s inference of harm. Though this method was rejected by the Fourth Circuit, and even before the Supreme Court stated that this form of evidence would be acceptable, the Second Circuit appropriately acknowledged that in almost every area of law facts may be found by drawing logical inferences from other established facts294 and observed that there was no reason why this should not be applicable to dilution claims.295 Therefore, since not every case of blurring is the same, different factors are relevant under the circumstances.

especially useful in demonstrating “any diminution of the favorable imagery and attributes associated with the brand” if the survey “inquir[es] as to how consumers feel about the brand or products associated with the senior mark before and after consumers’ exposure to the accused mark, and why consumers feel that way.” Id; see also infra text accompanying note 296 (explaining how consumer surveys could be most beneficial if owners of famous trademarks begin to construct them before the tarnishing uses come into existence).

292. See discussion supra Part IV.B.
293. See Respondents Brief at 30-31, F Secret Catalogue (No. 01-1015).
295. See id. at 224.
As with tarnishment, the question remains: What factors should a court examine when adjudicating a blurring claim? In addition to carefully constructed consumer surveys, the first factor a court should look to is the “similarity of the marks,” i.e., whether the junior user is using a mark that is identical to the famous mark as opposed to one that is merely substantially similar. When courts and commentators have offered examples of blurring, they have predominantly used examples of products bearing marks that are identical to famous marks. The use of a mark that is identical to a famous mark has greater potential to blur a famous mark than where the consumers have to make a connection between the marks as they would in “VICTORIA’S SECRET” and “VICTOR’S LITTLE SECRET.” The Supreme Court, in *V Secret Catalogue*, implied that the burden would be lower if the two marks in question were identical, and therefore courts presented with such a scenario should weight this factor more heavily than the others. The foregoing is not meant to discount the effect of the use of a substantially similar mark, since it “nevertheless may harm the [trademark owner] by lessening the distinctiveness and thus the commercial value of the [senior] mark[].” Along the same lines, the level of distinctiveness of the famous mark should be a factor considered. That is, where the famous mark is one that has “‘added to rather than withdrawn from the human vocabulary,’” it should be afforded greater protection since the owner of the famous trademark, by contributing to the human vocabulary, is not claiming for itself a word or phase that once belonged to no one.

296. Though the following advice could easily pertain to owners of famous trademarks who wish to use consumer surveys in demonstrating actual harm in their tarnishment cases, it is especially important in cases of blurring. An owner of a famous mark could begin to prepare its case before any blurring uses come into existence. This can be achieved by instructing their marketing departments to prepare “predilution” evidence of brand imagery and attributes, as perceived by the relevant consumer markets. See Jones and Sneed, supra note 291. Therefore, when a potential cause of action for blurring does arise, the “predilution” evidence can be supplemented with “post-dilution measurements [that] may be used to determine whether there has been any actual impact on the perceptions associated with those brands as a result of the allegedly dilutive conduct.” Id.

297. See, e.g., Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 903 (9th Cir. 2002) (Kozinski, J.) (using as examples of blurring “TYLENOL” snowboards, “NETSCAPE” sex shops and “HARRY POTTER” dry cleaners), cert. denied, 123 S. Ct. 993 (2003);Gilson, supra note 79, § 5.12[1][c][i], at 5-233 (using as examples of blurring “PEPSI” in-line skates, “MICROSOFT” lipstick, “KLEENEX” machine guns, and “JOCKEY” automobile tires).


300. *V Secret Catalogue*, 537 U.S. 418, 123 S. Ct. at 1122 (quoting Schechter, supra note 18, at 829). The Court noted that Schechter’s theory of dilution was based on the use of a well-known trademark, classified as arbitrary, on a non-competing product that would not have constituted
The next factor a court should look to is the “similarity of [the] products” because “[b]lurring occurs in the minds of potential customers.”301 While the Seventh Circuit concluded that the “similarity of the products” factor is “completely irrelevant” under the FTDA because the statute states that dilution can occur “regardless of the presence or absence . . . of competition between the [parties],”302 the court is only correct to the extent that this factor has no relevance and should not be discussed in a scenario involving completely different products. It also follows that this factor could be relevant where the products are similar.303 This factor was adopted by the Second Circuit because the facts with which it was presented made it relevant.304 It is relevant because there is a greater risk that the distinctive quality of the famous mark will be lessened in the minds of consumers that have the capability of viewing products bearing the senior mark and junior mark simultaneously. Therefore, the use of a junior mark on a dissimilar product in a very limited market is a fact that should weigh against a finding of blurring.305

In addition to the “similarity of the marks,” “the size of the market” in which the junior user’s mark is used is another relevant factor. If consumers are not able to observe both marks, there is no occasion for the distinctiveness of the famous mark to be lessened in their minds.306 Given a fact situation similar to Nabisco, a court should weigh this factor in favor of finding blurring, because both products are going to be

304. See id. at 217.
306. See I.P. Lund, 163 F.3d at 49-50.
nationally advertised, thus increasing the chances that the entire population will be able to see both marks simultaneously. Conversely, as in V Secret Catalogue, where the facts present a nationally advertised famous mark and a junior mark in a very limited market, where there is little exposure outside that area, a court should weigh this factor against a finding of blurring.

The “sophistication level of the relevant consumers” is also important because even if consumers are positioned to view both marks simultaneously, they may have the ability to continue to distinguish the two marks in their minds, thus allowing the mark to keep its distinctive quality. Another relevant factor for a court to look at when searching for the necessary level of proof of actual harm could be the “current position of the junior user.” Where the facts present a junior user that has not entered the market yet, as in Nabisco, the court should look closer at other factors to determine whether there is a potential for actual harm to the existing famous mark. On the other hand, when a fact situation involves marks that have co-existed for any length of time, as in Ringling and Westchester Media, this factor might logically lead a court to decide that the potential for actual harm is nonexistent.

The “intent of the junior user” is a factor that has received both acceptance and rejection from the circuit courts. As previously stated, with tarnishment there is already an implied predatory intent incorporated into the junior user’s selection of its mark. This factor, as it pertains to blurring, should be viewed as just another relevant factor incorporated into the court’s analysis of circumstantial evidence presented. The intent of the junior user becomes especially apparent when viewed in conjunction with the “similarity of the products” factor, specifically because the junior’s intent could be evidenced

307. See id. at 50.
308. Compare Nabisco, 191 F.3d at 225 (disagreeing with district court’s finding of predatory intent, but implying that this factor may be relevant if the junior user adopted its mark “in the hope of benefiting from association with [the] famous [mark].”), with Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 469 (7th Cir. 2000) (“[I]ntent of the junior mark holder . . . is not particularly relevant to the ‘capacity of [the senior] mark to identify and distinguish’ itself.”) (footnote and additional internal quotation marks omitted) (third alteration in original).
309. See discussion supra Part V.C.1.
310. The use of this factor has also been rejected because the FTDA allows for damages upon the finding of “willful intent,” and so the argument is that this factor should only be considered in respect to available remedies, not a finding of blurring. See Clinique Labs., Inc. v. Dep Corp., 945 F. Supp. 547, 563 (S.D.N.Y. 1996).
311. See Sally Gee, Inc. v. Myra Hogan, Inc., 699 F.2d 621, 626 (2d Cir. 1983) (“[T]he absence of predatory intent by the junior user is a relevant factor in assessing a [dilution] claim . . . since relief under the statute is of equitable origin.”) (citation omitted). Though the court was
through an aggressive advertising campaign to accentuate its mark.\textsuperscript{312} Put another way, when the junior user is operating in the same market as the senior user there is already a substantial risk that there will be a lessening in the capacity of the famous mark to identify the senior user’s goods because consumers are capable of viewing both marks simultaneously.\textsuperscript{313} That risk can exponentially increase when the junior user deliberately chooses its mark to trade on the fame of the senior mark and makes this intent obvious. Finally, the rejection of this factor by some courts is admittedly more appropriate where the marks are being used in completely different markets because of the inability of consumers to view both marks, but the willful intent on the part of the junior user will not go unnoticed, assuming blurring is found, given the court will have the discretion to award damages.\textsuperscript{314}

The factors discussed here are for illustrative purposes and do not exhaust those range of factors that are potentially relevant, including those already elaborated on in the various circuit court decisions. The FTDA applies the moment the unauthorized use of a famous mark reduces the public’s perception that the mark signifies something unique, singular, or particular, but by requiring this level of proof of actual harm in cases of blurring, courts and commentators will be assured that trademark owners will not be receiving the windfall of the relief provided by the FTDA when they have not actually been harmed.\textsuperscript{315}

VI. CONCLUSION

The number of trademarks that are eligible for protection from blurring and tarnishing junior users is small in comparison to the number of trademarks in use.\textsuperscript{316} In addition, the long-standing acknowledgement of the existence of both forms of dilution and the purpose of the FTDA to provide national uniformity to the patch-quilt system of protection afforded by the states must be considered when interpreting the FTDA. The two levels of proof of actual harm proposed by this Note are discussing New York’s anti-dilution statute, this statement should be equally applicable to the FTDA. See Nabisco, 191 F.3d at 225 (disagreeing with the district court’s finding of predatory intent under the facts, but nonetheless implying that this could be a relevant factor because of the junior user’s hope of benefiting from association with the famous mark).

\textsuperscript{312} See Clinique Labs., 945 F. Supp. at 563.
\textsuperscript{313} See discussion supra Part V.B.4
\textsuperscript{315} See Kellogg Co. v. Exxon Mobil Corp., 192 F. Supp. 2d 790, 804 (W.D. Tenn. 2001).
\textsuperscript{316} See GILSON, supra note 79, § 5.12, at 5-227 (2001) (noting that though the FTDA protects famous marks, “it leaves the more numerous journeyman trademarks that dot the landscape to the more traditional infringement remedies, at least until they become ‘famous.’”).
formulated with the above in mind and reflect the principle that “[d]iminishment of the famous mark’s capacity can be shown by the probable consequences flowing from use or adoption of the [junior user’s] mark.”\textsuperscript{317} Moreover, both levels of proof adhere to the “principles of equity” and recognize the “well-established presumption that injuries arising from Lanham Act violations are irreparable, even absent a showing of business loss.”\textsuperscript{318} Accordingly, absent a Congressional decision to overhaul the FTDA to include only the traditional blurring claim or in the alternative specifically requiring the same level of proof for both claims, the dichotomous standard approach proposed by this Note is a logical extension of the decision making process courts have employed from the beginning.

*Joseph J. Galvano*


\textsuperscript{318} Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 16 (7th Cir. 1992).

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NOTE

POSTCARDS FROM THE BENCH:
FEDERAL HABEAS REVIEW OF
UNARTICULATED STATE COURT DECISIONS

I. INTRODUCTION

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA" or "the Act"). The Act amended 28 U.S.C. § 2254(d) to read:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

As interpreted by the Supreme Court, the AEDPA requires federal habeas courts to limit issuance of the writ to petitioners’ applications arising from state court decisions that either contradict or unreasonably apply Supreme Court precedent. A federal habeas court may not grant a petition merely because its own holding would differ from that of the state’s court. While the term “deference” itself is not used in the statute, the review procedure implemented by the AEDPA is deferential, particularly when compared with the procedure it replaced. Prior to the enactment of the AEDPA, federal habeas courts owed deference only to

4. See id. at 412.
state court factual determinations. Although opinions differ on the practical magnitude of change in federal habeas review of state petitions wrought by the enactment of the AEDPA, the statute does mandate a level of federal deference to state court decisions on issues of federal law previously nonexistent.

Prior to the AEDPA’s enactment, a state court’s “postcard denial” resolving a petitioner’s claim presented no structural difficulties to a federal habeas court. Its standard of review on issues of law or mixed issues of law and fact did not depend on the reasonableness of the state court’s decision. A state petitioner did not risk the loss of federal de novo review because of the structure of his state decision. Since the federal standard of review did not depend on the nature of its decision, a state court risked nothing either. Whether its decision stood or fell rested on a federal court’s disagreement with it, not on its reasonableness.

Unarticulated state court decisions raise many questions in the context of the AEDPA. How much deference is due a state court’s simple holding that, “Appellant’s claims are without merit,” or more tersely, “Denied”? Does such a decision indicate whether the case was disposed of on substantive rather than procedural grounds? Is it clear from such holdings that the state court applied the correct federal law? Whether the state court even applied federal law at all? Does such a decision reflect “an unreasonable application of” federal law? Can it possibly reflect an “application,” however characterized? Do such curt dispositions reflect procedurally sufficient adjudications in which confidence should be reposed and to which deference should be accorded?

These questions reflect structural concerns over how the statute’s mandate and legislative purpose can effectively be implemented in the face of unarticulated state court decisions.

6. See Hobbs v. Peppersack, 301 F.2d 875, 880 (4th Cir. 1962); Hance v. Zant, 696 F.2d 940, 946 (11th Cir. 1983). While the pre-AEDPA version of § 2254(d) created a presumption of correctness for state court findings of fact, that presumption was awarded only where such findings were the result of “a hearing on the merits of a factual issue . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia.” See id. at 946, n.1 (quoting the version of 28 U.S.C. § 2254(d) then in effect).


8. See Williams, 529 U.S. at 399 (O’Connor, J., concurring).

9. See Luna v. Cambra, 306 F.3d 954, 960 (9th Cir. 2002), mandate recalled and reissued as amended by Luna v. Cambra, 311 F.3d 928 (9th Cir. 2002), (characterizing cursory state court decisions denying petitioner’s claims unaccompanied by articulated reasoning as “postcard” denials).

10. See supra notes 5-6 and accompanying text.
applicability are arguably missing from a postcard denial. The questions reflect policy concerns over adequate protections of a petitioner’s interest that the deprivation of his liberty or his life be constitutional, and a state’s interest in the finality of its decisions. Both of these interests are most at risk when postcard denials are accorded deferential AEDPA review. They also reflect constitutional concerns over what procedural minimums we are due before the state can deprive us of our liberty or more.

This Note will explore these questions in light of Supreme Court and circuit court interpretations of § 2254(d)(1), how similar issues in the context of different legislation, including other AEDPA amendments to § 2254, are addressed, the policies motivating the AEDPA, and practical implications for reviewed and reviewing courts. Part II gives a brief discussion of the AEDPA and how it changed federal habeas review of state court decisions. Part III clarifies what practically constitutes “deference” within the functioning of § 2254(d)(1) and discusses the dangers in invoking this term imprecisely. Part IV examines perfunctory or “postcard” denials, taking the position that summary state court decisions should not be treated as adjudications on the merits: (1) as consistent other prescriptions of the AEDPA; (2) as consonant with Supreme Court interpretation of § 2254(d)(1); (3) as furthering the joint goals of preventing unconstitutional detentions and respecting state court decisions; and (4) as maximizing the statute’s benefits to states while minimizing unnecessary burdens on petitioners. Part V examines the criteria held to be essential to the concept of adjudication and explores whether postcard denials can rightly be considered adjudication at all.

II. Habeas Review Pre- and Post-AEDPA

Prior to the passage of the AEDPA, federal habeas review of state court prisoners’ detentions was “de novo in the strictest sense.”11 A state petitioner could succeed on his federal habeas petition merely because the federal court reached a different result than a state court applying the same legal principle to the same set of facts.12 Traditionally a federal habeas court had broad latitude, both jurisdictionally and temporally, in what it could consider as governing constitutional law.13 The court could

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11. See Hertz & Liebman, supra note 5, § 32.1, at 1419.
12. See id. at 1419-20.
13. See id. at 1420.
look beyond Supreme Court precedent to federal circuit law. Additionally, until a 1989 Supreme Court decision held differently, federal habeas courts were free to apply constitutional principles that had not yet even been developed by the Supreme Court at the time of a petitioner’s state proceedings. A state’s decision in a petitioner’s case on issues other than those purely of fact has been described as “perilously close to irrelevant.”

The term “deference” often used to describe the prescriptions of the AEDPA can be misleading when one attempts to analyze practical applications of § 2254(d)(1). While taken as a whole, § 2254(d)(1) effects a level of deference to state court decisions previously not mandated by federal law, the mere fact that the state court has spoken does not qualify its pronouncements as deserving of deference. Where a federal habeas court considers petitioner’s federal issues as not adjudicated on their merits in the state court, the state court decision is not reviewed under the standards of the AEDPA at all. The import of this goes beyond the standard of review to encompass the law that binds the reviewing court. A district court thus finding that a petitioner’s claim was disposed of in the state courts on procedural rather than substantive grounds would review those decisions, where other applicable law permitted, de novo and in light of the pre-AEDPA standards enunciated in Teague regarding the source of the applicable law at the time of the decision.

Neither does a determination that § 2254(d)(1) applies to a given state court decision guarantee that the state’s judgment will be deferred to. If a petitioner’s claim is resolved in the state courts on substantive grounds, § 2254(d)(1) mandates the writ will not issue unless one of two conditions are satisfied. First, a federal court can grant the petition if the adjudication “resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court.” A writ

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16. See Hertz & Liebman, supra note 5, § 32.1, at 1420. But see Brown v. Allen, 344 U.S. 443, 458 (1953) (stating that in some “circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not res judicata.”).
18. See Hertz & Liebman, supra note 5, § 32.1, at 1420.
22. See Williams, 529 U.S. at 407 (O’Connor, J., concurring).
can also issue where the “decision... involved an unreasonable application of” Supreme Court precedent.24 The Supreme Court has not construed the statute as invoking deferential review in each of these scenarios.25

The primary Supreme Court decision interpreting § 2254(d)(1) defined instances satisfying the first prong of § 2254(d)(1) as including, but not limited to, two scenarios.26 “A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.”27 Additionally, where “a state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent,” such a result satisfies the “contrary to” prong of § 2254(d)(1).28 “[I]n either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision’s ‘contrary to’ clause.”29 This analysis supports the premise that not all decisions resulting from adjudications on the merits are to be accorded deference under the AEDPA. Clearly, those “decisions... contrary to... clearly established Federal law, as determined by the Supreme Court” do not constrain a federal habeas court’s standard of review.

The Court in Williams also discussed what constitutes an “unreasonable application of... clearly established federal law” within the context of the AEDPA.30 “A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case certainly would qualify as a decision ‘involv[ing] an unreasonable application of... clearly established Federal law.’”31 The effect of the word “unreasonable” is that “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”32 While the term “deference” is

24. § 2254(d)(1).
25. See Williams, 529 U.S. at 405-14 (O’Connor, J., concurring).
26. See id. at 405-06.
27. Id. at 405.
28. Id. at 406.
29. Id.
30. See id. at 407-08.
31. Id.
32. Id. at 411.
used nowhere in the statute, permitting state courts’ decisions to stand regardless of whether a federal reviewing court would concur in them exemplifies deference.

III. WHAT DOES “AEDPA DEFERENCE” REALLY MEAN?

“One of the most effective ways of diluting ... a constitutionally guaranteed right is to substitute for the crucial words ... another word ... more flexible and ... less restricted in meaning.” The use of the term “deference,” admittedly an accurate reflection of the statute’s motivating philosophy, as a codeword for its prescriptions obscures the statute’s actual mechanics. While the premise that the AEDPA mandates deference to state court decisions is reiterated throughout federal habeas opinions, its practical application is inconsistent across the circuits, even subsequent to the Supreme Court’s decision in *Williams*. Federal habeas courts invoke AEDPA deference as the appropriate analytic framework once a state court decision is determined to be an adjudication on the merits. However, some construe the level of deference required by the AEDPA quite broadly, permitting state court decisions that concededly do not even reach the federal issues to escape considered review.

A. Deference to the Fact of State Court Proceedings

Decades of work seeking to limit or even eradicate federal courts’ power to conduct habeas review of state prisoners’ detentions bore some fruit with the enactment of the AEDPA. While this law did not go as far as some proponents had hoped, the AEDPA did move the analytic starting point for federal habeas review away from the fact of a state prisoner’s detention. The Act placed “a previous state court judgment as the starting point for federal habeas adjudication,” rather than treating such judgments “as if, in effect, a state court had not already adjudicated the same claims.”

36. See *Schoenberger v. Russell*, 290 F.3d 831, 836 (6th Cir. 2002).
37. See *Yackle*, *supra* note 7, at 381.
38. See id. at 385.
39. See id. at 383.
40. Id.
41. HERTZ & LIEBMAN, *supra* note 5, § 32.1, at 1419.
B. Deference and Adjudications on the Merits

The above “deference” paid to the existence of a state decision requires the federal habeas court to examine that decision to answer a threshold question.42 A predicate for the application of § 2254(d)(1) is that the state court’s decision resulted from an “adjudication on the merits.”43 Within the context of habeas review, an adjudication on the merits is one that has been disposed of on other than procedural grounds.44 While it is generally true that “[a] defendant who has procedurally defaulted his or her claim . . . [is] precluded from a merits review on federal habeas,”45 there are exceptions. First, a state prisoner who can show “cause and prejudice” for the procedural default can be granted federal habeas merits review.46 Second, “[a] petitioner who fails to satisfy the cause-and-prejudice standard may nonetheless be entitled to habeas relief if he can show that the imposition of the procedural bar would constitute a miscarriage of justice—i.e., that the petitioner is actually innocent of the crime.”47 Third, a state failing to raise the existence of a procedural bar in federal habeas proceedings can be deemed to have waived it, thus qualifying the petitioner for merits review.48 Federal habeas review of these cases are not performed under the strictures of § 2254(d)(1).

The circuits are split over whether the existence of procedural grounds supporting a state court’s decision is an exclusive and sole predicate for finding that it did not result from an adjudication on the merits. Some districts apply a formalistic approach, finding any decisions not clearly and solely disposed of on purely procedural grounds to be adjudications on the merits. The Eleventh Circuit distinguished its rule that state court decisions not reaching the federal claim fail under a Williams analysis of § 2254(d)(1)’s first prong as separate from a determination of whether such decisions are adjudications on the merits.49 A decision under the former still qualifies as an adjudication on the merits to the extent it “does not rest on procedural grounds alone.”50 The Tenth Circuit applied this approach to

43. See, e.g., Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir.1999).
44. See Hertz & Liebman, supra note 5, § 32.2, 1422.
45. Steinman, supra note 5, at 1513 n.92.
47. Haley v. Cockrell, 306 F.3d 257, 263 (5th Cir. 2002).
49. See Wright v. Sec’y for Dep’t of Corrs., 278 F.3d 1245, 1254-56 (11th Cir. 2002).
50. Id. at 1255.
a state court decision denying a petitioner review “because he had failed to raise [his] issue on direct appeal,” adding, “however, that [petitioner’s] claim was one previously rejected” by the state court.\textsuperscript{51} The federal habeas court found that the state court’s reliance “on the merits as an alternative basis for its holding,” though dicta, nonetheless constituted an adjudication on the merits.\textsuperscript{52}

Some circuits construe the adjudication on the merits requirement as not applicable to decisions that do not reach the federal claim. In \textit{Fortini v. Murphy},\textsuperscript{53} the First Circuit held that AEDPA deference does not apply to state court decisions that do not address petitioners’ federal claims.\textsuperscript{54} The petitioner in \textit{Fortini} appealed his state court conviction for second-degree murder arguing that the exclusion of certain evidence violated his state and federal constitutional due process rights to a fair trial.\textsuperscript{55} Although the assertion of his federal claim was apparently only clearly made in a point heading to one section of his appellate brief, the first case cited in that section was the appropriate Supreme Court precedent.\textsuperscript{56} After finding that this sufficiently alerted both the state’s intermediate and highest courts to the existence of a federal issue, the court held that since it was not addressed by either in their review, their decisions were not owed deference by the federal habeas court under the AEDPA.\textsuperscript{57} Distinguishing these decisions from claims “adjudicated on the merits,” to which AEDPA deference applies, the court held that although the “AEDPA imposes a requirement of deference to state court decisions, . . . [this court] can hardly defer to the state court on an issue that the state court did not address.”\textsuperscript{58} Similarly, the Third Circuit, when confronted with a state court decision that discussed only state law in denying a petitioner’s claim of ineffective assistance of counsel under the Sixth Amendment, stated, “[t]he AEDPA standard of review does not apply unless it is clear from the face of the state court decision that the merits of the petitioner’s constitutional claims were examined in light of federal law as established by the Supreme Court.”\textsuperscript{59}

The Second and Fifth Circuits use a functional approach to determine whether a state court decision is an adjudication on the merits.

\textsuperscript{51} Johnson \textit{v. McKune}, 288 F.3d 1187, 1191 (10th Cir. 2002).
\textsuperscript{52} Id. at 1192.
\textsuperscript{53} 257 F.3d 39 (1st Cir. 2001).
\textsuperscript{54} See id. at 47.
\textsuperscript{55} See id. at 44.
\textsuperscript{56} See id. at 44-45.
\textsuperscript{57} See id. at 45.
\textsuperscript{58} Id. at 47.
\textsuperscript{59} Everett \textit{v. Beard}, 290 F.3d 500, 507-08 (3d Cir. 2002).
These circuits apply a test first enunciated in a pre-AEDPA case, but since applied to post-AEDPA decisions. The Green test considers three factors:

1. what the state courts have done in similar cases; 2. whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and 3. whether the state courts’ opinions suggest reliance upon procedural grounds rather than a determination on the merits.

In Mercadel, the Fifth Circuit considered whether a one-word decision issued by a state’s highest court denying a petition for state habeas relief constituted an adjudication on the merits of the petitioner’s claims. The petitioner filed his writ directly with the state’s highest court in the mistaken belief that this court had original jurisdiction to hear his claims. His petition was rejected in a one-word decision reading, “Denied.” The federal habeas court, applying the Green test, found that its third factor did “not come into play [as] the [state] Supreme Court’s one-word rejection of Mercadel’s petition is silent as to the reason for its denial of relief.” Since the state supreme court presumably knew of its lack of original jurisdiction over petitioner’s claim, consideration of the second Green factor led the federal habeas court to conclude that “the history of the case suggests that the [state] Supreme Court was aware of a ground for not adjudicating the case on the merits.” Finally, inquiry into Green’s first factor demonstrated that the state supreme court had “consistently refused to consider the merits of state court prisoners’ habeas petitions originally filed in its court.”

“Consideration of these factors leads us to conclude that the [state] Supreme Court’s denial of relief on Mercadel was on procedural grounds, and therefore not on the merits.”

Application of the test in Green resulted in a finding that the petitioner’s claims were adjudicated on the merits in Dowthitt v.
Johnson, where the petitioner alleged the prosecutor’s misrepresentation of evidence on summation violated his due process rights. The petitioner did not object at trial or raise the issue in his appeals, arguing it for the first time in his state habeas proceedings. The state habeas court did not address this claim in its denial of relief, requiring the federal habeas court to inquire whether the denial was based on procedural or substantive grounds. The federal court determined Green’s first factor indicated the state habeas court’s decision was made on substantive grounds: the state courts had consistently determined that prosecutorial comments on summation, such as those made in petitioner’s case, were not so inflammatory as to be incurable, thereby excepting them from the law requiring timely objection. Consideration of Green’s second factor also weighed against a procedural basis for the state court’s denial. The history of the case indicated the state argued the merits of the petitioner’s due process claim, rather than simply raising the “contemporaneous objection rule” as a procedural bar. Further, the fact that state law treats a denial of habeas relief by the intermediate court as an automatic “denial on the merits” demonstrated the state court’s lack of reliance on procedural grounds as the basis for its denial.

While the Second Circuit also uses this test, its application is not consistent with the Fifth Circuit. The court in Selan stated, “[w]e adopt the Fifth Circuit’s succinct articulation of the analytic steps that a federal habeas court should follow in determining whether a federal claim has been adjudicated ‘on the merits’ by a state court.” However, after setting out the test, citing to Mercadel, the next paragraph concluded that the instant petitioner’s claims had been adjudicated on their merits, without analysis of how the test’s factors weighed in the determination. Subsequent decisions imply that the Second Circuit does not apply all

70. 230 F.3d 733 (5th Cir. 2000).
71. See id. at 754; see also Barrientes v. Johnson, 221 F.3d 741 (5th Cir. 2000).
72. See Dowthitt, 230 F.3d at 754.
73. See id.
74. See id.
75. See id.
76. See id.
77. See Ex parte Torres, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (distinguishing the words “dismiss” and “deny,” stating that the former means the court “declined to consider the claim for reasons unrelated to the claim’s merits,” while the latter “signifies [the court] addressed and rejected the merits of a particular claim”).
79. Id.
80. See id.
three factors where even a conclusory analysis of any factor supports a finding that a petitioner’s claim was adjudicated on its merits. In *Aparicio v. Artuz*, the court found the petitioner’s claims were adjudicated on the merits solely on the basis of the third *Green* factor. Without indicating any basis for the conclusion, the court stated, “there is nothing in [the] decision to indicate that the claims were decided on anything but substantive grounds.” In a similarly unsupported conclusion in *Brown v. Artuz*, the court found an adjudication on the merits on the basis of the second and third *Green* factors. “[T]here is no basis either in the history of the case or the opinion of the [state court] for believing [the] claim was denied on procedural or any other nonsubstantive grounds . . . .”

The Second Circuit has also based findings that claims were not adjudicated on their merits on considering less than all three *Green* factors. In *Norde*, the state prisoner raised Sixth Amendment claims on appeal that were never addressed in the opinion affirming his conviction, although other state claims regarding sufficiency of evidence and prosecutorial misconduct were. He raised the same claims in his request for the appellate court to rehear his appeal; the one-sentence denial of this request again made no mention of his Sixth Amendment claims. These same claims were raised in the petitioner’s state habeas proceedings and the state habeas court denied relief in a terse opinion that did not mention the Sixth Amendment at all.

The federal habeas court applied the *Green* test, analyzing only the last of its factors. Although no basis for the state habeas court’s determination was evident, no inquiry into what the state had done in similar cases was made. No analysis of the case history’s indication of a possible procedural basis was performed. The federal court relied on the multiple state opinions, stating that they “did not mention [petitioner’s] Sixth Amendment claims, and . . . [do] not contain any language, general or specific, indicating that those claims were
considered and denied on the merits.”93 “Because the [state court] never indicated in any way that it had considered [petitioner’s] Sixth Amendment claims, we find that those claims were not adjudicated on the merits, and therefore that the AEDPA’s new, more deferential standard of review does not apply.”94

Whether the Green test is applied as a “totality of the circumstances” test as in the Fifth Circuit, or as a multi-pronged exclusive “or” test as in the Second Circuit, the test itself does not deferentially review a state court’s basis for its disposition of a petitioner’s claim. Both of these methods, while “deferring” to the existence of the state court decision, do not invoke a deferential standard of review in the sense that the actual distinction of procedural from substantive grounds made by the federal court is informed by whether it considers the state court acted “reasonably.” While the test in the Second and Fifth Circuits looks to how such determinations have been made in a state court in the past and whether denials in similar fact scenarios have been made on procedural grounds, there is no deference given to what the term “procedural grounds” itself encompasses.

C. Deference and Decisions Contrary to Clearly Established Federal Law

According to the holding in Williams, no deference is accorded to state court decisions that apply a rule in direct contradiction to federal law as identified by Supreme Court precedent. The Eleventh Circuit has extended this ruling to include state court decisions that do not address a validly presented federal claim.95 In Romine, the court held that for the purposes of determining whether AEDPA deference adheres to a state court decision, “[f]ailure to apply . . . governing [Supreme Court] law . . . is tantamount to applying a rule that contradicts governing law.”96 The petitioner in Romine appealed his capital murder convictions on the grounds that the prosecutor’s closing argument invoking Biblical law as a basis upon which the jury should render its verdict violated the constitutional protections afforded him under the Due Process Clause.97 The state’s highest court dispensed with this claim in three short sentences, which did not mention the petitioner’s federal claim.98

93. Id.
94. Id.
95. See Romine v. Head, 253 F.3d 1349 (11th Cir. 2001).
96. Id. at 1365.
97. See id. at 1363.
98. See id.
Additionally, in supporting its assertion that there was “no reversible error,” the court provided a lengthy string-cite referring only to state court decisions.99 “It is far from clear what, if any, rule of federal law the [state supreme court] applied.”100 “[W]hen there is grave doubt about whether the state court applied the correct rule of governing federal law . . . . [a federal habeas court] proceed[s] to decide the issue de novo.”101

The imprecision surrounding the meaning of “deference” as used in the context of § 2254(d)(1) creates confusion when analyzing almost any issue regarding its application. For instance, the Second Circuit held that a state court decision that does not explicitly address a petitioner’s federal claims can nonetheless be considered “an ‘adjudication on the merits’ to which [the federal habeas court] owe[s] deference” if it passes the circuit test discussed above.102 A close reading of Morris, however, reveals that the “deference” referred to is limited to the restraints placed on the source of “clearly established Federal law,” as opposed to the deference accorded “unreasonable applications” of that law as mandated by the Supreme Court’s decision in Williams.103 “Because Morris’s double jeopardy claim was adjudicated on the merits, the district court correctly found that 2254(d) deference is due the state court decision. Therefore, this Court is constrained to apply ‘clearly established Federal law,’ as determined by the holdings, not dicta, of the United States Supreme Court.”104 The court conducted a full and independent review of the record, and cited Williams’ analysis in ultimately determining that the state court’s decision “‘contradict[ed] the governing law’ established by Supreme Court precedent . . . .”105 Finishing with a somewhat confusing conclusion, the court stated, “[c]onsequently, petitioner’s application . . . falls within the constraints of § 2254(d)(1), and we therefore grant the petition for writ of habeas corpus.”106 The use of the term “constraint” here is particularly imprecise given the language in Williams, a decision quoted in the same paragraph, that specifically states, “a federal court will be unconstrained by § 2254(d)(1) because

99. Id.
100. Id. at 1365. The implications of the Supreme Court’s recent decision in Early v. Packer, 537 U.S. 3 (2002), see infra note 172, for the Eleventh Circuit’s approach have not, as of this writing, been addressed.
101. Romine, 253 F.3d at 1365.
103. See id.
104. Id.
105. Id. at 51.
106. Id.
the state-court decision falls within that provision’s ‘contrary to’ clause.\textsuperscript{107}

D. Deference and Decisions Involving Unreasonable Applications of Clearly Established Federal Law

The focus, per \textit{Williams}, on the deference due a state court’s decision on federal review is properly aimed at determining whether or not it represents a decision involving an unreasonable application of Supreme Court precedent to its given facts. \textit{Williams} described the lineaments of this deference. “[A] federal habeas court may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly[;] that application must also be unreasonable.”\textsuperscript{108}

The Second Circuit expressed its conception of \textit{Williams’} construction of § 2254(d)(1)’s unreasonableness as “[s]ome increment of incorrectness beyond error.”\textsuperscript{109} Finding no guidance in \textit{Williams} on what quantum of error in its decision “elevate[d] [the state court’s] omission from ‘merely erroneous’ to ‘objectively unreasonable,’”\textsuperscript{110} the court held that “the increment need not be great [or] habeas relief would be limited to state court decisions ‘so far off the mark as to suggest judicial incompetence.’”\textsuperscript{111} In \textit{Francis S.}, this narrow increment proved sufficient to deny habeas relief on petitioner’s claim that the state procedure recommitting him for mental health treatment violated his equal protection rights.\textsuperscript{112}

We consider it a close question . . . . As an initial question of federal constitutional law, unconstrained by section 2254(d)(1), we might well rule that an equal protection violation has been shown. Applying the standard of ‘objective unreasonableness’ required by section 2254(d)(1), however we cannot say that it was objectively unreasonable for the [state court] to reject Francis’s equal protection claim. . . . Even if only a small increment beyond error is needed to meet the standard of ‘objectively unreasonable,’ we do not believe it is present [here].\textsuperscript{113}

\textsuperscript{108} Id. at 411.
\textsuperscript{109} Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000).
\textsuperscript{110} Id. at 110.
\textsuperscript{111} Id. at 111.
\textsuperscript{112} See id. at 113.
\textsuperscript{113} Id.
The First Circuit formulates its understanding of reasonableness as lying within a range described by mere error or incorrectness at one end and by the simple possibility a competent court might agree at the other. \footnote{114}{See McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir. 2002).} “Within that range, if it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application.”\footnote{115}{Id.} The extent of this range beyond error alone “must be great enough to make the decision unreasonable in the independent and objective judgment of the federal court.”\footnote{116}{Id.} These formulations highlight that the tangible benefits of deference under this prong are realized where the state court’s decision represents a close call on the federal question.\footnote{117}{See also Hertz & Liebman, supra note 5, § 32.3, at 1444 (stating “[w]hen . . . the question is so close that the reviewing federal court can muster no confidence that the outcome it would reach de novo is more appropriate than the different outcome the state court reached, then the state court decision is not ‘an unreasonable application[] of clearly established’ Supreme Court precedent, and relief ‘shall be denied’”).}

Circuits treating unarticulated state court decisions as adjudications on the merits justify deference under the unreasonable application prong as owing to a state court’s result.\footnote{118}{See, e.g., Harris v. Stovall, 212 F.3d 940, 943 n.1 (6th Cir. 2000) (stating “[w]here a state court decides a constitutional issue by form order or without extended discussion, a habeas court should then focus on the result of the state court’s decision”).} In conducting review of these silent state court decisions for compliance with § 2254(d)(1), these circuits do their own analysis of the facts and the governing law from the record.\footnote{119}{See Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999).} In the Ninth Circuit, the state court decision does not enter the analysis until the federal habeas court has determined the existence of constitutional error.\footnote{120}{See Van Tran v. Lindsey, 212 F.3d 1143, 1155 (9th Cir. 2000).} The court then measures such error against § 2254(d)(1)’s reasonable benchmark.\footnote{121}{See id.}

In other circuits, the “full and independent review” is performed by the federal habeas court from the point of view of the state court, and passes on the reasonableness of all the interim steps it assumes the state court took on the way to its result.\footnote{122}{See, e.g., Bell v. Jarvis, 236 F.3d 149, 167-75 (4th Cir. 2000).} In essence, since the federal courts cannot look for support in the state court’s silent decision, they look to the record for any possible support for the state court’s decision. Construing § 2254(d)(1) in this way presumes the reasonableness of a
decision the court can only defer to once it finds such decision reasonable.

Where the substance of a claim involves a standard placing heavy burdens on a petitioner to overcome it, the practical impact of this nearly automatic deference may actually be quite minimal. An example is the Strickland standard for ineffective assistance of counsel. 123 Strickland's presumption of professionalism and broad leeway accorded to counsel's strategic and tactical choices, and its further requirement of prejudice 124 effectively resolve all shades of gray against a petitioner. Such a standard seems inherently unlikely to often present the close situations where the narrow margin of deference matters. An examination of the cases involving perfunctory state court decisions analyzed under § 2254(d)(1)'s unreasonable application prong shows that many involved Strickland claims 125 or other standards difficult for petitioners to meet. 126 Additionally, most of the federal decisions do not expressly rest on the narrow margin of deference. Even where they use such language as “not unreasonable for the state court to . . . ,” it most often refers to clearly correct applications of federal law.

The Second Circuit opinion holding that unarticulated state court decisions are adjudications on the merits for the purposes of § 2254(d)(1) described its deference as essential to its decision. 127 The petitioner in Sellan sought habeas relief on the ground of ineffective assistance of appellate counsel. 128 The petitioner argued that his counsel failed to raise on appeal a purportedly applicable state rule that would have resulted in the reversal of his conviction. 129 Evidence generated during his state post-conviction relief proceedings showed that counsel’s decision was strategically grounded on a state intermediate court decision directly reflecting the facts of the petitioner’s case and devoid of any support for reversing his conviction. 130 Since that opinion was rendered by the same department hearing her client’s case, counsel

124. See id. at 693.
125. See, e.g., Bell, 236 F.3d at 157; see also Luna v. Cambra, 306 F.3d 954, 961 (9th Cir. 2002), mandate recalled and reissued as amended by Luna v. Cambra, 311 F.3d 928 (9th Cir. 2002); Sellan v. Kuhlman, 261 F.3d 303, 308 (2d Cir. 2001).
126. See, e.g., James v. Bowersox, 187 F.3d 866, 870 (8th Cir. 1999) (holding that “trial court’s [exercise of its discretion in failing] to declare a mistrial sua sponte [did not] ‘so infect[] the trial with unfairness as to make the resulting conviction a denial of due process’”).
127. See Sellan, 261 F.3d at 309-10.
128. See id. at 307.
129. See id.
130. See id. at 316-17.
chose to focus on other arguments more likely to prevail and did not argue the specific rule the petitioner put forth.\textsuperscript{131}

The applicable standard of review was not directly presented to the court. The petitioner did not raise it, assuming the AEDPA standard governed by arguing the state court had unreasonably applied Supreme Court precedent.\textsuperscript{132} The decision in the district court posed the question briefly, and then only in dicta as its denial of relief was based on finding that the petitioner’s theory of ineffective assistance of counsel was not grounded in clearly established federal law.\textsuperscript{133} Indeed, the strength of the court’s assertion that the applicability of “AEDPA deference . . . [was] all but outcome-determinative,”\textsuperscript{134} is undercut by its weak characterization of the likely result de novo.\textsuperscript{135} Further, examination of the applicable circuit and Supreme Court cases cited in \textit{Sellan} indicates the outcome would not have differed under de novo review. First, the Second Circuit had found ineffective assistance of counsel where appellate counsel failed to raise a particularly strong state law claim that “would require per se reversal under prevailing [state] case law.”\textsuperscript{136} The “prevailing [state] case law” on point was not the petitioner’s proffered state highest court’s case, but the intermediate court case which was unfavorable to him. This hardly qualifies as “a particularly strong” claim resulting in “per se reversal.” Second, the circuit court acknowledged that the Supreme Court held that “counsel is not required to raise every non-frivolous issue on appeal.”\textsuperscript{137} Nothing in the law or the facts of \textit{Sellan} suggests that the narrow margin of “some element of incorrectness beyond error” made the difference there.

That such decisions would probably not be different under de novo review should not be taken as support for continuing to review them deferentially when rendered in the form of a postcard denial. I suggest only that they represent cases requiring no great exertion and posing no great risks for federal courts perceiving themselves constrained by a mandate to defer to state courts. As discussed below, even an ineffective assistance of counsel claim can present a close issue. Where it does, the

\textsuperscript{131} See id. at 317.
\textsuperscript{132} See id. at 311, n.4.
\textsuperscript{133} See id. at 309.
\textsuperscript{134} Id. at 310.
\textsuperscript{135} See id. at 310. But see Hardaway v. Young, 302 F.3d 757, 759 (7th Cir. 2002) (denying habeas relief despite the court’s “gravest misgivings and only in light of the stringent standard of review” mandated by § 2254(d)(1)).
\textsuperscript{136} \textit{Sellan}, 261 F.3d at 310.
\textsuperscript{137} Id.
lack of articulated reasoning most greatly threatens both states’ and petitioners’ interests.

E. The Danger in “Deference”

Confusion is a relatively benign effect of an imprecise use of the term “deference.” A recent decision in the Sixth Circuit demonstrates a more sinister implication of imprecision. In *Schoenberger v. Russell*, the court affirmed a district court’s decision denying a state prisoner’s habeas corpus petition. The petitioner asserted that the admission of certain evidence violated his due process rights, and that counsel’s failure to object to the admissions constituted ineffective assistance. In each of three separate claims, the state reviewing court failed to address the federal constitutional issues, applying only state law and making no reference to Supreme Court precedent.

Quoting circuit precedent holding that misapplications of state evidentiary law rarely are appropriate considerations for federal habeas courts, the court found that given the AEDPA’s mandated level of deference, the state court’s determinations regarding the two instances of admission of evidence did not “contravene[] clearly established federal law.” The circuit court did not discuss, or even cite to, any Supreme Court case supporting this holding. The analysis stopped there, with no further inquiry conducted regarding whether the state court unreasonably applied Supreme Court precedent under the second prong of § 2254(d)(1). While the opinion did mention the test for ineffective assistance of counsel under the controlling Supreme Court precedent, its discussion of the petitioner’s claim was conducted under the state’s version of the federal test. No analysis of whether the state law complied with federal constitutional requirements was performed. The circuit court merely reiterated its interpretation of AEDPA’s deference as preventing it from holding that counsel’s failure to object to the evidence’s admission was “contrary to clearly established federal law.” Again, analysis under § 2254(d)(1) stopped there, with no

138. 290 F.3d 831 (6th Cir. 2002).
139. See id. at 834-37.
140. See id.
141. Id. at 835.
143. See *Schoenberger*, 290 F.3d at 837 (Keith, J., concurring).
144. See id.
145. Id. at 836-37.
examination of whether the state unreasonably applied governing
Supreme Court precedent to the petitioner.

While the three-judge panel concurred in the result, it split over the
issue of whether the state court’s failure to discuss and apply federal law
was an “adjudication on the merits” triggering AEDPA “deference.”
Two judges each wrote separately, urging the circuit to reconsider its
precedent that held that AEDPA deference adheres “even to the
constitutional claims that the state court never considered.”146 The
concurring justices thought the Sixth Circuit should fall in line with
“sister circuits who have addressed this issue and hold that a claim not
actually decided upon by the state courts should not be reviewed under
§ 2254(d)(1)’s deferential standard, but the pre-AEDPA de novo
standard of review.”147

What is most remarkable about both concurrences is that while each
evinces a concern over what the proper test regarding state court
decisions silent on federal claims should be, neither addresses the lead
opinion’s complete misreading of the analysis mandated by Williams.
The danger in finding that “AEDPA deference,” rather than the process
mandated by § 2254(d)(1), applies to all federal claims “adjudicated on
the merits” is clearly evidenced in Schoenberger’s deferential
consideration of whether the state court decision was contrary to clearly
established federal law. This is clearly counter to the process enunciated
in Williams, which requires such deference be applied only after the
federal habeas court determines that a state decision is not contrary to
clearly established federal law.148

The danger in presumptively according state court decisions
deference rather than performing the analysis prescribed by § 2254(d)(1)
is demonstrated starkly by a recent Second Circuit case.149 Rudenko
represented sixteen consolidated claims of fourteen state prisoners’
appealing denials of habeas relief in the district court, issued over a three
year period from 1996 to 1999. Most of the district court opinions
expressly based their denials on the state intermediate court’s
“ambiguous opinions” and the state respondent’s “multi-alternative
memoranda of law,” incorporating these by reference in terse
paragraphs.150 The two judges who authored those opinions issued a

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146. Id. at 838 (Keith, J., concurring) (citing Doan v. Brigano, 237 F.3d 722, 730-31 (6th Cir.
2001)).
147. Id.
149. See Rudenko v. Costello, 286 F.3d 51 (2d Cir. 2002).
150. Id. at 58-61, 81.
memorandum opposing the circuit court’s granting of a certificate of appealability in one of the cases, setting out their understanding that the AEDPA required “that federal district courts considering habeas petitions by state prisoners give substantial deference to state court rulings [making] their adoptions of the state-court opinions particularly appropriate.” After quoting § 2254(d)(1), emphasizing its threshold requirement of an adjudication on the merits, the court continued:

Most of the [state court] decisions adopted by the district court, which apparently were accorded AEDPA deference, were not clearly determinations of the merits of all of the constitutional claims asserted in the present habeas petitions. Some of the claims that are at issue here were not mentioned in the [state court] opinions and may not even have been presented to that court.

The claims of thirteen of the fourteen petitioners suffered from this defect and were remanded to the district court for clarification of the basis for their original denials.

While Rudenko is primarily a case about a federal habeas court’s responsibility to provide unambiguous, if minimal, reasoning in its decisions, its illustration of the impact of misinterpreting the word deference as the sum and substance of the mechanics of § 2254(d)(1) is startling. Thirteen people were denied even the narrower post-AEDPA federal habeas review of their claims. Although these thirteen petitioners represented less than ten percent of the approximately 170 state habeas petitions decided in the district during that time, the systematic misapplication of the law caused by an overly broad conception of the word “deference” is more striking in the aggregate than any one decision standing on its own.

That federal courts fail to conduct the analysis mandated by § 2254(d)(1) and its interpretation by the Supreme Court is in itself problematic. In these cases, however, there was at least some reasoning in the underlying state court opinions that could have informed the reviewing federal courts. The likelihood that a federal reviewing court, unanchored by any findings of fact or legal analysis in a state postcard denial, could misapply § 2254(d)(1) is considerably magnified.

151. Id. at 57 (emphasis added) (internal citation omitted).
152. See id. at 68.
153. Id. at 69.
154. See id. at 81.
155. Result of Westlaw search on file with author.
IV. THE SUPREME COURT AND SUMMARY STATE COURT OPINIONS

The Supreme Court has yet to directly address the issue of what quantum of articulated analysis is necessary to qualify a state court opinion for review under § 2254(d)(1). Inferences favorable to all sides of the issue can be drawn from the Court’s cases interpreting the statute. In *Weeks v. Angelone*, the Court reviewed, under § 2254(d)(1)’s “unreasonable application” prong, a petitioner’s claim dispensed with in the state court in the following few brief sentences:

[D]efendant effectively presents no arguments in support of five of [forty-seven] alleged errors . . . . Typical of the argument in support of those five is the following conclusory statement on brief in support of No. 45: ‘This error of the court violated the defendant’s rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States . . . . We have considered these so-called arguments and find no merit in any of the five.

Because the issue the Supreme Court actually reviewed in the petitioner’s federal habeas proceedings was one of the “effectively” unargued claims, at least one circuit has relied on *Weeks* as authority for treating summary state court decisions as adjudications on the merits. While *Weeks* provides the strongest support for this view, this support is not absolute. A close reading of the state case makes clear that the state court did not find the petitioner’s claim without merit, but his arguments in support of it. The state court did so only after considering those arguments. The state court provided detailed analysis of the rest of the petitioner’s claims, taking approximately thirteen reporter pages to do so and citing to governing Supreme Court precedent in support of its holdings. This level of articulated reasoning bolsters confidence in the sufficiency of the consideration paid to the five unargued claims. Viewed in this light, *Weeks* at best supports the

156. 528 U.S. 225 (2000).
157. See id. at 234.
159. See *Weeks*, 528 U.S. at 236-37.
160. See Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002) (holding that per *Weeks*, “§ 2254(d) standards apply when a state supreme court rejects a claim without giving any ‘indication of how it reached its decision’”).
161. See *Weeks*, 450 S.E.2d at 383.
162. See id.
view that state courts need only supply some minimal analysis for their decisions.

Importantly, *Weeks* neither addressed nor offered an explicit holding that perfunctory state court decisions are adjudications on the merits qualifying for federal habeas review under § 2254(d)(1). Although the Fourth Circuit opinion reviewed by the Court specifically addressed this issue, citing its own precedent “holding that a perfunctory decision constitutes an adjudication on the merits,” it analyzed the state court’s opinion closely, as above, emphasizing that the state court “considered” and found all of the petitioner’s “arguments” on the claim at issue without merit.\footnote{164. Weeks v. Angelone, 176 F.3d 249, 259 (4th Cir. 1999) (citing Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998)).} Thus, absent a statement by the Supreme Court grounding its decision, its analysis under § 2254(d)(1) as easily validates requiring minimal articulated reasoning as it does of requiring none at all.

The majority opinion in *Williams*, decided after *Weeks*, frequently uses active phrases in describing the mechanics of § 2254(d)(1), such as: “if the state court applies a rule,”\footnote{165. Williams v. Taylor, 529 U.S. 362, 405 (2000) (O’Connor, J., concurring) (emphasis added).} “a state-court decision . . . correctly identifies . . . controlling legal authority,”\footnote{166. Id. at 406 (emphasis added).} “[a] state court decision that correctly identifies the governing legal principle but applies it unreasonably,”\footnote{167. Id. at 408 (emphasis added).} “when a state-court decision unreasonably applies the law,”\footnote{168. Id. at 409 (emphasis added).} and “if a state court identifies . . . but unreasonably applies . . . .”\footnote{169. Id. at 413 (emphasis added).} This suggests a presumption on the part of the Court that in order to be reviewable under § 2254(d)(1), a state court decision must provide articulated reasoning rather than merely a passive one word or one sentence denial. The Supreme Court relied heavily on the articulated state court opinion, “analyzing the reasoning employed by the State court in ways that would have been impossible if the State court had not identified the federal precedents under which it acted.”\footnote{170. Washington v. Schriver, 255 F.3d 45, 64 n.5 (2d Cir. 2001) (Calabresi, J., concurring).} Additionally, the description in *Williams* of the state court’s articulated analysis denying the petitioner relief as an “adjudication”\footnote{171. See Williams, 529 U.S at 413 (O’Connor, J., concurring).} lends support for the view that such adjudications are defined by more than their mere results.
The Supreme Court most recently held that surviving the “contrary to” prong does “not require citation of [its] cases—indeed, it does not even require awareness of [them], so long as neither the reasoning nor the result of the state-court decision contradicts them.” Early overturned the Ninth Circuit’s decision granting habeas relief based on its finding that the state court neither identified nor applied federal law. The Supreme Court held that the state court’s reliance on its state rule, well established as providing defendants greater protection than its sister federal rule, was sufficient. While the first clause of the quoted holding appears to relieve state courts of a burden in drafting their opinions, the second clause actually imposes one. By requiring both the state court’s result and reasoning not contradict Supreme Court precedent, the Court places an affirmative obligation on state courts to expose their rationale for review.

V. POSTCARD DENIALS AS ADJUDICATIONS ON THE MERITS

It is clear from the above discussion that the fact that a state court has issued a decision does not of necessity qualify that decision for the prescriptions of § 2254(d)(1), regardless of how voluminous its rationale. It is also clear that finding a postcard denial not to be an adjudication on the merits would provide a federal habeas court the broadest latitude when reviewing such decisions. The effect of the alternative finding, that such decisions are adjudications on the merits, is that the applicability of § 2254(d)(1) is triggered. This, as discussed, would require deference to these decisions only where they fall under its “unreasonable application” prong.

Holding summary state court decisions to be adjudications on the merits is problematic on many levels. First, it introduces practical difficulties in applying § 2254(d)(1), requiring judicial gymnastics on the part of federal courts extending well beyond a deferential bow. The methods applied in federal courts treating postcard denials as adjudications on the merits have adverse implications for the principles

172. Early v. Packer, 537 U.S. 3, 8 (2002) (emphasis added). The discussion of “awareness” in Early is dicta in that the state court’s actual knowledge of the existing federal rule was not at issue. However, if this statement accurately reflects the Supreme Court’s opinion that state courts need not actually be aware of federal law the Supremacy Clause binds them to uphold, it is extremely problematic: it undermines the very foundations upon which federal courts’ respect for state court decisions on issues of federal law rests. It is illogical to presume a state court unaware of Supreme Court precedent competent in the exercise of its concurrent jurisdiction applying it.

173. See id.

174. See id.
motivating the AEDPA. The real advantage of the deference accorded under § 2254(d)(1)’s “unreasonable application” prong is gained by state court decisions on close calls. This advantage is most at risk where a state court fails to support its conclusion with articulated analysis. Additionally, deferring to such decisions risks awarding deference where none is due, thus resulting in illegal detentions or executions. Finally, the burden imposed on petitioners, already heavy under other habeas reforms imposed by the AEDPA, is increased when confronted with a silent state court decision.

A. Functional Implications

Deferential review under the AEDPA first requires a state court’s decision result from an adjudication on the merits. Such a decision must not then be the product of an unreasonable application of Supreme Court precedent. Postcard denials on their face provide no indications these requirements are met.

The First and Third Circuit approaches regarding whether a state court decision resulted from a merits determination would put an unarticulated state court decision outside § 2254(d)(1)’s reach: it neither provides clear evidence the federal issue was addressed nor is it clear from its face “that the merits of the petitioner’s constitutional claims were examined in light of federal law as established by the Supreme Court.” Finding postcard denials not reached by § 2254(d)(1) would obviate the additional analytic work required by the Green test applied in the Second and Fifth Circuits, placing the responsibility for making this determination clearly on the state courts making it.

Similarly, determining whether a state court unreasonably applied Supreme Court precedent from the void of a postcard denial can be problematic. In Helton, a district court discussed this problem upon being confronted with a series of summary state court denials of a prisoner’s petition for habeas corpus whose lack of articulated reasoning gave “no indication at all whether or not [they] applied” the appropriate Supreme Court precedent.

176. See supra notes 53-59 and accompanying text.
177. Everett v. Beard, 290 F.3d 500, 508 (3d Cir. 2002).
178. See supra notes 60-94 and accompanying text.
180. See id. at 1336.
This court could treat the issue, then, as a nullity, assume that the state courts did apply the [Supreme Court] analysis, and proceed to the third step . . . of determining whether the state courts’ application of [Supreme Court precedent] was ‘unreasonable.’ Or this court could make the inverse assumption—that the state courts’ perfunctory dispensations indicate the Supreme Court’s decision . . . was ignored.\textsuperscript{181}

After deciding that it could not “reasonably find the state court applied federal precedent” in the complete absence of evidence it did so, the federal habeas court ruled that the state court decisions “were contrary to federal law.”\textsuperscript{182} Further, the district court acknowledged that deference does not apply to such decisions, stating, “[u]nder § 2254(d)(1), the court need not be bound by those state court judgments.”\textsuperscript{183} While this decision was rendered prior to the Supreme Court’s decision in Williams, the Eleventh Circuit’s opinion upholding it on appeal was given after Williams.\textsuperscript{184} The circuit court stated, “we are favored with no reasoning, analysis, findings of fact, or legal basis for the denials . . . . [and] have, therefore, no basis for determining whether the state court properly applied [Supreme Court precedent] in denying the habeas claim. Accordingly, we find no error in our trial court’s determination.”\textsuperscript{185}

Forcing postcard denials through a deferential gatekeeper erects a tall barrier when applying § 2254(d)(1). Since most circuits directly addressing the issue have concluded that such perfunctory state court decisions either are or can be adjudications on the merits,\textsuperscript{186} placing

\begin{itemize}
  \item \textsuperscript{181} Id.
  \item \textsuperscript{182} Id.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} See Helton v. Sec’y for the Dep’t of Corrs., 233 F.3d 1322 (11th Cir. 2000).
  \item \textsuperscript{185} Id. at 1326-27. Again, the effect of the court’s recent decision in Early, holding that surviving the “contrary to” prong does “not require citation of [its] cases—indeed, it does not even require awareness of [them],” see supra notes 172-74 and accompanying text, on the Eleventh Circuit’s approach has not yet been addressed. However, given Early’s reliance on the fact that the state court opinion cited state law that provided greater protections than the related federal rule, it is not clearly extensible to state court opinions that cite no law at all.
  \item \textsuperscript{186} See Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002); Luna v. Cambra, 306 F.3d 954 (9th Cir. 2002) mandate recalled and reissued as amended by Luna v. Cambra, 311 F.3d 928 (9th Cir. 2002); Wright v. Sec’y for the Dep’t of Corrs., 278 F.3d 1245 (11th Cir. 2002); Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000); Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999); James v. Bowersox, 187 F.3d 866 (8th Cir. 1999); Mercadel v. Cain, 179 F.3d 271 (5th Cir.1999). But see Gruning v. DiPaolo, 311 F.3d 69 (1st Cir. 2002) (holding that the state court’s rejection without opinion of petitioner’s claims was not an adjudication on the merits qualifying for review under § 2254(d)(1) and reviewing the state court’s decision to deny relief de novo).
\end{itemize}
deference ahead of the requisite § 2254(d)(1) determinations results in a level of deference much broader than contemplated by the term “unreasonable.”

An independent review that gives full § 2254(d)(1) deference to any possible grounds for affirming the state court would . . . seem unwarranted as the a federal court would then be granting extreme deference not only to the grounds the state court actually relied on, but to all grounds that they could have relied on . . . .

The Second Circuit in Rudenko v. Costello, discussed above in the context of the implications of misplacing deference in § 2254(d)(1) determinations, went into detail about the difficulties of meaningful review in the absence of articulated reasoning. Although the discussion was in the context of federal circuit courts reviewing federal district courts, many of the practical difficulties are the same when applied to federal review of state court decisions, principles of comity notwithstanding.

Federal courts review a lower court’s findings of fact under a clearly erroneous standard. Issues of law and issues of mixed law and fact are reviewed de novo. Absent articulated reasoning, determining which of these scenarios formed the basis for a decision is difficult.

Whether the district court’s ultimate decision turns on factual determinations or on a choice between competing legal principles or on the manner in which the legal principles are applied to the facts, the district court must provide an indication of its rationale that is sufficient to permit meaningful appellate review.

This distinction is paralleled in federal habeas review of state court decisions. Under § 2254(e)(1), a state court’s findings of fact are presumed to be correct unless rebutted by clear and convincing evidence. Section 2254(d)(1) mandates a less deferential standard than this, although more deferential than de novo, to applications of controlling Supreme Court precedent. How can the factual or legal

187. Schoenberger v. Russell, 290 F.3d 831, 840 n.6 (6th Cir. 2002) (Keith, J., concurring).
188. 286 F.3d 51 (2d Cir. 2002).
189. See id. at 65-69.
190. See FED. R. CIV. P. 52(a).
191. See Rudenko, 286 F.3d at 64-65.
192. Id. at 65.
194. See supra notes 17-33 and accompanying text.
basis of a state court’s decision, necessary to determine the standard of federal habeas review, be divined from the single word, “Denied”? Rudenko further examined the issue in the context of the very deferential abuse of discretion standard.

Even when the district courts have “wide discretion . . . discretionary choices are not left to a court’s inclination, but to its judgment; and its judgment is to be guided by sound legal principles. . . . The exercise of judicial discretion hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.” . . . “If we are to be satisfied that a district court has properly exercised its discretion, we must be informed by the record of why the district court acted as it did.”

A federal appellate court remands cases to the district court for further clarification where the record is “insufficiently clear to permit [it] to determine the basis for the district court’s decision.” Principles of federalism prevent a federal habeas court from remanding an unclear or ambiguous decision to a state court for clarification; it can only grant or deny the writ based on the record before it. If that record is insufficient to adequately inform a federal habeas court’s review of the basis for the state court’s decision, surely the standard of “reasonable” deference does not mean “shielded from . . . review” any more than the more lenient abuse of discretion standard does.

B. Policies Motivating the AEDPA

How are the interests motivating the AEDPA’s amendments to § 2254(d)(1) served by treating postcard denials as adjudications on the merits? Depending on the interest involved, it is either served not at all or actually frustrated. One policy motivating the Act was that of protecting a state’s interest in the finality of its judgments. This

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195. See Rudenko, 286 F.3d at 65.
196. Id. (internal citations omitted).
197. Id. at 66.
198. See Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).
200. See, e.g., 141 CONG. REC. H1425-03 (1996) (statements of Representative Cox) (“[I]f . . . statutory habeas corpus is available simply to throw out the whole State judicial system, why do we have it in the first place? If we are going to look at these questions from scratch, de novo, facts, evidence, law, the whole thing, as if the State proceeding had never happened, then [a death row prisoner] would be able to, in the future, [further] delay his execution . . . .”).
interest can only be valid, however, where the judgment results from a proper adjudication of a petitioner's federal claim—a state has no interest in judgments resulting from the misapplication of or disregard for federal law.\textsuperscript{201} A silent state court opinion gives as much evidence that a state court adequately exercised its concurrent jurisdiction as it does that the state court failed in this exercise: it provides no support at all. Under § 2254(d)(1), such a silent opinion is accorded only a minimal level of deference until certain threshold questions are answered. This deference is limited to asking those questions of the state court decision. If the words of the judgment itself do not provide the requisite answers, there is simply no basis for extending it the deference due opinions under the “unreasonable application” prong.

Another of the AEDPA’s goals, according a due modicum of respect to state courts exercising concurrent jurisdiction,\textsuperscript{202} is defeated by treating postcard denials as adjudications on the merits. First, federal deference to unarticulated state court decisions demonstrates a lack of respect for state courts whose diligence results in a reviewable opinion. Second, where a state court is silent on the reasoning behind its decision, a federal habeas court is practically forced to provide its own in order to comply with § 2254(d)(1)’s prescriptions.\textsuperscript{203} Determining whether a perfunctory state court decision contradicted Supreme Court precedent requires the federal habeas court to identify the correct precedent; determining whether such precedent was applied unreasonably to the facts further requires the federal court to do so itself. Such review extends well beyond the review of an articulated opinion that encompasses a search for support of the state court’s holding. It effectively requires a federal court to determine any possible basis for the state court’s decision and to pore through the record for any possible support. Not only is judicial economy ill served, certainly comity is offended where a federal court presumes to speak for a state court, pronouncing what it must have meant, whether or not the end results differ.

Finally, treating postcard denials as adjudications on the merits creates a perverse incentive for state courts to ultimately not consider their petitioners’ federal claims at all. Where silence represents a state

\begin{footnotes}
\footnotetext{201}{U.S. CONST. art. VI, cl. 2.}
\footnotetext{202}{See, e.g., 141 CONG. REC. H1425-03 (1996) (statements of Representative Cox) (reading a letter to Representative Hyde from a group of state attorneys general stating, “[t]he central problem underlying federal habeas corpus review is a lack of comity and respect for state judicial decisions”).}
\footnotetext{203}{See supra notes 118-22 and accompanying text.}
\end{footnotes}
court’s failure to consider an issue, it will reap the same deferential benefit as if it had spoken, at least where its result is not contrary to Supreme Court precedent. This would permit “a state court that flagrantly ignored the governing law [to] thwart independent federal habeas review,”204 and “profoundly undermine any incentive for state courts to openly participate in constitutional adjudication.”205 The disincentive, however, is functionally much greater. Given the work required of a federal court applying § 2254(d)(1) to postcard denials, a state court practically receives the additional benefit of an extremely well qualified law clerk. Why wouldn’t a busy state court avail itself of this golden opportunity to conserve its resources?

C. State Court Burdens and Benefits

Proffering the deference accorded under § 2254(d)(1) only to articulated state court decisions is the best way to guarantee a state court receives its benefits. It is also the only way to avoid the risk that the petitioner’s detention does not rest on violations of his due process rights. Further, rather than imposing burdens on state courts, not treating perfunctory state court decisions as adjudications on the merits can be viewed as honoring state courts’ resource management choices while protecting petitioners’ rights to review.

1. The Benefits of Articulated Reasoning

Even federal courts distasteful of imposing structural requirements on state court opinions recognize the benefit of articulated decisions. “[O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review.”206 “A state court’s explanation of its reasoning would avoid the risk that we might misconstrue the basis for the determination, and consequently diminish the risk that we might conclude the action unreasonable . . . .”207 The magnitude of this risk depends in large part on the nature of the federal law in question. Rules requiring a fact intensive totality of the circumstances determination, where the balances can be delicate, present greater risks a state court will be misconstrued absent articulated reasoning supporting its decision.

204. Steinman, supra note 5, at 1520.
205. Id. at 1522.
206. Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).
207. Aycox v. Lytle, 196 F.3d 1174, 1178 n.3 (10th Cir. 1999).
In *Hardaway v. Young*, the Seventh Circuit relied heavily on the analysis in the state court’s decision when it applied § 2254(d)(1)’s “unreasonable application” prong to the petition of a fourteen year old convicted murderer who sought habeas relief on the basis of the involuntariness of his confession. A confession’s voluntariness is determined based on a consideration of the totality of the circumstances surrounding it, weighing such factors as the personal characteristics of the defendant as well as whether he was subject to physical mistreatment and psychological coercion. Where a defendant is a minor, evaluation of his personal characteristics specifically includes his “age, experience, education, background and intelligence.” The *Hardaway* court further recognized that “[t]he Supreme Court . . . has spoken of the need [for] ‘special caution’ when assessing the voluntariness of a juvenile confession.”

Since the state court correctly identified the applicable constitutional test and acknowledged the special care required of it due to Hardaway’s age, the federal court analyzed the claim as one involving an “unreasonable application” of Supreme Court precedent. After performing its own totality of the circumstances analysis, the court stated it “might well find that on balance [there was evidence] enough to exclude the confession,” but held it could not grant relief. “As the state courts pointed out, there are arguments that pass the lenient test of ‘reasonableness’ in favor of finding the confession voluntary.” The federal habeas court then went into a detailed discussion of the factors considered in the state courts’ opinions. It continued:

[T]he trial court stated that it weighed all relevant factors, and after doing so, it concluded that the lack of any apparent coercion by the police, Hardaway’s recitation of his rights, his mental capacity, and his past experience with the criminal justice system on balance rendered his confession voluntary and admissible. Even assuming that the weighing of factors by the . . . state courts . . . was incorrect, the

208. 302 F.3d 757 (7th Cir. 2002).
209. See id. at 761-63.
215. Hardaway v. Young, 302 F.3d 757, 762 (7th Cir. 2002).
216. See id. at 762.
217. Id. at 766.
218. Id. at 767.
219. See id. at 767-68.
The balance is close enough that, in the final analysis, it is not unreasonable.\(^{220}\)

The federal court “reluctantly conclude[d]” that the state court did not unreasonably apply the totality of the circumstances test to Hardaway’s confession.\(^{221}\) It denied habeas relief despite its “gravest misgivings and only in light of the stringent standard of review” mandated by § 2254(d)(1).\(^{222}\)

Surely, the deference due under § 2254(d)(1)’s “unreasonable application” prong made a difference in this close case. However, it is unlikely, given the federal court’s inclination to find the confession involuntary, that the state court would have received the benefit of this deference absent the articulated reasoning supporting its decision. Detailing the analysis they performed enabled the state courts to convince a “reluctant” federal court, over its own “misgivings,” that it was owed the small increment of deference that mattered here.

### 2. The Risks of Silence

A passage from Williams, discussing the standard for the prejudice prong under the Strickland test for ineffectiveness of counsel,\(^{223}\) provides the basis for a hypothetical highlighting a mirror issue, that of awarding a state court the essential benefit of deference where no deference is deserved.

If a state court were to reject a prisoner’s claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be [contrary to] our clearly established precedent . . . .\(^{224}\)

For the sake of argument, suppose the state decision also found the prisoner had shown there was a reasonable probability the result would have differed. Where a state court clearly evidences such a basis for its decision, per Williams, a federal habeas court does not owe it the benefit of deference under § 2254(d)(1).\(^{225}\) However, where a state court is silent as to the rationale for this decision, treating it as an adjudication on

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\(^{220}\) Id.

\(^{221}\) Id. at 759.

\(^{222}\) Id.

\(^{223}\) See Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that the test for prejudice is the existence of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”).


\(^{225}\) See id. at 406.
the merits risks a federal court awarding the state court a deferential windfall. For instance, the federal court might assume state court’s decision was based on an analysis that the petitioner demonstrated a quantum short of the necessary “reasonable probability” the outcome would have differed. A federal court upholding the state’s rejection under the “unreasonable application” prong, based on its own review of the record, would not only be legally inappropriate in this situation, it runs counter to specifically enunciated Congressional intent behind the AEDPA. 226 It also effectively nullifies the likely decision by the state that, based on a correct understanding of Strickland, the petitioner was due relief.

3. Relieving State Court Burdens

Judge Guido Calabresi offered a vision of state empowerment rather than disrespect if perfunctory state court decisions are not treated as adjudications on the merits qualifying for deferential review under § 2254(d)(1). 227 Affording states a mechanism by which they can refuse the “first opportunity to review [a federal constitutional] claim and provide any necessary relief,” 228 accords a state the same respect that comity requires as does offering it the opportunity to begin with. 229 In this view, a state would signal its intention not to shoulder the “heavy, and sometimes unwanted and unmanageable, burden” of deciding “what can be very complicated questions of federal law” by issuing an opinion failing to address them. 230 Reviewing these postcard denials de novo enables state “courts that believe their energy and resources are better employed elsewhere . . . . to exercise that control over their judicial resources which a true respect for state sovereignty requires,” 231 while fully protecting petitioners’ rights.

The Second Circuit did not ultimately share Judge Calabresi’s vision, due in part to its lack of “textual” support within the statute. 232 Support, however, can be found in the related area of exhaustion. The exhaustion doctrine mandates that “[f]ederal habeas relief is available to state prisoners only after they have exhausted their claims in state court.” 233 The exhaustion doctrine, as codified in 28 U.S.C.

229. See Washington, 255 F.3d at 63.
230. Id. at 62.
231. Id. at 63.
233. O’Sullivan, 526 U.S. at 839.
§§ 2254(b)(1) and (c), is a “rule of comity . . . . designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts.”

In *O’Sullivan*, the Supreme Court held that the mere fact a state’s highest court’s review was discretionary did not make such review unavailable and relieve a petitioner from the obligation of seeking it in order to fulfill the exhaustion requirement. While recognizing that “some state courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court [and that in] these circumstances . . . the increased, unwelcome burden on state supreme courts [may disserve] . . . comity,” it held that “the creation of a discretionary review system does not, without more, make [such] review . . . unavailable.”

This requirement of “more” is satisfied where a state supreme court decision or order includes specific language stating a petitioner has exhausted all available state remedies when he presents his claims to the state’s intermediate court. “Disregarding a state supreme court’s explicit attempt to control its docket and to decline the comity extended to it by the federal court goes against the very purpose of the exhaustion doctrine and obliterates . . . comity.”

One can argue that the Supreme Court’s requirement of “more” and the lower courts’ focus on the positive declarations of state courts satisfying it, militate against a presumption that a state court’s passive silence is an effort on its part to “decline the comity extended to it” or to “exercise . . . control over [its] judicial resources.” While certainly even a coded expression that a state court’s failure to address the merits of a petitioner’s federal constitutional claim was intentional would be helpful, such a presumption is not without basis. Prior to the passage of the AEDPA, a state court did not need to communicate its intent in

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234. *Id.* at 845.
235. *See id* at 846.
236. *Id.* at 847.
237. *Id.* at 848.
238. *See Swoopes* v. *Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999) (holding a state supreme court’s decision “that ‘[o]nce the defendant has been given the appeal to which he has a right, state remedies have been exhausted’ . . . [meant] review need not be sought before the [state’s supreme court] in order to exhaust state remedies.”); *Mattis* v. *Vaughn*, 128 F. Supp. 2d 249, 261 (E.D. Pa. 2001) (holding that a state supreme court order “removes a petition for discretionary review from one full round of [the state’s] ordinary review process, and therefore makes discretionary review unavailable for the purpose of the exhaustion requirement in § 2254”).
240. *Id.*
242. *See supra* note 77.
this regard to avoid risking a petitioner’s otherwise available opportunity for de novo federal review.\textsuperscript{243} In any event, an affirmative declaration that unarticulated state court decisions will not be treated as adjudications on the merits obviates the need for this presumption and allows a state court’s silent “less” to be “more.”

\textbf{D. Petitioners’ Burdens}

\textit{Rudenko} also addressed the effect of perfunctory decisions on petitioners themselves.\textsuperscript{244}

Specifications of the grounds on which the district court denied a habeas petition would seem especially necessary where . . . the petitioner is not represented by counsel. Without an explanation of the court’s rationale, it hardly seems likely that these prisoners proceeding \textit{pro se} would be able to make an intelligent decision as to whether—and as to what issues—to attempt an appeal, or to make any orderly presentation in support of an appeal, given that the application of AEDPA is believed to be “particularly difficult” even “for law clerks who serve . . . one year, to master.”\textsuperscript{245}

Again, while this argument was made regarding federal appellate review of federal habeas decisions, its principles are still apt when applied to federal review of state habeas decisions. A state \textit{pro se} petitioner is no more able to intelligently effectuate complex habeas strategy simply because a federal district court has not yet had the opportunity to review his petition. A compelling argument can be made that terse, unarticulated denials of relief in state court proceedings \textit{pro se} habeas petitioners, and, as such, states should not be permitted to take advantage of the structure of their courts’ opinions in countering these prisoners’ claims.

Support for this argument can also be found in the Supreme Court’s interpretation of a different AEDPA amendment to federal habeas review of state prisoners’ petitions.\textsuperscript{246} Under § 2254(e)(2), a federal habeas court cannot grant a state petitioner an evidentiary hearing where he has “failed to develop the factual basis of a claim in state court,”

\textsuperscript{243} See supra note 8.
\textsuperscript{244} See Rudenko v. Costello, 286 F.3d 51, 64 (2d Cir. 2002).
\textsuperscript{245} Id. at 67 (internal citations omitted).
\textsuperscript{246} See Michael Williams v. Taylor, 529 U.S. 420 (2000). I refer to this case using the petitioner’s full name as this opinion, interpreting another subsection of § 2254 amended by the AEDPA, involved a different state petitioner named “Williams” and was decided on the same day as \textit{Williams v. Taylor}, 529 U.S. 362 (2000) interpreting § 2254(d)(1).
except in two narrow circumstances. "To be . . . a ‘failure’ under [§ 2254(e)(2)] the deficiency in the record must reflect something the petitioner did or omitted." [248] "[W]here an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, 2254(e)(2)” does not apply, and the federal habeas court retains full discretion over whether or not to conduct the hearing. [249] Here, comity cedes to the habeas petitioner’s right to meaningful review of the legality of his detention. [250]

The AEDPA does not permit a state court to “insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts.” [251] In Michael Williams, the Court agreed with the circuit court cases discussed here, specifically citing to them. [252] The Court further stated that “comity is not served by saying a prisoner ‘has failed to develop the factual basis of a claim’ where he was unable to develop his claim in state court despite diligent effort.” [253]

The only arguable basis for distinguishing a state court’s development of factual issues from a state court’s exposition of legal issues is that its factual determinations are accorded more deference than are its legal determinations. [254] This margin is narrowly limited to the difference between “presumed correct” unless rebutted by clear and convincing evidence [255] and “[s]ome increment of incorrectness beyond error.” [256] However, a pro se petitioner developing a legal rather than factual basis for his petition is confronted with an inherently more difficult task, being most likely far more familiar with even the disputed facts of his case than with the law applied to them. Treating summary state court decisions as adjudications on the merits in the context of pro se petitioners is therefore inapposite to the policy motivating the broader latitude generally accorded them. [257] Since there is no constitutional right to counsel in federal habeas proceedings, [258] all state prisoners are potentially pro se petitioners: whether they will be represented in any

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248.  Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir. 1997).
250.  See id. at 337-38.
251.  Burris, 116 F.3d at 259.
253.  Id. at 438.
254.  See supra note 189 and accompanying text.
256.  Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000).
257.  See, e.g., U.S. v. Garth, 188 F.3d 99, 105 n.7 (3d Cir. 1999) (stating, “[w]e generally accord wide latitude to pro se petitions for relief”).
possible future proceedings can only be known after the state court has ruled.

VI. THE POSTCARD DENIAL AS ADJUDICATION: JUST BECAUSE JUDGE POSNER SAID IT, DOESN’T MAKE IT SO

Addressing whether or not postcard denials should be treated as adjudications on the merits presupposes that they represent the results of adjudication. A question fundamental to the animating spirit behind the writ of habeas corpus is whether a perfunctory, unarticulated state court decision can be properly considered adjudication at all, let alone adjudication that may or may not have reached the merits of a petitioner’s federal constitutional claims. In its decision holding that a state court need not articulate the rationale underlying its decision for it to be reviewed under § 2254(d)(1), the Second Circuit began its task of statutory construction by presuming that “[w]hen Congress uses a term of art . . . it speaks consistently with the commonly understood meaning of the term." Its own “well settled meaning” included reference to an adjudication’s “res judicata effect.” The court then cited as support a legal dictionary’s definition of adjudication as “the legal process of resolving a dispute; the process of judicially deciding a case,” a definition at odds with its own result oriented decision. However, the court made no inquiry into any other areas where Congress used the term.

Federal habeas review of state prisoner petitions is not the only area of tension between judicial review and respect for a coordinate branch of government where Congress has found the concept of adjudication to be important. In the area of administrative law, an agency’s responsibilities and the rights of those affected by an agency’s conduct depend on whether such conduct is adjudicatory or rulemaking in nature. The Administrative Procedures Act defines “adjudication [as] agency process for the formulation of an order.” An “order” is defined as “the


261. Id.

262. Id. (citing BLACK’S LAW DICTIONARY (7th ed. 1999)).


whole or a part of a final disposition." 266 In this context, Congress has clearly conceived of the “process” of adjudication as more than its ultimate result in a “final order.” The Administrative Procedures Act also imposes structural requirements on decisions resulting from agency adjudications, requiring they “include a statement of . . . findings and conclusions, and the reasons or basis therefor [sic], on all material issues of fact, law or discretion . . . on the record.” 267 Congress thereby required a published decision reflect the adjudicatory “process by which an agency applies either law or policy, or both, to the facts of a particular case in order to determine past and present rights and responsibilities.” 268 Further,

[a]n adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including . . . [a] formulation of issues of law and fact in terms of the application of rules . . . [and] other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, . . . and the opportunity of the parties to obtain evidence and formulate legal contentions. 269

These structural requirements are motivated by concerns of preventing arbitrary agency action, 270 and enabling meaningful judicial review. 271

The writ of habeas corpus is similarly motivated by concerns of preventing arbitrary government conduct. 272 Review of state postcard denials is no less infected with guesswork than judicial review of unclear or incomplete agency decisions. The two different contexts also share similar concerns about the appropriate level of deference under which

266. 5 U.S.C. § 551(6).
268. 2 AM. JUR. 2d Administrative Law, § 261 (defining agency adjudication).
269. RESTATEMENT (SECOND) OF JUDGMENTS § 83 (2002); see also United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (stating “[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose”).
270. See Armstrong v. Commodities Futures Trading Comm’n, 12 F.3d 401, 404 (3d Cir. 1993).
271. See id.; see also NLRB v. Clement-Blythe Co., 415 F.2d 78, 82 (4th Cir. 1969) (stating “the reasons for the [agency’s] decision become essential, for lack of clarity in the administrative process infects review with guesswork”).
judicial review should be conducted.273 Tracing the history of judicial review of agency decision-making, Judge Patricia Wald wrote:

> The concerns that animate that debate—the desire for a check on . . . absolutism . . . and a means of insuring that laws are actually carried out as intended—are still pitted against a deep seated conviction, rooted in our constitutional format of separation of powers, that the courts should not take [inappropriate] control . . . from [coordinate] political branches. This may result in an unavoidable and irreducible tension inherent in any attempt to accommodate deference and scrutiny in the same jurisprudential doctrine. At different periods, one goal trumps the other, and usually the winner reflects forces outside the boundaries of the law, the government or the courthouse.274

Judge Wald could just as easily be describing the issues surrounding federal habeas review of state court denials of post-conviction relief. The Administrative Procedures Act’s requirements on the structure of decisions resulting from agency adjudications were enacted in a period of “almost obsequious [judicial] deference to agency decisions.”275 It is highly appropriate then to import the process dependent agency concept of adjudication into the context of § 2254(d)(1), enacted also during a period when deference was philosophically trumping scrutiny. Doing so would result in the inevitable conclusion that postcard denials, lacking “the essential elements of adjudication,”276 such as “a statement of . . . the reasons or basis” for their conclusions “on all material issues of fact [or] law . . . on the record,”277 are not reflective of adjudication at all.278

In a Seventh Circuit decision 279 often cited as supporting a result-oriented approach to applying § 2254(d)(1), 280 Judge Richard Posner determined administrative review requirements to be inappropriate in the habeas context.281 He found this so because they merely reflected a

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274. Id. at 229-30.
275. Id. at 224.
278. “A written statement of reasons, almost essential if there is to be judicial review, is desirable on . . . other grounds. The necessity for justification is a powerful preventive of wrong decisions.” Henry J. Friendly, “Some Kind of Hearing”, 123 U. Pa. L. Rev. 1267, 1292 (June 1975) (describing and prioritizing the due process requirements of a fair hearing).
279. See Hennon v. Cooper, 109 F.3d 330 (7th Cir. 1997).
280. See, e.g., Wright v. See’y for the Dep’t of Corrs., 278 F.3d 1245, 1254 n.2 (11th Cir. 2002); Sellan v. Kuhlman, 261 F.3d 303, 313 (2d Cir. 2001); James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999).
281. See Hennon, 109 F.3d at 335.
federal court’s unquestioned ability to remand administrative decisions back to the issuing agency for further clarification, an option not available to a federal court reviewing a state court’s decision.\textsuperscript{282} However, it is precisely because there is no mechanism for further clarification in this context that there is a premium on an “articulate[d] . . . rational path connecting the law and the evidence to the outcome.”\textsuperscript{283} The greater risks generally posed to a state habeas petitioner fallen “victim [to] a failure of judicial articulateness”\textsuperscript{284} further increase the value of this premium.

That federal habeas review should focus on the quality of the process by which a state petitioner was imprisoned is merely a reflection of the primary and traditional concern of the writ. “[T]he Great Writ is . . . a mode of procedure . . . . Vindication of due process is precisely its historic office.”\textsuperscript{285} “The result of a proceeding can be rendered unreliable” by a defect in the process that spawned it.\textsuperscript{286} This is as true of proceedings at the trial court level as it is of proceedings in higher, reviewing courts. The deference mandated by the AEDPA is not intended to apply to unreliable applications of federal law, only to reasonable ones.

\section*{VII. Conclusion}

Laying aside due process concerns raised by postcard denials, treating unarticulated state court decisions as qualifying for review under the AEDPA poses functional barriers to federal courts’ ability to determine specific predicates necessary for review. First, an unarticulated state court decision provides no insight regarding whether the merits of the petitioner’s federal claims were reached, and thus, whether or not de novo review should apply. Second, such a decision’s lack of rationale obscures the factual or legal basis grounding it necessary to determine the standard of review under the AEDPA. Third, a federal habeas court reviewing a postcard decision is forced to make assumptions about how the state court arrived at its conclusion. This can lead to misunderstandings having negative implications for both the state and the petitioner. Where a federal court’s back-filling analysis results in a decision at odds with the state court, the state court risks losing the

\textsuperscript{282} See id.
\textsuperscript{283} Id.
\textsuperscript{284} Id.
benefit of the doubt that the AEDPA provides when the issue is a close one. Where the federal court agrees with the state court, lack of articulated analysis can mask an incorrect application of federal law making the petitioner’s custody unlawful. Finally, a silent state court opinion offers no guidance to a pro se petitioner in making an intelligent decision about whether to pursue federal habeas relief and, if so, over which issues. Treating unarticulated state court decisions as not qualifying for review under the AEDPA would protect both states’ and petitioners’ interests alike, while minimizing the risks that reasonable state court decisions will be obviated and petitioners will be held in illegal custody.

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NOTE

A TOAST TO THE DIGNITY OF STATES:
WHAT ELEVENTH AMENDMENT
JURISPRUDENCE PORTENDS FOR DIRECT
SHIPMENT OF WINE

“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”

I. INTRODUCTION

It started out as just a simple bet between the Governors of California and Florida—Governor Gray Davis agreed to send Florida Governor Jeb Bush a case of California cabernet if his state’s Oakland Raiders lost to the Tampa Bay Buccaneers in Super Bowl XXXVII. But this simple bet grew quickly into a snafu when Governor Davis tried to settle the bet and ship a case of wine to Florida, one of thirty-seven states that restrict direct shipping of wine under Prohibition-era laws. When confronted with the legal consequences of violating Florida’s strict direct shipment law, Governor Davis chose to avoid the potential for being extradited and charged with a felony. Instead, he decided he would just have to hand-carry two bottles to Governor Bush at a meeting in Washington, D.C. While Florida’s law may seem bizarre, it represents a common theme that runs through the patchwork of the fifty states’ direct shipment of wine laws. As support for the opposing sides of the direct shipment argument increases and media coverage grows, federal courts around the nation are confronting the contentious issue of

3. See id.
4. See id.
5. See id.
6. See infra Part II.C.
direct shipment of wine that implicates constitutional issues of federalism, states’ rights, and Commerce Clause power.

Since William Rehnquist became Chief Justice in 1986, the Supreme Court, in construing the scope of the Eleventh Amendment, has consistently upheld states’ rights and has tipped the scales of federalism in the states’ favor. This interpretation of the Constitution does not bode well for small wineries and wine aficionados who are fighting against restrictive state shipping laws in courts across the country. Thus far, several federal courts have considered the issue of directly shipping wine to consumers’ homes and analyzed it as a tug-of-war between the Commerce Clause and the Twenty-First Amendment. Because the opinions vary on which constitutional provision wins out, it is likely that the United States Supreme Court will make the final decision. What the Court will decide is less of a mystery than might appear at first glance. Recent Eleventh Amendment jurisprudence provides strong hints as to how the Supreme Court would rule on direct shipment prohibitions.

In Part II, this Note will explain the “wine war” that is currently being waged in courts and legislatures in many states. The background of the direct shipment of wine issue will be fleshed out, including a discussion of the players in the legal battle and a summary of the states’ regulatory laws on direct shipment. Part III highlights the lower court cases that have already been decided in the “war” and will review commentaries that have been published concerning these decisions. In Part IV, the Supreme Court’s emphasis on the sovereignty and the dignity of the States in its recent Eleventh Amendment cases will be used, not for its specific constitutional subject matter, but as evidence of the Court’s current approach to issues concerning state power. Part V uses Eleventh Amendment jurisprudence in discussing how the Supreme

7. See infra Part IV.
10. The issues surrounding the Eleventh Amendment are very complex and this Note is not intended to explain its complete history and jurisprudence. Many authors and commentators have discussed the complexity of Eleventh Amendment jurisprudence. This Note looks at just a few cases that provide examples of how the court has used the Eleventh Amendment to defend states’ rights. For a more complete history and discussion of Eleventh Amendment jurisprudence see infra notes 282 & 291.
Court may rule on the direct shipment issue considering its commitment to the “dignity” of the state and its recent history of upholding states’ rights.

Part VI concludes that states’ prerogatives under the Twenty-First Amendment should not overcome the Commerce Clause’s purpose of eliminating economic protectionism and encouraging a robust national economy. Nevertheless, if the direct shipment of wine issue reaches the Supreme Court, it is likely, in light of recent Eleventh Amendment jurisprudence, that the Court will protect the states’ right to prohibit or limit direct shipment of wine from out-of-state producers to the homes of in-state consumers. While this decision would denigrate the negative implication of the Commerce Clause prohibiting states from putting an undue burden on interstate commerce, the Court may view the Twenty-First Amendment as being preeminent in this situation because it implicates the sovereignty of the states. Throughout United States history, the law has treated alcohol differently from any other product, with states having exclusive control over its regulation.11 To diminish that control could be viewed by the current Supreme Court majority as diminishing the dignity and infringing on the sovereignty of the states.

II. INTRODUCTION TO THE WINE WAR

Imagine taking a vacation in the Napa Valley, stopping at wineries, taking tours, and then sampling the wines. You find yourself really enjoying a bottle of wine and would like to ship some home and to friends in different states. Yet, thanks to protectionist laws that preserve the monopoly of wholesalers, it is against the law to ship wines or other alcoholic beverages from out-of-state to homes in half the states in the United States.

The last decade has seen a dramatic increase in interest in wine:

11. See Thurlow v. Massachusetts, 46 U.S. 504, 539 (1847) (commonly known as the License Cases). Massachusetts prohibited sales of liquor in quantities less than twenty-eight gallons and required sellers to obtain licenses. See id. at 505. Chief Justice Taney opines that unless specifically contradicted by congressional action, states may regulate interstate commerce in exerting their police power for the general welfare of their citizens. See id. at 514-15. See also Background on Anti-Direct Shipment Laws, at http://www.wineinstitute.org/shipwine/backgrounder/backgrounder.htm (last visited Aug. 19, 2003) (describing that the common understanding of the Twenty-First Amendment is that it gives each state the power to regulate alcoholic beverages within its boundaries unhampered by any federal control).
buying it, drinking it, and making it.\textsuperscript{12} Underscoring Americans’ enthusiasm for wine is the tremendous growth in the last decade of the twentieth century in the number of wineries in the United States.\textsuperscript{13} There are more than 2700 licensed wineries in the nation, representing a ninety-three percent increase since 1990 when there were 1400 wineries.\textsuperscript{14} Wineries are now a part of the rural farm economy in all fifty states.\textsuperscript{15} Many of these wineries are family businesses operating on a small scale.\textsuperscript{16} Although California is the premier winegrowing state, comprising roughly half the nation’s wineries and over ninety percent of the production, there are many wineries in Washington, Oregon, New York, Ohio, Virginia, Pennsylvania, Texas, Missouri, Colorado, New Mexico, Illinois, and Michigan.\textsuperscript{17} Each of these states has a minimum of thirty wineries, with the top three having more than 150 apiece.\textsuperscript{18}

As the number of wineries has increased, however, the number of wholesalers has decreased from five thousand in 1950 to less than four hundred today.\textsuperscript{19} Following Prohibition, state legislatures instituted a three-tier system to keep control over the sale, distribution, and consumption of all alcoholic beverages.\textsuperscript{20} The primary purpose of the system was to keep the liquor industry out of the hands of organized criminals who had controlled liquor empires during Prohibition.\textsuperscript{21} Under the three-tier system, all liquor must go from producer to distributor/wholesaler to retailer, with each tier being regulated individually and no owner investing in more than one tier.\textsuperscript{22}

The result of the three-tier system is that a relatively small number

\textsuperscript{12} See, e.g., Frank J. Prial, \textit{Caught Between Two Amendments}, N.Y. TIMES, Nov. 20, 2002, at F11 (describing the wine industry’s growth from a cottage industry to a one billion dollar per year enterprise); Alan J. Wax, \textit{Hearty Appetite for Grapes}, NEWSDAY (Nassau), July 12, 1999, at C8, C9 (acknowledging tremendous increase in prices for land with vineyard potential).


\textsuperscript{14} See id.

\textsuperscript{15} See id.

\textsuperscript{16} See id.

\textsuperscript{17} See id.

\textsuperscript{18} See id.

\textsuperscript{19} See id.


\textsuperscript{21} See id.

\textsuperscript{22} See id.
of wholesalers now determine what wines are available to consumers.\textsuperscript{23} Wholesalers have generally been unwilling to represent smaller wineries with limited production capacity—preferring to stick with national brands that generate greater sales volume.\textsuperscript{24} Fewer than seventeen percent of wineries are represented by distributors.\textsuperscript{25} Each year, wineries in the United States produce many more wines than those represented by wholesalers or sold in retail stores.\textsuperscript{26} Consumers who are wine aficionados want to buy those unusual, hard-to-get wines and, based on the wide availability of all kinds of other products, theirs is a reasonable expectation that they should be able to do so.\textsuperscript{27} Under current conditions, many cannot.\textsuperscript{28}

The Internet is an ideal medium for small wineries to showcase their wine.\textsuperscript{29} The Internet is also ideal for wine consumers to purchase wines unavailable in their home states.\textsuperscript{30} However, in many states, state statutes keep consumers from ordering wine over the Internet and wineries from shipping their product in response.\textsuperscript{31} In some states, such as Florida and Maryland, selling or ordering wine from out-of-state over the Internet is a felony, with punishments equal to those handed out to violent criminals.\textsuperscript{32}

Wine consumers and wine makers are waging a war in state legislatures and federal courts to overturn these prohibitive direct

\textsuperscript{23} See Hearings, supra note 13.
\textsuperscript{24} See id.
\textsuperscript{25} See K. Lloyd Billingsley, Ship the Wine in Its Time, PAC. RES. INST., at 1 (Aug. 2002).
\textsuperscript{26} See id.
\textsuperscript{27} See id.
\textsuperscript{28} See id.
\textsuperscript{29} See Dana Nigro, Tide Turns in Direct Shipping Battle, WINE SPECTATOR, Oct. 21, 2002, at 53-54, available at http://www.winespectator.com/Wine/Main/Feature_Basic_Template/0,1197,1501,00.html [hereinafter Nigro, Direct Shipping Battle]; see also David Post & Bradford C. Brown, On the Horizon: The Internet and the 21st Amendment, at http://www.informationweek.com/story/IWK20021122S0020, Nov. 25, 2002 (describing how the “Internet can do what distributors and wholesalers can’t—provide access to all wineries large and small across all geographic boundaries.”).
\textsuperscript{30} See, e.g., Caroline E. Mayer, Stopped at the State Line: Cabernet-and-Contacts Coalition Challenges Curbs on E-Commerce, WASH. POST, Oct. 8, 2002, at E1 (describing a Washington D.C. wine lovers’ frustration when trying to order wine over the Internet and how state regulations limit the amount of wine he can receive from out-of-state wineries); see also Tony Mauro, Interstate Wine Sales Start to Flow, USA TODAY, Dec. 15, 2002, at A15 (noting that internet sites like eBay do not auction wines and that most wine websites that wanted to become virtual wine shops have collapsed partly because of the complex laws that govern interstate shipping).
\textsuperscript{31} See generally Mayer, supra note 30, at E1; Mauro, supra note 30, at A15.
\textsuperscript{32} See Billingsley, supra note 25, at 1-2.
shipment laws. After years of building momentum to convince courts and legislatures to eliminate state shipping bans, consumers and wineries have finally made some headway. However, the powerful wholesaler lobby has used its political and financial muscle to protect its lucrative, and virtually monopolistic market.

A. The Players in the Wine War

The participants in the legal battles are: on one side, owners of small wineries who want to ship wine directly to the homes of consumers throughout the country, and consumers who do not have many of those limited-production wines available at their local stores; and on the other side, wholesalers who control the distribution of most alcoholic beverages in this country, and state governments that are concerned with collecting taxes on alcoholic beverages and preventing underage drinking.

1. The Winery Owners and the Consumers

Owners of small wineries want people in every state to have access to their wine, and wine consumers want to order their favorite wines from small wine boutique operations wherever they are located. However, twenty-six states expressly prohibit the direct shipment of wine from out-of-state to consumers; eleven states significantly limit direct shipment; and thirteen states have “reciprocal” shipping laws, meaning that consumers can have wine sent to their homes directly from wineries as long as the seller’s home state allows out-of-state companies to ship wine to its residents. One owner of a winery in Virginia estimates that she loses about twenty percent of her business in sales each year because she cannot ship to out-of-state customers. Some small wineries claim that they cannot find or afford wholesale representation in many states, so they get locked out of those markets entirely.

33. See Nigro, Direct Shipping Battle, supra note 29, at 49.
34. See infra Part III for a discussion of the status of direct shipment cases.
35. See infra Part II.A.
38. See infra Part II.C. for a more in-depth discussion of the states’ shipping laws.
39. See Nigro, Direct Shipping Battle, supra note 29, at 53.
40. See id. at 53-54.
A wine connoisseur was shocked to receive a “very dramatic” letter from the Maryland comptroller’s office threatening him with criminal prosecution and confiscation of his wines after he joined a wine-of-the-month club and received wine from an out-of-state winery.\footnote{See id. at 49. After receiving the threatening letter from the state of Maryland, he not only stopped his wine-club orders, he scaled back what was a $4,500-a-year hobby, settling for the limited selection available at his local Maryland stores. See id.} Countless wine drinkers visit wineries and are introduced to new wines they like, but can’t buy in their home state.\footnote{See id.} Another consumer in Montana wanted to make sure that he did everything legally to have wine directly shipped from a California winery.\footnote{See id.} Montana regulators said he had to buy a special state permit—a “connoisseur’s license”—for fifty dollars to have wine shipped directly to his home.\footnote{See id.} The state also required him to keep track of every purchase, give paperwork to regulators, and send semiannual tax filings to the state.\footnote{See id. In the end, it was such a hassle that he gave up and decided that it was easier to drive to the Napa Valley.\footnote{See id.}}

It is not only vineyard owners who are losing customers, but farmers who have added grapes to their repertoire to avoid the dire consequences to more traditional crops during arid growing seasons.\footnote{See id.} Growing grapes has become a way for some farmers to hedge their bets—grapes flourish when other, more water-dependent crops die.\footnote{See id.} It is interesting that while state Alcohol Beverage Control (ABC) agencies have been fighting to preserve prohibitions on wine shipments, state agriculture departments have been fighting to eliminate them.\footnote{See id. See also, e.g., Laylan Copelin, \textit{Will Texas Allow Wine Shipments? Stay Tuned}, AUSTIN AM.-STATESMAN, Feb. 20, 2001, at B1.}

2. The Wholesalers

Alcoholic beverage wholesaling is big business, and it is clear that powerful liquor wholesalers want to retain their monopoly or near-monopoly advantage.\footnote{See Billingsley, \textit{ supra} note 25, at 4.} One wholesaler based in Miami, Southern Wine and Spirits, generates annual revenues of $2.3 billion.\footnote{See id.} Other...
wholesalers who wish to block direct shipment include Peerless Importers Inc., Charmer Industries, Inc., Eber Bros. Wine & Liquor Corp., and Premier Beverage Company LLC. While the current system is obviously advantageous to wholesalers, the benefits do not trickle down to consumers. Consumers’ ability to purchase is limited by what wholesalers stock, and many wholesalers do not carry the wines produced by small wineries.

The median production of the 2700 licensed wineries in the United States is approximately 3500 cases of wine per year. The larger California wineries may typically make three hundred thousand cases a year or more. A mid-size winery makes about fifty thousand cases a year. A small boutique winery, or “family-farm” type winery, might make only one or two thousand cases a year. The vast majority of all United States wineries are small, often family-owned businesses. The annual U.S. production exceeds two hundred million cases with the top one hundred wineries, only six percent of all U.S. wineries, producing ninety-five percent of that total. The explosion in the number of small wineries coupled with the tremendous consolidation amongst wholesalers, has locked out hundreds of wineries and their customers from conducting business in many markets.

Consumers also pay higher prices due to the considerable mark-up by wholesalers, roughly eighteen to twenty-five percent more per bottle. In other industries, businesspeople strive to eliminate the middle distribution level to increase efficiency and profitability. In the wine industry, however, eliminating the middle man can be a criminal offense.

52. See id.
53. See id.
54. See id.
57. See id. at 68-69.
58. See Interstate Hearings, supra note 55.
59. See id.
60. See id.
61. See Billingsley, supra note 25, at 4.
62. See id.
63. See id.
The Wine and Spirit Wholesalers of America, an industry association of alcoholic beverage wholesalers, argues that its members support the bans on direct shipment, not to protect their own economic interests, but to perform important state functions such as encouraging social responsibility in alcohol sales.64

3. State Governments

Rather than acknowledging simple economic protectionism, which is a Commerce Clause violation, prohibitionist states cast their support for prohibitive laws in moral and fiscal terms.65 The moral argument against wine sales over the Internet is that such an arrangement would promote drinking by minors.66 The main fiscal argument is that alcoholic beverages generate much revenue for states, and officials fear that consumers will purchase all their wine and spirits online, depriving the state of lucrative taxes.67

State legislatures and the wholesalers have aligned themselves with those trying to discourage underage drinking and underage access to alcohol.68 They conclude that prohibiting direct shipment of wine is an important method of protecting the nation’s young people.69 They cite the large number of high school students who have access to the Internet, and the significant number of students who report that they have engaged in binge drinking.70 However, one study has shown that approximately sixty-seven percent of high school seniors who say they drink alcohol also say they can buy it locally, and the study concluded that if it is so easy to get alcohol in the neighborhood, young people are not going to wait to have it shipped from out-of-state.71 Furthermore, California and New York, the two states with the highest wine consumption, have for many years permitted shipments of alcoholic beverages.

64. See Nigro, Direct Shipping Battle, supra note 29, at 50.
65. See Billingsley, supra note 25, at 5.
66. See id.
67. See Prial, supra note 12. State taxes on alcoholic products are estimated at nearly ten billion dollars per year. See id.
69. See id.
70. See id.
beverages within their states, as have twenty-eight other states. If keeping children from ordering alcoholic beverages online is the true reason for prohibiting direct shipment of wine, it certainly does not make sense that a child living on Long Island in New York can order wine online from Rochester, New York, but cannot order wine from New Jersey.

State governments have an interest in direct shipment of alcoholic beverages apart from general law enforcement and protection of minors: tax revenue. One estimate has it that in 1998 states lost six hundred million dollars in revenue because of illegal alcohol shipments. The National Conference of State Liquor Administrators has estimated that direct shipment of all kinds of liquor, primarily wine and beer, amounts to three hundred million dollars annually, resulting in losses of state tax revenues in the tens of millions.

The argument that removing the ban on direct shipment of wine would encourage the avoidance of taxes on wine is a mere pretext. Collecting taxes on shipments of wine directly to consumers is not a problem that is specific to wine. It is the same problem states have had with all Internet sales and with mail-order catalogue sales. The emergence of the Internet as a vehicle for retail sales has generated much interest in the collection of state sales taxes. Many journalists and academics have written articles concerning this issue. One study has estimated that in 2003 the total amount of sales and use taxes due on e-commerce transactions but uncollected will be over twenty billion dollars, from a low of about thirty-two million dollars in Vermont to a

76. One Dallas wine collector said direct shipments are not a way to save money and that he would be “‘be more than happy to pay the sales tax.’” See Nigro, supra note 30. Direct Shipping Battle, supra note 29, at 53-54.
77. See Martin, supra note 56, at 94.
78. See id.
79. See id.
high of about three billion dollars in California. Thus, it is unreasonable for proponents of collecting taxes on e-commerce transactions to isolate the direct shipment of wine as causing a particular tax collection problem for states. Directly shipped wine would be just a small fraction of all wine purchases and a mere fraction of all directly shipped goods in total. Many states are finally making an attempt to solve the problem of collecting these taxes by making it easier for e-commerce retailers to collect. It is clear that wineries selling directly to consumers should have to collect state taxes, and consumers shopping that way should not be able to avoid taxes. Small wineries should be able to sell their wines, and consumers should be able to buy from them, but neither should have a tax advantage over retail stores. That, however, is the same argument that applies to Amazon.com, Dell.com, or J.Crew.com—the wine industry should not be singled out. The “avoidance of tax” argument used by supporters of a ban on the direct shipment of wine is a red herring that should be discounted by presiding courts.

B. The Legal Battle: Direct Shipment, the Commerce Clause, and the Twenty-First Amendment

Underlying the direct shipment legal battle is the tension between the Commerce Clause of the United States Constitution and the Twenty-First Amendment to the Constitution, which grants to the states the power to regulate the importation and distribution of alcoholic beverages within their borders. The Commerce Clause grants Congress the power “[t]o regulate Commerce . . . among the several States.” Although the clause speaks specifically only to the powers of Congress, it is well settled that there is a “dormant” aspect to the Commerce Clause that prohibits states, while exercising their police power, from putting an undue burden on interstate commerce through economic protectionism.

82. See Martin, supra note 56, at 96.
83. See infra notes 205-06.
85. U.S. CONST. art. I, § 8, cl. 3.
This “negative implication” of the Commerce Clause prohibits economic protectionism through regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.87

To determine whether state statutes violate the dormant Commerce Clause, the Supreme Court has used a two-tier analysis.88 If the statute “directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court] ha[s] generally struck down the statute without further inquiry.”89 Only if such a regulation is shown to “advance[] a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives” will it be upheld.90 When, however, a statute has only incidental effects on interstate commerce and regulates evenhandedly, the Court has examined whether the State’s interest is legitimate and whether the burden on interstate commerce exceeds the local benefits.91 Although the two tiers of analysis are not clearly distinguishable, “[i]n either situation, the critical consideration is the overall effect of the statute on both local and interstate activity.”92

The primary basis for the direct shipment lawsuits is the plaintiffs’ assertion that the statutes prohibiting the direct shipment of wine by out-of-state producers into the state are unconstitutional because they violate the negative implication of the Commerce Clause.93 The position of the plaintiffs probably seems intuitively correct to most consumers because they are so used to ordering every kind of product on the phone or online from sellers all over the country. A basic understanding of the Commerce Clause would seem to suggest that states could not prohibit an out-of-state producer from sending a legal product into the state, particularly when in-state producers are allowed to ship directly to consumers’ homes. Nevertheless, the defendants defend the right of states to regulate alcoholic beverages on two fronts. First, the defendants contend that even if the direct shipping ban on wine were found to be discriminatory, it is justified “both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives

88. See Brown-Forman Distillers Corp., 476 U.S. at 578-79.
89. Id. at 579.
90. New Energy Co., 486 U.S. at 278.
91. See Brown-Forman Distillers Corp., 476 U.S. at 579.
92. Id.
93. See Hearings, supra note 13, (statement of David P. Sloane, President, Am. Vintners Ass’n).
adequate to preserve the local interests at stake." Those benefits are limiting underage drinking and collecting taxes. Second, the defendants contend that Section 2 of the Twenty-First Amendment confers rights that trump the Commerce Clause. Section 2 says: “The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” What Congress intended in this section is not entirely clear. The wholesalers argue that Section 2 of the Twenty-First Amendment gives each state the power to regulate alcoholic beverages within its boundaries unhampered by any federal control. Court decisions rendered shortly after the enactment of the Amendment contributed to that belief.

However, the United States Supreme Court has indicated in recent

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95. See, e.g., Swedenburg v. Kelly, 232 F. Supp. 2d 135, 139 (S.D.N.Y. 2002); see also Mauro, supra note 30 (describing the wholesalers’ argument that alcohol is the sole product that has its own constitutional provision—a reflection of the unique history of alcohol in this country).
96. U.S. Const. amend. XXI, § 1.
97. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) (stating that the Twenty-First Amendment is treated as though it permits states to enact some laws banning the importation of alcoholic beverages even though such laws might, without the Twenty-First Amendment, violate the dormant Commerce Clause). But see Healy v. Beer Inst. 491 U.S. 324, 341-43 (1989) (holding that the Twenty-First Amendment falls short of giving states free rein in regulating the importation of alcoholic beverages). In discussing the confusion surrounding section 2 of the Twenty-First Amendment, Laurence Tribe, a constitutional law scholar wrote:

Section 2 of the Twenty-[F]irst Amendment directly prohibits—talk about prohibition!!—the conduct that it was apparently meant to authorize the States to prohibit, freeing them of some (but not all) otherwise applicable limits derived from the rest of the Constitution. As a result, not only does the Amendment do more than its purpose required, it also does less. That is, it fails to specify that the States are authorized by it to do anything at all; that conclusion is evidently thought to follow by some sort of logical necessity. And just what it is they are authorized to do—to prohibit importation of liquor, yes; to use their liquor authority to distort the national liquor market, no—is left largely to the constitutional imagination. Moreover, the two statutes enforcing the Twenty-First Amendment necessarily rest for their underlying authority not on anything added to the Constitution by the Twenty-first Amendment but on the good old Commerce Clause of Article I, Section 8.

99. See, e.g., State Bd. of Equalization v. Young’s Mkt. Co., 299 U.S. 59, 62 (1936) (holding that a California license fee for importing beer into the state did not violate the Commerce Clause); Indianapolis Brewing Co. v. Liquor Control Comm’n, 305 U.S. 391, 394 (1930) (holding that a Michigan statute prohibiting dealers from selling beer made in a state that discriminates against Michigan beer did not violate the Commerce Clause).
cases that the Twenty-First Amendment does not give the states unfettered power to regulate alcoholic beverages within their boundaries; that state liquor regulation is not completely free of compliance with other federal rules and constitutional mandates.\textsuperscript{100} The Court has said specifically that “the Twenty-First Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause.”\textsuperscript{101} Nevertheless, “not completely free” and “did not entirely remove” leave a great deal of room for the current Court to conclude that a state’s freedom in this area is very close to complete.

\section*{\textit{C. State Direct Shipment Laws}}

This country, settled by Puritans who denounced drinking as a sin, then populated by immigrants who viewed wine, beer or spirits as an integral part of their culture, has seen attitudes on drinking swing back and forth over the centuries.\textsuperscript{102} The temperance movement led to the ratification of the Eighteenth Amendment banning the manufacture and sale of alcoholic beverages throughout the nation and it set in motion a chain of events that has led to today’s complex system of alcohol regulations.\textsuperscript{103}

In order to repeal Prohibition in 1933, Congress had to promise states the means to encourage temperance, allow counties and towns to remain “dry,” keep out organized crime, and prevent the monopolistic practices of the past in which brewer—and distiller—owned retail outlets encouraged abusive consumption habits.\textsuperscript{104} The Twenty-First Amendment gave the states broad power to regulate the sale, distribution and importation of alcoholic beverages within and across their borders.\textsuperscript{105}

The different state alcohol laws came into effect after Prohibition

\textsuperscript{100} See \textit{44 Liquormart, Inc.}, 517 U.S. at 484 (holding that Rhode Island’s ban on price advertising for liquor violated the First Amendment’s free speech protection, a protection that is not qualified by the Twenty-First Amendment); Bainbridge v. Turner, 311 F.3d 1104, 1112 (11th Cir. 2002) (holding that the Twenty-First Amendment alters the dormant Commerce Clause in a way that “provides states some added insulation from an otherwise valid attack, but falls short of full immunization”).

\textsuperscript{101} Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 584 (1986); \textit{see also} Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 275 (1984); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964) (holding that the Twenty-First Amendment and the Commerce Clause “each must be considered in light of the other”).

\textsuperscript{102} See Nigro, supra note 29, at 50.

\textsuperscript{103} See id.

\textsuperscript{104} See id.

\textsuperscript{105} See id.
when State legislatures enacted prohibitive wine shipment statutes and instituted a three-tier system. 106 State legislatures concluded that by prohibiting “tied-house” arrangements, large alcoholic beverage businesses would not be able to dominate local markets through vertical and horizontal integration, or by using excessive marketing techniques. 107 The legislatures assumed that consumption of alcohol would decline absent aggressive marketing and price-cutting. 108 Therefore, the three-tier system would promote orderly markets and temperance. 109 States have dealt with the potential breakdown of the system when out-of-state producers send wine directly to consumers in a variety of statutory ways.

As one commentator has written, “[W]hen it comes to buying wine,. . . Americans may as well live in [fifty] different countries—some relatively free and open, some so closed they resemble old-style dictatorships.” 110 Today you can go online to buy books, artwork, computers, clothes, music, and medical prescriptions and have them shipped directly to your home, yet in twenty-six states it is illegal for an out-of-state winery to ship a bottle of wine to a consumer’s address. 111 Direct-to-consumer wine shipments are prohibited in Alabama, 112 Arkansas, 113 Delaware, 114 Kansas, 115 Maine, 116 Massachusetts, 117 Michigan, 118 Mississippi, 119 New Jersey, 120 New York, 121 Ohio, 122

106. See Billingsley, supra note 25, at 5; Prial, supra note 12.


108. See id. at 748, 748 n.7.


111. See The Wine Institute, State-by-State Analysis, at http://www.wineinstitute.org/shipwine/analysis/state_analysis.htm (citing the direct shipment laws of the fifty states) (last visited Aug. 20, 2003); Nigro, supra note 29, at 49.

112. See Ala. ADMIN. CODE r. 20-X-8.03 (2002) (prohibiting consumers from ordering wine from out-of-state wineries unless they obtain permission from the liquor authority and have wine sent to an ABC store for pickup and payment of taxes).

113. See Ark. CODE ANN. § 3-7-106(a)(1) (Michie 2002) (prohibiting consumers from shipping wine into Arkansas without permission from a liquor authority).

114. See Del. CODE ANN. tit. 4, § 501(c) (2002) (prohibiting direct shipment except for special orders of up to five cases per year allowed for wines not readily available in state).


116. See Me. REV. STAT. ANN. tit. § 28-A, § 2077-B (West 2002) (prohibiting a person from selling, furnishing, delivering or purchasing liquor from an out-of-state company by mail order).

117. See Mass. GEN. LAWS ANN. ch. 138, §§ 1, 2 (West 2002) (prohibiting consumers from shipping wine into Massachusetts without following the provisions of this chapter).

118. See Mich. COMP. LAWS ANN. § 436.1203 (West 2002) (prohibiting direct shipment but
allowing personal transportation of up to nine quarts from out-of-state).

121. See N.Y. ALCO. BEV. CONT. LAW § 102(1)(c) (McKinney 2000) (prohibiting consumers from shipping wine into New York without permission from a liquor authority).
122. See OHIO REV. CODE ANN. § 4301.20 (West 2002) (prohibiting direct shipment but allowing personal transportation from out-of-state, as long as not more than one liter of liquor in any thirty-day period).
123. See OKLA. STAT. ANN. tit. 37 § 505 (West 2002) (prohibiting direct shipment except for person entering state in possession of liquor as long as Oklahoma excise tax has been paid).
125. See S.D. CODIFIED LAWS § 35-4-66 (Michie 2002) (prohibiting direct shipment except for individual transporting into the state one gallon or less of alcoholic beverages).
127. See VT. STAT. ANN. tit. 7 § 63(b) (2002) (prohibiting direct shipment except for personal transportation of up to six gallons from out-of-state with a permit).
128. See VA. CODE ANN. § 4.1-310 (Michie 2002) (prohibiting direct shipment except for personal transportation of up to four liters from out-of-state). A U.S. District Court has overturned this ban, but an appeal is pending. See Bolick v. Roberts, 199 F. Supp. 2d 397, 451 (E.D. Va. 2002), discussed infra Part III(5). On February 5, 2003, the Virginia General Assembly passed measures that would allow the direct shipment of wine in and out of the state. See Steven Ginsberg, Lawmakers Pass Bills on Va. Wine Shipment; Direct Delivery Sought In and Out-of-state, WASH. POST., Feb. 6, 2003, at B1. The final version of the bill needs to be agreed upon by both state houses before the final bill is forwarded to the governor. See id. The legislation would permit the delivery of up to twenty-four bottles a month of out-of-state wine and would allow Virginia vintners to ship directly to consumers in the thirteen states with similar provisions. See id.
129. In a recent decision, however, the Southern District Court of New York held that the ban was unconstitutional. An appeal is pending. See Swedenburg v. Kelly, 232 F. Supp. 2d 135, 152 (S.D.N.Y. 2002), discussed infra Part III(4).
130. See FLA. STAT. ANN. 561.545 (West 2002) (authorizing imprisonment for a violation of direct shipment prohibition).
131. See IND. CODE ANN. §§ 7.1-5-1-9.5, 7.1-5-11-1.5 (West 2002) (authorizing imprisonment for retailers and brewers which do not hold a federal basic permit as wineries do).
132. See KY. REV. STAT. ANN. § 244.165 (Banks-Baldwin 2002) (authorizing imprisonment for a violation of direct shipment prohibition).
133. See MD. ANN. CODE art. 2B, § 16-506.1 (2002) (authorizing imprisonment of up to two years and $1,000 fine).
134. See N.C. GEN. STAT. § 18B-102.1 (2002) (authorized imprisonment for retailers and breweries that do not hold a federal basic permit). In a recent decision, however, a U.S. District Court held that North Carolina’s ban on direct shipment of wine was unconstitutional. An appeal is pending. See Beskind v. Easley, 197 F. Supp. 2d 464, 475 (W.D.N.C. 2002), discussed infra Part III(6).
Tennessee, direct shipment is a felony. Many wineries will not risk shipping to out-of-state sellers and consumers because if they are convicted of a felony, they can lose their federal permit to make wine. In Indiana and North Carolina, it is a felony for those without permits to ship wine directly, and a misdemeanor for wineries. Even those who have purchased wine out-of-state and attempt to ship it to themselves can be charged in some cases, and in some cases a bottle of wine in luggage can be considered direct shipment.

There are twelve states that allow consumers to bring in out-of-state wine under certain conditions, typically requiring the seller or consumer to register with the state or pay for a special shipping permit. These states also generally restrict the amount of wine that a resident can bring in annually and require the winery and consumer to pay taxes and report the transactions. States that allow limited shipping and require special permits include Alaska, Connecticut, Georgia, Louisiana, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, Wyoming, and the District of

136. See Nigro, Crossing State Lines supra note 111, at 60.
137. See IND. CODE ANN. § 7.1-5.1-9.5(b).
138. See N.C. GEN. STAT. § 18B-102.1(e).
139. See id. at 62.
140. See id. at 61.
142. See CONN. GEN. STAT. ANN. § 12-436 (West 2002) (limiting direct shipment but allowing consumers to get permits to ship or personally carry in up to four gallons at one time or five gallons within a sixty-day period).
143. See GA. CODE ANN. § 3-6-32 (2002) (limiting direct shipment to no more than five cases of wine a year to a consumer who has purchased the wine while on the premises of the winery).
144. See LA. REV. STAT. ANN. § 359 (West 2002) (limiting direct shipment to no more than four cases per year from retailers and wineries that do not have a distributor in the state).
145. See MONT. CODE ANN. § 16-4-901 (2001) (limiting direct shipment to no more than twelve cases per year from out-of-state wineries, after obtaining a fifty dollar license).
146. See NEV. REV. STAT. ANN. § 53-194.03 (2002) (limiting direct shipment to no more than nine liters per month from out-of-state wineries).
147. See NEV. REV. STAT. ANN. § 369.490 (Michie 2002) (limiting direct shipment to no more than twelve cases per year from out-of-state wineries).
148. See N.H. REV. STAT. ANN. § 178:14-a (2002) (limiting direct shipment to no more than five cases per year to any individual consumer and a total of one hundred cases per year in the state).
149. See N.D. CENT. CODE § 5-01-16 (2001) (limiting direct shipment to no more than nine liters per month from out-of-state wineries).
Columbia. Arizona, Maryland, and Pennsylvania are “special-order” states under the three-tier system. “Special order” state systems allow consumers to buy wines that are not distributed in the state. After the order is placed, the wine must be sent through a wholesaler to a retailer for a pickup, where the consumer will be charged state taxes and additional handling fees.

Reciprocity states have another category of state direct shipment laws. In such states, direct shipment is allowed from another state that accords the same privilege. These shipments must be to persons of legal age and are only for personal use, not resale. For example, if you live in Illinois, you can order directly from a California winery because both states allow reciprocal shipping, but you cannot order from a New York winery because New York State has no such law. The thirteen reciprocity states are: California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico,

151. See R.I. GEN. LAWS § 3-4-1 (2002) (limiting direct shipment to on-premises purchases at wineries only).
152. See WYO. STAT. ANN. § 12-2-204 (Michie 2002) (limiting direct shipment to no more than two cases per year).
154. See ARIZ. REV. STAT. § 4-203.04 (2002) (limiting direct shipment but allows special orders through the three-tier system).
155. See MD. ANN. CODE art. 2B, § 16-506.1 (2002) (limiting direct shipment to only those holding the requisite license).
156. See 40 PA. CODE §§ 9.41, 9.115 (2002) (limiting direct shipment to only those holding the requisite license but providing exception for gifts of liquor which may be imported into the state).
157. See Nigro, supra note 111, at 61.
158. See id.
159. See id.
160. See id.
161. See id.
162. See id.
163. See id.
164. See CAL. BUS. & PROF. CODE § 23661.2 (West 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
165. See COLO. REV. STAT. ANN. § 12-47-104 (West 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
166. See 2002 Haw. Sess. Laws 281–33.5 (reciprocity state allowing out-of-state wineries to ship two cases of wine per year after registering with the individual island commissions).
168. See 235 ILL. COMP. STAT. ANN. § 5/6-29 (West 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
169. See IOWA CODE ANN. § 123.187 (West 2001) (reciprocity state allowing out-of-state wineries to ship wine into the state).
Reciprocal laws do not mean unlimited shipping; some states place stricter limits than others on how many cases can be delivered. For example, in Idaho up to two cases per month from wineries and retailers may be directly shipped, while in Illinois only up to two cases per year from wineries and retailers may be directly shipped.

D. Recent Federal Actions

Congress is also getting involved in the direct shipment issue. In October, 2002, Congress passed a measure that temporarily allows winery visitors to ship wine back home to themselves, provided that the laws in their state of residence permit them to carry alcohol purchases personally across state lines. The new provision, which is part of the much larger Department of Justice Appropriations Authorization Act, applies even to some states that currently ban interstate shipments from a winery directly to the consumer. The wine-shipping provision grew out of the airline security precautions instituted after Sept. 11, 2001, particularly the restrictions on the number, size, and type of carry-on bags. Wineries became concerned that the carry-on restrictions would cut into tasting-room sales. The provision, which applies to wine only, is effective during any period that the Federal Aviation Administration

171. See MO. ANN. STAT. § 311.462 (West 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
172. See N.M. STAT. ANN. § 60-7A-3(E) (Michie 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
175. See W. VA. CODE ANN. § 60-8-6 (Michie 2002) (reciprocity state allowing out-of-state wineries to ship wine into the state).
176. See WIS. STAT. §§ 125.58, 125.68 (West 2001) (reciprocity state allowing out-of-state wineries to ship wine into the state).
177. See Dana Nigro, supra note 111, at 61.
178. See id. at 62.
180. See id.
181. See id.
182. See id.
places restrictions on airline passengers to ensure safety. Consumers must still adhere to the restrictions in their home state and an adult must purchase the wine in person at the winery for personal use only. The wine business views this new provision as an important measure because Congress was finally “acknowledging the legitimacy of direct shipments as a means of getting a product from wineries to consumers.”

The Federal Trade Commission (“FTC”) announced in July 2002 that antitrust regulators will be scrutinizing state laws to see if any are unfairly restricting e-commerce in order to protect local businesses from competition. Among the industries the FTC plans to examine are automobile, real estate, and wine.

III. THE WINE WAR AND THE LOWER COURTS

Since the Supreme Court has not specifically addressed state bans on direct shipment of wine, the other federal courts in recent years have grappled with the complex relationship between the dormant Commerce Clause and the Twenty-First Amendment. There is little agreement on what approach should be taken thus far. Court opinions vary but usually depend upon (1) whether the judge interprets the Twenty-First Amendment as providing nearly absolute power to the states, under Section 2, to establish a comprehensive regulatory system to achieve legitimate state interests in promoting temperance, raising revenue, and insuring orderly market conditions, and views any inequitable results as inconsequential burdens on commerce, or (2) whether the judge applies a Commerce Clause balancing test and gives prominence to economic discrimination resulting from a state’s disparate application of its regulatory scheme to favor local wineries over out-of-state wineries.

Consumers and small wineries have gotten together to change the laws in states that prohibit direct shipment. They have challenged state statutes in eight states: Florida, Indiana, Michigan, New York, North Carolina, Texas, Virginia, and Washington. In New York, North
Carolina, Virginia, and Texas federal district courts have struck down state restrictions on direct shipment of wine on dormant Commerce Clause grounds, while in Michigan a federal district court upheld such restrictions.\footnote{190} All these decisions currently are on appeal.\footnote{191} The two Circuit Courts to hear cases thus far have split their decisions, with the Seventh Circuit holding that Indiana direct shipment laws are constitutional and the Eleventh Circuit holding that Florida direct shipment laws are unconstitutionally discriminatory.\footnote{192}

1. Indiana

In \textit{Bridenbaugh v. Freeman-Wilson},\footnote{193} consumers of alcoholic beverages brought suit challenging an Indiana statute prohibiting direct shipments of alcohol from out-of-state to Indiana consumers.\footnote{194} The United States District Court for the Northern District of Indiana found the statute unconstitutional.\footnote{195} Judge Easterbrook, for the Court of Appeals for the Seventh Circuit, reversed the lower court’s decision, reinstating the statute citing constitutional authorization under the Twenty-First Amendment.\footnote{196} Judge Easterbrook noted that “[Section] 2 of the [T]wenty-[F]irst Amendment empowers Indiana to control alcohol in ways that it cannot control cheese”\footnote{197} and found that Section 2 “enables a state to do to importation of liquor . . . what it chooses to do to the internal sales of liquor, but nothing more.”\footnote{198} He acknowledged that the Supreme Court has held that imports cannot be allowed on discriminatory terms, but got around that problem in Indiana by declaring that there was no discrimination in Indiana against out-of-state wineries.\footnote{199}

The court rejected the plaintiffs’ contention that a provision of the Indiana Code that allowed only holders of wine wholesaler or retailer permits to ship wine directly to Indiana consumers’ homes was discriminatory.\footnote{200} The court noted that permit holders could “deliver
California and Indiana wines alike; firms that do not hold permits may not deliver wine from either (or any) source.201 Thus, the court concluded that there was no discrimination in Indiana. However, while Easterbrook insisted that there was no discrimination against out-of-state wineries because all alcoholic beverages had to pass through Indiana’s three-tier system, and, therefore all sellers were being treated equally, he completely ignored the fact that many of the wines the plaintiffs wanted to buy are made by very small wineries. There are no wholesalers that are going to want to put the resources into efforts to sell and distribute the thousands of wines made by such small wineries.202 The Indiana statute, thus, in effect, keeps these wines out of Indiana, giving an advantage to Indiana wine retailers, wholesalers, and producers.

Judge Easterbrook’s opinion suggests that he was determined to find the Indiana statute constitutional because of his conviction that the plaintiffs’ only interest was in flouting Indiana law and avoiding taxes on their wine purchases.203 Although he noted Indiana’s failure to enforce its permit and tax laws,204 he did not seem to consider that there are ways to enforce such laws without prohibiting out-of-state wineries from shipping to Indiana consumers.205 Many state legislatures are currently considering just that issue.206

The United States Supreme Court refused to hear the plaintiffs’ appeal of the Seventh Circuit decision.207 Interestingly, the Wine Institute and the Coalition for Free Trade, both advocates of eliminating direct shipment prohibitions, were pleased by the Court’s refusal to hear

201. Id.
203. See Bridenbaugh, 227 F.3d. at 854.
204. See id. at 850.
205. See States Pass Streamlined Sales Tax Agreement, Nov. 12, 2002, at http://www.nga.org/nga/newsRoom/1,1169,C_PRESS_RELEASE%5eD_4632,00,00.html (describing how the Streamlined Sales Tax Agreement, if enacted by ten state legislatures, would establish uniform definitions for taxable goods and would require participating states and local governments to have only one statewide tax rate for each type of product effective 2006); see also supra text accompanying notes 77-82.
206. See STREAMLINED SALES TAX PROJECT, LIST OF PARTICIPATING STATES (as of Mar. 27, 2003), at http://www.nga.org/cda/images/USAMap.gif (last visited Aug. 20, 2003) (listing thirty-eight states that have adopted legislation, one state where legislation has been introduced and is pending approval, three states that are observers, five states that have no sales tax, and three states that are not participating).
the Indiana case.\textsuperscript{208} Because the Indiana lawsuit did not include any wineries as plaintiffs, unlike similar cases filed later in other states, the Coalition for Free Trade and Wine Institute felt the case was not the strongest among those pending.\textsuperscript{209} The advocacy groups believe that the cases pending in six other states (Florida, Michigan, New York, North Carolina, Texas and Virginia) face a better chance if they eventually reach the Supreme Court because the plaintiffs are both consumers and wineries.\textsuperscript{210}

2. Texas

Following the Seventh Circuit’s decision in Bridenbaugh, Judge Harmon of the United States District Court for the Southern District of Texas granted a motion for reconsideration in Dickerson \textit{v. Bailey}\textsuperscript{211} to allow the parties to address the impact of Bridenbaugh. In Dickerson, Texas residents wishing to receive wine shipments directly from out-of-state suppliers sued the administrator of the state Alcohol Beverage Commission (“ABC”), claiming that a Texas statute prohibiting those sales violated the dormant Commerce Clause.\textsuperscript{212} Upon reconsideration, Judge Harmon adhered to her prior determination that the statute was unconstitutional, finding that it imposed “differing burdens on in- and out-of-state [wine] producers so as to favor in-state wineries.”\textsuperscript{213} Judge Harmon held that Texas’ statutory ban on direct importation of out-of-state wine by Texas residents for personal consumption violated the dormant Commerce Clause.\textsuperscript{214} “Because out-of-state producers must go through Texas-licensed wholesalers and retailers to sell wine in Texas, they suffer higher costs which translate into higher prices, which in turn affect their ability to compete with local Texas wineries.”\textsuperscript{215} Furthermore, the court held that the Texas ABC law was not “saved” by the Twenty-First Amendment because the state failed “to demonstrate

\textsuperscript{209} See id.
\textsuperscript{210} See id.
\textsuperscript{211} 212 F. Supp. 2d 673 (S.D. Tex. 2002).
\textsuperscript{212} See id. at 674-75.
\textsuperscript{213} Id. at 694.
\textsuperscript{214} See id.
\textsuperscript{215} Id. at 694-95.
how a statutory exception for local wineries from Texas’ three-tier regulatory system . . . is justified by any of the traditional core concerns of the Twenty-First Amendment.”

In this well-written and convincing opinion, Judge Harmon identified a crucial problem in Judge Easterbrook’s opinion. Easterbrook’s ruling is based on the history of the Twenty-First Amendment, which he limited to before and around the time of its enactment, and on the language of Section 2. Harmon, convincingly, pointed out that both bases of interpretation are incorrect. After reviewing the ratification debates of the Amendment, Harmon drew on academic studies to conclude that the plain meaning of the text and the legislative history “fails to reveal clearly any unified Congressional intent in enacting . . . section [2].” Comments of various senators during the ratification debates support three different interpretations of Section 2. At the time of the ratification debates, Section 2 was viewed as primarily a procedural section, necessary to support and implement Section 1. Therefore, if there is no definitive guidance on the issue from the text or the history of the Twenty-First Amendment, then the task of interpretation must be left to the Supreme Court. However, because Easterbrook viewed Section 2 as giving states an absolute right to regulate the importation and distribution of alcohol, “he did not discuss the last forty years of Supreme Court jurisprudence relating to balancing and harmonizing the dormant Commerce Clause and [Section] 2 of the Twenty-First Amendment.” Easterbrook determined “that since the establishment of Indiana’s three-tier system was fully authorized by the Twenty-First Amendment, . . . no further Commerce Clause analysis was necessary.”

In neglecting a dormant Commerce Clause analysis, Judge Easterbrook ignored an important point raised by Judge Harmon—by requiring even small, “family-run” wineries to go through wholesalers, many of them are blocked from access to out-of-state markets, thus

216. Id. at 695. The “core concerns” of the Twenty-First Amendment are promoting temperance, raising revenue, and insuring orderly market conditions. See id. at 682.
217. See id. at 680.
218. Id. at 682.
219. See id. at 680-81.
220. See id. at 681.
221. See id.
222. Id. at 682.
223. Id. at 686.
discriminating against them. The plight of small, out-of-state wineries was “inconspicuous or insignificant to Judge Easterbrook.” Harmon’s critique of Easterbrook’s flawed analysis is excellent and could serve as a model analysis for other jurisdictions.

3. Florida

In Bainbridge v. Bush, the plaintiffs alleged that the Florida direct shipment law violated the Commerce Clause by discriminating against interstate wine sales and protecting economic interests of in-state business, and by regulating sales transactions that occur in other states. The district judge upheld Florida’s direct shipment law relying on a completely different constitutional analysis than the Seventh Circuit in the Indiana case. Whereas Judge Easterbrook concluded that the Indiana law was not discriminatory, in Bainbridge the court agreed that the Florida law did discriminate against out-of-state wineries. Nevertheless, the court found that although Florida’s direct shipment law violates the dormant Commerce Clause, it represents a permissible regulation under the Twenty-First Amendment. The district court wrote that where there are mixed motives, both legitimate and protectionist, behind the enactment of a facially discriminatory statute regulating alcoholic beverages, the legitimate motives are sufficient to save the statute from being unconstitutional. The judge found that Florida’s express goals were to deal with what Florida perceived to be a “threat to the public health, safety, and welfare; to state revenue collections; and to the economy of the state,” all of which fall within the recognized core concerns of the Twenty-First Amendment. The court concluded that “the numerous interests promoted by the Florida statutory scheme, including temperance, revenue protection, and the reduction of diversion and bootlegging outweigh the minimal burden placed on interstate commerce.”

The Eleventh Circuit Court, however, vacated and remanded the case, ordering the district court judge to consider more evidence.
Circuit Judge Tjoflat held that if Florida could demonstrate that its statutory scheme was closely related to the core concern of the Twenty-First Amendment of raising revenue and not a pretext for mere protectionism, Florida’s statutory scheme could be upheld against a dormant Commerce Clause challenge.\textsuperscript{233} While the court of appeals agreed with the district court’s determination that the Florida direct shipping ban was facially discriminatory, it found that a question of fact remained as to whether the “regulatory scheme is so closely related to the core concern of raising revenue as to escape Commerce Clause scrutiny.”\textsuperscript{234}

In its decision the court dismissed two of the three “core concerns” alleged by the state; it said that the current laws were not the only way of preventing alcohol sales to minors or of ensuring orderly markets. The judges noted that they were not sure exactly what “‘ensuring orderly markets’ . . . means, but it certainly does not mean discrimination in a way that effectively forecloses out-of-state firms from the Florida market.”\textsuperscript{235} In addressing the other “core concern” of excise taxes, the court asked, “Why, exactly, must Florida engage in this discriminatory scheme to effectuate its desire to raise revenue?”\textsuperscript{236} These issues will be reconsidered by the district court.

4. New York

In \textit{Swedenburg v. Kelly}\textsuperscript{237} the plaintiffs were the owner of a winery in Virginia, the owner of a winery in California, and three New York consumers.\textsuperscript{238} The defendants, the Chairman and Commissioners of the New York State Liquor Authority, were joined by several wholesalers who intervened to file a joint motion to dismiss the plaintiffs’ complaint.\textsuperscript{239} The plaintiffs claimed that a New York state alcohol statute violates the rights of all the plaintiffs to freedom of commerce guaranteed by the Commerce Clause.\textsuperscript{240} In a decisive victory for direct shipment proponents, District Court Judge Berman found for the

\textsuperscript{233} See \textit{id.} at 1115.
\textsuperscript{234} \textit{Id.}
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} \textit{Id.}
\textsuperscript{239} \textit{See id.} at 137.
\textsuperscript{240} \textit{See id.} New York state currently allows in-state wineries to ship directly to their New York customers, but prohibits out-of-state producers from doing the same. The latter must distribute all their wine through the three-tier system, selling it to a wholesaler who then resells it to retailers.
plaintiffs and held that it is unconstitutional for New York to bar direct shipments of wine to consumers from out-of-state producers while allowing direct sales by wineries inside the state. In his opinion, Judge Berman stated that “[t]here is evidence that the direct shipping ban was designed to protect New York State businesses from out-of-state competition.” Judge Berman made it clear that New York cannot exercise its power under the Twenty-First Amendment as a pretext for economic protectionism. Berman rejected the argument that there is any temperance or tax justification for prohibiting direct shipment. He said that the legitimate state interests protected by the Twenty-First Amendment, such as promoting temperance, banning the sale of wine to minors, and raising tax revenues, could be addressed through other nondiscriminatory means. In solving the constitutional problem, Berman suggested one possibility would be to eliminate the direct-shipping ban; another would be to eliminate exceptions in the law, like the one that allows wineries in New York State to sell directly to consumers. Following his ruling, Judge Berman issued an injunction preventing New York State from enforcing its current ban on interstate direct shipments of wine to consumers. This opinion will not change the situation for consumers immediately because the ruling is stayed while the defendants prepare their appeal. Judge Berman indicated that “the issue would ultimately have to be settled by the New York state legislature.” If the Second Circuit upheld this decision, state legislators would still have a choice between overhauling their rules on wine shipping or simply removing the exemption for local wineries.

5. Virginia

In Bolick v. Roberts, consumers of wine in Virginia and out-of-

241. See id. at 136.
242. Id. at 148.
243. See id.
244. See id. at 148-50.
245. See id. at 150.
246. See id. at 153.
248. See Nigro, supra note 247.
249. Id.
250. See id.
state growers and producers of wine brought an action against the Virginia Alcoholic Beverage Control Board, challenging Virginia’s regulatory scheme involving the shipment and distribution of alcoholic beverages.\footnote{252} District Judge Williams held that the statutory scheme requiring all liquor to pass through hands of state-licensed entity was discriminatory and, thus, unconstitutional.\footnote{253}

In his opinion Judge Williams noted that the statute was facially discriminatory because Virginia producer licensees do not have to pass their products through a wholesale tier although out-of-state entities must.\footnote{254} The court found that Virginia had not established “that there are no other nondiscriminatory means of enforcing legitimate interests,”\footnote{255} and held that the Twenty-First Amendment did not shield the direct shipping ban.\footnote{256}

Judge Williams viewed Easterbrook’s decision in \textit{Bridenbaugh} as incorrectly decided because it did not apply established dormant Commerce Clause analysis and ignored the interstate commerce issues raised by the facts of the case.\footnote{257} Williams further concluded that Judge Easterbrook’s analysis of the history and the text of Section 2 was very narrow and disregarded the evolution of case law consistent with that text and history in the twentieth century.\footnote{258}

6. North Carolina

In \textit{Beskind v. Easley},\footnote{259} the plaintiffs, comprised of North Carolina residents who enjoy drinking wine and a small California winery, challenged several provisions of North Carolina’s ABC laws as unconstitutional violations of the Commerce Clause.\footnote{260} District Court Judge Mullen held that the challenged provisions of North Carolina’s alcohol statutes directly discriminated against out-of-state wine manufacturers and that the Twenty-First Amendment did not empower the state to favor local liquor industries by enacting barriers to

\begin{itemize}
  \item \textit{See id.} at 401.
  \item \textit{See id.} at 450-51.
  \item \textit{See id.} at 407-09.
  \item \textit{Id.} at 409.
  \item \textit{See id.} at 413.
  \item \textit{See id.} at 408.
  \item \textit{See id.} at 430-33. In response to Judge Williams decision, the Virginia General Assembly passed measures that would allow the direct shipment of wine in and out of the state. \textit{See Ginsberg, supra} note 128.
  \item 197 F. Supp. 2d 464 (W.D.N.C. 2002).
  \item \textit{See id.} at 466.
\end{itemize}
While the court stated that North Carolina was allowed to use the Twenty-First Amendment to protect the overall three-tier system because it promotes the core purpose of the Twenty-First Amendment, the court concluded that North Carolina cannot use the Amendment to protect the direct shipment ban from the Commerce Clause because the ban does not fulfill a purpose of the Amendment. The court enjoined North Carolina from enforcing the provisions of the law “that prohibit or punish out-of-state wine dealers from directly shipping wines to adult North Carolina residents.”

In an in-depth opinion, Judge Mullen concluded that plaintiffs were not challenging the three-tier system, but rather North Carolina’s failure to apply that system uniformly and even-handedly to in-state and out-of-state wineries. Emphasizing that the State failed to present any reason for applying its ABC laws unevenly in its exception for local wineries, Mullen concluded that the only explanation was “protection of local economic interests, which the Commerce Clause will not tolerate.” In his opinion, Judge Mullen applied a balancing test and identified the “correct inquiry” as “whether the interests implicated by a state regulation are so closely related to the powers preserved by the Twenty-First Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.”

As a remedy for the violation of the Commerce Clause, Mullen suggests that it is the job of the legislature and not the court, to design a non-discriminatory regulatory structure for the sale of alcoholic beverages in North Carolina. The court enjoined the defendants from enforcing the statutes.

7. Washington

In Mast v. Long, the plaintiffs are law students who seek to purchase wine directly from sources outside the State of Washington. The plaintiffs allege that the “existing system is unconstitutional because

261. See id. at 475-76.
262. See id. at 474.
263. Id. at 476.
264. See id. at 470.
265. Id. at 472.
266. Id. (citation omitted).
267. See id. at 476.
268. See id.
270. See id. at *1.
it violates the ‘dormant’ Commerce Clause and the First Amendment." What is different about this case from the previously discussed cases is that Washington is a reciprocity state, and its laws on direct shipping are among the most liberal. The court in this case abstained from making any decision because the plaintiffs wanted to bring more than the statutory two liters of wine into the State without paying a penalty tax—a State tax issue the court believed belonged in state court. This case is inconsequential in advancing the direct shipment issue.

8. Michigan

In Heald v. Engler, the district court found “that direct shipment laws are a permissible exercise of state power under [section] 2 of the [Twenty-First] Amendment." Michigan’s three-tier distribution system contained an “exemption” that allowed in-state wineries, but not out-of-state wineries, to ship directly to consumers. The court determined that because the Twenty-First Amendment gave states “virtually complete control” over alcohol regulation, a state’s action pursuant to the Twenty-First Amendment would violate the Commerce Clause only if it constituted “mere economic protectionism.” In the court’s opinion, Michigan’s law was not mere economic protectionism because it was designed to “ensure the collection of taxes” and “reduce the risk of alcohol falling into the hands of minors.”

9. Summary of the Decisions

As of the writing of this Note, federal district courts have struck down direct shipment prohibition laws in New York, North Carolina, Texas, and Virginia, while in Indiana, Florida, and Michigan the district courts upheld the states’ rights to prohibit direct shipment of wine. In the first case to reach a U.S. Court of Appeals, the Seventh Circuit upheld Indiana’s ban on out-of-state direct shipping. In Bridenbaugh v. Freeman-Wilson, the Seventh Circuit relied heavily on the Twenty-First Amendment, Section 2 which grants the states considerable authority to

271. Id.
272. See id. at *6.
274. Id. at 8.
275. See id. at 3-4.
277. Id. at 10.
regulate alcoholic beverages. The court in Bridenbaugh found that Indiana’s direct-shipping restrictions fall within this authority. In effect, the court concluded that when it comes to alcoholic beverages, states have authority under the Twenty-First Amendment to enact measures that may otherwise violate the Commerce Clause.

However, a more recent Eleventh Circuit decision, handled the constitutional battle between the Twenty-First Amendment and the Commerce Clause very differently. In reviewing a district court decision upholding Florida’s direct-shipping law, the Eleventh Circuit in Bainbridge v. Turner criticized Bridenbaugh and held that the Twenty-First Amendment can trump the Commerce Clause only under limited circumstances. The Eleventh Circuit decision, along with the well-reasoned opinions by Judge Harmon in Texas and Judge Williams in Virginia provide a comprehensive framework for addressing the direct shipment issue.

IV. ELEVENTH AMENDMENT JURISPRUDENCE

This next section is not meant to apply the substance of the Eleventh Amendment to the direct shipment of wine issue. Rather, it is an attempt to use the reasoning of the Supreme Court in recent Eleventh Amendment decisions to predict the outcome if the direct shipment of wine issue comes before the Court. While district court decisions in New York, Texas, and Virginia and the Eleventh Circuit decision make very convincing and logical arguments as to why a state’s ban on the direct shipment of wine is unconstitutional, it would be naive to ignore the weight the Supreme Court has given to protecting states’ rights and the “dignity of the states.” What follows in this section is an analysis of Eleventh Amendment jurisprudence that suggests how the Court views state sovereignty. The Court’s Eleventh Amendment decisions are relevant to the direct shipment cases because they indicate the Court’s predilection for giving the states increased regulatory

278. See Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).
279. See id. at 854.
280. See Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002).
281. U.S. CONST. amend. XI states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”
control. It is a very small step to conclude that the Twenty-First Amendment gives states unfettered control over alcoholic beverage regulation, unhampered by Commerce Clause considerations.

When Justice William Rehnquist became Chief Justice in 1986, the Court embarked on a mission to return power to the states. A slim majority of the Supreme Court has over the past decade expanded states’ immunities against federal authority. Nearly all of the recent Supreme Court cases affecting federalism have been 5-4 decisions, with the majority composed of the Chief Justice and Justices O’Connor, Scalia, Kennedy, and Thomas.

The issue in these cases is one that was debated during our country’s founding—the rights of the individual states versus the power of federal authority. Since Rehnquist’s reign as Chief Justice, the conservative majority has used the Eleventh Amendment to the United States Constitution to justify the expansion of the sovereign immunity enjoyed by the states. The idea that states should be immune from lawsuits comes from the notion that immunity is necessary to preserve the people’s idea that the sovereign is “a superior being” and that states’ “dignity” must be protected. Promoting the common law doctrine of sovereign immunity, the current Supreme Court has used it to shield states from damages for age discrimination, disability discrimination, and the violation of patents, trademarks, copyrights, and fair labor standards.

As one commentator has written, the Eleventh Amendment is a mess—it is the “home of self-contradiction, transparent fiction, and arbitrary stops in reasoning.” Furthermore, “[a]ny hope of doctrinal stability is undermined by shifting paradigms, as the Eleventh Amendment is inconsistently conceptualized as a form of sovereign immunity, as an exception to federal jurisdiction, and as a structural

283. See generally infra note 286 and accompanying text.
284. See John T. Noonan, Jr., Narrowing the Nation’s Power: The Supreme Court Sides with the States, 41-57 (2002).
constraint on the powers of the national government.” Understanding this confusion is important because the Eleventh Amendment is a vital element of federal jurisdiction that defines the federal system and affects the balance of power between the United States and its states.

For much of the twentieth century, the Supreme Court interpreted the Constitution to empower the federal government to deal with national problems. Now, though, the Court is restricting congressional powers and aggressively protecting state governments from lawsuits by private individuals. This shift in constitutional law jurisprudence has generated many articles concerning federalism, state sovereign immunity, and the expansion of the Eleventh Amendment. As a result of reviving federalism as a constraint on national power, dozens of federal laws are now being challenged in federal court. The newly expanded concepts of sovereignty and sovereign immunity have become the Court’s way of restricting the powers of Congress and enlarging the areas where the states can escape effective control by Congress. Under Congress’ express constitutional powers, Congress can create standards that are as applicable to the fifty states as they are to any individual. The standards apply to the states, but as the Supreme Court has now determined, they cannot be enforced by a private person seeking damages from the states. The standards exist, giving rights to private persons but without providing them a remedy. A right without a remedy is the odd consequence the Supreme Court has endorsed by protecting the sovereignty of the states.

The history of Eleventh Amendment jurisprudence from inception until the present day makes it clear that the Supreme Court has extended the scope of state sovereign immunity and has limited Congress’s power

288. Id. (footnotes omitted).
290. See id. at 1012-13.
292. See infra notes 300-305 and accompanying text.
293. See NOONAN, supra note 285, at 4-5.
294. See id.
295. See id.
296. See id. at 4.
297. See id.
to authorize suits against the states. Specifically, the Court has thrown out suits brought by a Florida State University professor who said he was paid less because of his age,\textsuperscript{298} an Alabama hospital nurse who said she was demoted after battling breast cancer,\textsuperscript{299} and a Maine probation worker who was not paid for his overtime work.\textsuperscript{300} The Court also barred suits against state agencies over stolen patents, trademarks, or copyrights, all violations of federal law.\textsuperscript{301} Thus, although Congress has attempted to give individuals federal statutory rights against the states, the Supreme Court’s view of the Eleventh Amendment and sovereign immunity has foreclosed much of the judicial relief that gives meaning to those federal rights.\textsuperscript{302}

Starting in 1890 in \textit{Hans v. Louisiana},\textsuperscript{303} the Supreme Court grappled with the question of whether the Eleventh Amendment barred a citizen from suing his or her own state in federal court, even though the Amendment itself makes no mention of this scenario.\textsuperscript{304} Quoting Alexander Hamilton from Federalist Number 81 the Court stated, “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”\textsuperscript{305} Therefore, the Court concluded that the Eleventh Amendment bars individuals from suing their own states.\textsuperscript{306} This decision was particularly significant because it was the Court’s first departure from the literal text of the Eleventh Amendment.\textsuperscript{307} In addition to making state immunity central, \textit{Hans} brought into the discourse of the Supreme Court the opinions on immunity of Alexander Hamilton, James Madison, and John Marshall, providing the modern Court a reference and precedent for expanding the sovereign immunity doctrine.\textsuperscript{308}

After \textit{Hans}, it appeared unlikely that a federal court could ever compel a state to act, even if the state violated the Constitution or a federal statute.\textsuperscript{309} To get around \textit{Hans}, when shareholders of several railroads alleged that a Minnesota statute regulating railroad rates

\textsuperscript{299}. See Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
\textsuperscript{300}. See Alden v. Maine, 527 U.S. 706, 711 (1999).
\textsuperscript{301}. See Bohannan, supra note 294, at 274.
\textsuperscript{302}. See id.
\textsuperscript{303}. 134 U.S. 1 (1889).
\textsuperscript{304}. See id. at 4.
\textsuperscript{305}. Id. at 13. (italics omitted).
\textsuperscript{306}. See id. at 16.
\textsuperscript{308}. See Noonan, supra note 285, at 75.
\textsuperscript{309}. See Kenny, supra note 307, at 2.
violated the Fourteenth Amendment, they sued not the state, but the
state’s Attorney General, Edward Young, for a temporary restraining
order prohibiting him from enforcing the legislation in question.310
Young claimed that the Eleventh Amendment barred the suit, but the
Supreme Court held that “[t]he State has no power to impart to [the
Attorney General] any immunity from responsibility to the supreme
authority of the United States.”311 Therefore, Ex parte Young held that
the Eleventh Amendment applies only to the states themselves, and
plaintiffs could obtain injunctive (prospective) relief against a state by
suing a state official.312 This decision gave private citizens a way to
challenge unconstitutional state action by “stripping” officers of the state
of their official status.

More than half a century later, the ability of private citizens to
challenge unconstitutional state action was severely limited in Edelman
v. Jordan313 when the Supreme Court began to lay down new restrictive
interpretations of what the Eleventh Amendment proscribed. In
Edelman, the Court held that a class of intended welfare recipients could
not sue state officials for retroactive payment of benefits.314 Edelman
held that the Eleventh Amendment barred an action against a state
official that resulted in retrospective monetary awards likely to be paid
by the State.315 The Court stated that a suit “seeking to impose a liability
which must be paid from public funds in the state treasury is barred by
the Eleventh Amendment.”316 The effect of that decision was to permit
federal courts to require state officials to comply in the future with
claims payment provisions of the welfare assistance sections of the
Social Security Act, but federal courts could not entertain claims seeking
payment of funds found to be wrongfully withheld in the past.317
Conceding that some of the characteristics of prospective and retroactive
relief would have the same effects on the state treasury, the Court
suggested that retroactive payments were equivalent to the imposition of
liabilities that must be paid from public funds in the state treasury, and
that this was barred by the Eleventh Amendment.318 In describing why it

310. See Ex parte Young, 209 U.S. 123, 126 (1908).
311. Id. at 160.
312. See id. at 167-68.
314. See id. at 678.
315. See id. at 667.
316. Id. at 663 (citation omitted).
317. See id. at 668.
318. See id.
drew the line between prospective and retrospective relief, the Court said that remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law whereas a compensatory or deterrence interest is insufficient to overcome the dictates of the Eleventh Amendment. Accordingly, this case held that suits against states and their officials seeking damages for past injuries are firmly foreclosed by the Eleventh Amendment.

Congress’ power to abrogate a state’s sovereign immunity under the Commerce Clause and hold states to federal legislative requirements took a hard hit in the landmark decision *Seminole Tribe of Florida v. Florida*. *Seminole* cut deeply into the powers of Congress over the states. Even where the Constitution vests in Congress complete lawmaking authority over a particular area, the Court declared that the states cannot be made liable for damages when they violate federal law. The Seminole Tribe filed suit against the State of Florida in federal court to compel negotiations under the Indian Gaming Regulatory Act (“IGRA”). IGRA was enacted pursuant to the Commerce Clause and authorized suits against states in federal court. The Court rejected the plaintiff’s argument that Congress could abrogate state sovereign immunity to enforce legislation enacted pursuant to the Commerce Clause. Writing for the Court, Chief Justice Rehnquist concluded that “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.” Rehnquist further stated that, “Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.” The Court explained that Congress could, however, still abrogate a state’s sovereign immunity pursuant to Section 5 of the Fourteenth Amendment because it was adopted after the Eleventh Amendment and that the sole focus of Section 5 is legislation directed at the states. The Court concluded that Article I powers such

319. *See id.*
320. *See id. at 663.*
322. *See id. at 47, 72.*
323. *See id. at 51-52.*
324. *See id.*
325. *See id. at 65-66.*
326. *Id. at 72.*
327. *Id. at 73.*
328. *See id. at 65-66.*
as the commerce power, on the other hand, do not override the Eleventh Amendment.\(^{329}\) Since *Seminole Tribe* was decided in 1996, the Supreme Court has been moving to reduce the accountability of the states for not complying with federal legislation.\(^{330}\)

In 1999, the Supreme Court drastically expanded state sovereign immunity in *Alden v. Maine*.\(^{331}\) In *Alden*, a group of probation officers sued their employer, the State of Maine, for monetary damages in federal court alleging that the State had violated the overtime provisions of the Fair Labor Standards Act (“FLSA”).\(^{332}\) The District Court dismissed the action after the Supreme Court in *Seminole Tribe* ruled that Congress could not subject unconsenting states to suit in federal court pursuant to its Article I powers.\(^{333}\) The petitioners then filed the suit in state court pursuant to language in the FLSA purporting to authorize private actions against states in their own courts, a practice not banned by *Seminole Tribe* or the Eleventh Amendment.\(^{334}\) Closing this abrogation loophole, the Court held that “the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”\(^{335}\) What was particularly notable about *Alden* was that for the first time the Court recognized state sovereign immunity existing independent of the Eleventh Amendment. Justice Kennedy wrote: “[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment” but rather “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution . . . .”\(^{336}\) This new conception of sovereign immunity not directly derived from the Eleventh Amendment helps the Court expand the scope of the immunity and also opens the Court to greater criticism for its judicial activism. As one commentator has noted, “the Supreme Court has failed to adequately explain how the immunities derive from the text of the Constitution . . . .”\(^{336}\)

\(^{329}\) See id. at 72-73.

\(^{330}\) See NOONAN, supra note 285, at 120.

\(^{331}\) 527 U.S. 706 (1999).

\(^{332}\) See id. at 711-12.

\(^{333}\) See id. at 712.

\(^{334}\) See id.

\(^{335}\) Id.

\(^{336}\) Id. at 713.
aid to interpretation, is not itself text.  

The Supreme Court’s policy considerations for making law regarding states’ sovereign immunity are explicitly mentioned in its most recent decision concerning sovereign immunity. In May of 2002, the Court’s conservative wing continued to enhance the immunity of the states and to curtail Congress’ power when it extended the principle of sovereign immunity from lawsuits in federal court to adjudicative hearings by federal agencies. The dispute arose when the South Carolina State Ports Authority (“SCSPA”) refused to berth a cruise ship that offered gambling. Officials said they did not want gambling ships operating out of Charleston, but the ship’s sponsors countered that another shipping line berthed two ships that offered casino gambling. The cruise ship company filed a complaint against the SCSPA with the Federal Maritime Commission (“FMC”), seeking reparations and injunctive relief for alleged violations of the Shipping Act of 1984. Writing for the majority, Justice Thomas held that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a non-consenting State. Because “administrative proceedings bear a remarkably strong resemblance to civil litigation in federal courts[,]” the same rule of state immunity should apply to both, stated Justice Thomas speaking for the 5-4 majority. He was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy. According to Thomas, it would be an “affront to the state’s dignity” to force it to respond to complaints by individuals and private companies. Thomas emphasized that the primary purpose of the Eleventh Amendment was to preserve a state’s dignity, not its treasury. Thomas stated that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”

Justice Thomas concluded that “[b]y guarding against

337. Shaffer, supra note 289, at 1022 (alteration in original) (citation omitted).
339. See id. at 747.
340. See id.
341. See id. at 748.
342. See id.
343. See id. at 768-69.
344. Id. at 757.
345. Id. at 760.
346. See id. at 769.
347. Id. at 760 (citation omitted).
encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to ‘reduce the risk of tyranny and abuse from either front.’”\textsuperscript{348} This decision highlights how the majority is adamant in protecting state’s rights—the majority immunized states from certain proceedings before federal administrative agencies which, as part of the executive branch, do not even exercise the “judicial power” to which the Eleventh Amendment is addressed. The Court mentioned “that [w]hile state sovereign immunity serves the important function of shielding state treasuries and thus preserving ‘the States’ ability to govern in accordance with the will of their citizens,’\textsuperscript{349} the doctrine’s central purpose is to “accord States the dignity that is consistent with their status as sovereign entities.”\textsuperscript{350} The Court made it clear that the relief sought by a plaintiff suing a state is irrelevant to the question of whether the suit is barred by the Eleventh Amendment.\textsuperscript{351} It is clear that this Court is committed to a policy of federalism allowing states to govern themselves with as little interference from the federal government as possible.

The dissent in many of the sovereign immunity cases questions where the majority finds in the Constitution the principle of law that allows the expansion of states’ sovereign immunity. Led by Justice Souter, the dissenters in these cases argue that the “interpretation of the Eleventh Amendment that a majority of this Court has embraced is fundamentally mistaken.”\textsuperscript{352} Justice Souter has stated that Alden’s “conception of state sovereign immunity . . . is true neither to history nor to the structure of the Constitution.”\textsuperscript{353} Furthermore, Souter asserted in Seminole Tribe that the “indignity” rationale is “embarrassingly insufficient.”\textsuperscript{354}

Justice Breyer’s dissent in Federal Maritime Commission notes that the practical result of the Court’s current policy is to keep citizens from acting as private attorney generals to enforce federal law.\textsuperscript{355} Although the Justice Department and federal agencies can themselves bring

\begin{footnotes}
351. See \textit{id.} at 766.
\end{footnotes}
actions against States for violating federal law, as a practical matter, they do not because they lack the resources to do so. As Breyer points out, federal agencies would have to rely heavily upon their own informal staff investigations in order to decide whether a citizen’s complaint has merit. The natural result [of this] is less agency flexibility, a larger federal bureaucracy, less fair procedure, and potentially less effective law enforcement.

Siding with the dissent in opposing the Court’s expansion of the state’s immunity from the reach of federal law, one commentator has written that this expansion has occurred “without justification of any kind,” threatening “intolerable injury to the enforcement of federal standards,” and warning of the “danger to the exercise of democratic government.” Furthermore, no justification for the immunity accorded to the fifty states has been shown. Using City of Boerne v. Flores as an example, author and federal judge for the Ninth Circuit John Noonan contends that the Supreme Court, as the devotee of dignity, “has embraced with mistaken enthusiasm a doctrine of state immunity that is overextended, unjustified by history, and unworkable in any consistent way.” Judge Noonan calls into question the Supreme Court majority’s argument that immunity is important because “the dignity of the state demands it.” States are not people; people have dignity Noonan contends, and thus, the argument that state immunity has a moral quality of dignity is “inexplicable.” Since states can’t blush, all the attributes of dignity that are attributed to a person do not make sense when applied to a fictional entity. The claim that the sovereignty of the states is constitutional rests on the pretense that the idea of state sovereignty is somehow incorporated in the Eleventh Amendment. The

356. See id at 781-82.
357. See id. at 785.
358. Id.
359. NOONAN, supra note 285, at 154.
360. Id. at 155.
361. Id. at 140.
362. See id. at 10.
363. 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act unconstitutional as applied to state and local governments and that Congress cannot expand rights or create new rights pursuant to Section 5 of the Fourteenth Amendment).
364. NOONAN, supra note 285, at 11.
365. Id. at 154.
366. Id.
367. See Power to the State (roundtable discussion), ABA J. 39, 42 (Jan. 2003) (comments by Erwin Chermerinsky, Professor of Law).
368. See NOONAN, supra note 285, at 151-52.
constitutional connection referring to state sovereignty as an Eleventh Amendment matter is imaginary. Neither the text nor the legislative history of the Eleventh Amendment supports this claim. In his conclusion, Noonan harshly criticizes the Supreme Court’s protection of the immunity of the states when he writes:

No reason in the [C]onstitution or in the nature of things or in the acts of Congress supplies an answer [to the question of why a state should have immunity]. The states are permitted to act unjustly only because the highest court in the land has, by its own will, moved the middle ground and narrowed the nation’s power.

V. Analysis: The Wine War Outcome in Light of Current Eleventh Amendment Jurisprudence

In light of recent Eleventh Amendment jurisprudence where the Supreme Court has tipped the scales of federalism in favor of states’ rights and states’ sovereign immunity, it is unfortunate but likely that the Court, if it chooses to hear one of the several cases challenging the right of states to prohibit the direct shipment of wine from out-of-state producers to the homes of in-state consumers, would hold that the prohibitory statutes are constitutional.

Given the circuit court splits on the issue of the direct shipment of wine and the growing publicity of the issue, the stage is now set for the direct shipment battle to move to the Supreme Court. The reasoning in the New York, Texas, and Virginia cases are most persuasive, particularly because they demonstrate how Section 2 of the Twenty-First Amendment can be harmonized with the dormant Commerce Clause. As discussed in those cases, the Twenty-First Amendment was not meant to trump the Commerce Clause whenever a conflict arises. The Commerce Clause should trump Twenty-First Amendment regulation if permissible goals such as temperance or revenue-raising are accomplished by in-state favoritism when they can be accomplished by other means. With the issue of direct shipment, it is clear that the state laws prohibiting direct shipment are a vestigial structure remaining from the days following Prohibition and are perpetuated by state legislatures only for economic protectionism and encouraged by wholesalers to increase

369. See id. at 152.
370. See id.
371. Id. at 156.
profits. Because other, non-discriminatory methods can be used by the state to regulate alcohol, the state direct shipment laws violate the Commerce Clause, and the Twenty-First Amendment does not make that violation constitutional.

Nevertheless, based on this nation’s history of alcohol regulation and the present Court’s interest in promoting states’ rights as evidenced by recent Eleventh Amendment jurisprudence, it is far from clear that if faced with the direct shipment issue, the Supreme Court would decide against the states. The dissent in *Bacchus Imports, Ltd. v. Dias* 372 (the Hawaii liquor tax case) may be particularly useful in understanding how the Court might view the direct shipment issue. The three dissenters in that case in 1984 were Justices Stevens, Rehnquist, and O’Connor, 373 all of whom are still on the Court. The majority, none of whom are now on the Court, held that Hawaii’s tax exemption for pineapple liquor violated the Commerce Clause because it discriminated in favor of in-state products and that the tax was not saved by the Twenty-First Amendment. 374 In contrast, the dissenters asserted that the Commerce Clause claim was foreclosed by the Twenty-First Amendment, and they would have affirmed the constitutionality of the tax with its exemption. 375 If Justices Stevens, Rehnquist, and O’Connor would still hold these opinions, it is likely they would be joined by Justices Scalia, Kennedy, and Thomas, creating a majority to uphold states’ prohibitions on direct shipment of wine.

Therefore, given the makeup of the Supreme Court and the Court’s recent Eleventh Amendment jurisprudence, it is likely that the Court will, unfortunately, uphold the power of the states to prohibit and limit the direct shipment of wine from out-of-state. While some commentators, including the author, may argue that prohibitions violate the Commerce Clause, the Court, given its mission to protect the “dignity” of the states, may interpret the Twenty-First Amendment as trumping the Commerce Clause and allowing states to restrict and limit

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372. 468 U.S. 263 (1984). In *Bacchus*, the state of Hawaii acknowledged that it exempted okolehao and pineapple wine from its liquor tax in order “to promote a local industry.” Id. at 276 (quoting Brief for Appellee Dias). The Court held that Hawaii liquor tax imposed on wholesale sales of liquor but exempting certain locally produced beverages was an unconstitutional violation of the Commerce Clause. See id. The Court noted with certainty that the purpose of the Twenty-First Amendment was not to give states the authority to favor local liquor industries at the expense of out-of-state competitors. See id.

373. See id. at 278.

374. See id. at 273-74.

375. See id. at 279.
the direct shipment of wine. If the “judicial power” of the Eleventh Amendment can be equated with administrative proceedings in order to allow states to avoid federal mandates, then surely dormant Commerce Clause concerns (which do not appear in the text of the Constitution) can fall to the Twenty-First Amendment in order to allow states unfettered control over alcoholic beverages.

VI. CONCLUSION

Small wineries and wine consumers want the option of selling and buying wine across state boundaries, and their demand is causing a grassroots legal battle—one in which wineries have teamed with consumers and free-trade groups against the alcoholic beverage distributors and wholesalers. The main argument that opponents of state bans on interstate shipments use is that the regulations violate the Commerce Clause, which gives Congress the authority to regulate interstate commerce and prohibits state discrimination against nonresident businesses. Proponents of bans on direct shipment of wine rely on the Twenty-First Amendment. The balance between the Commerce Clause and the Twenty-First Amendment is currently unclear. The differing approaches taken by the Seventh and Eleventh Circuits increase the likelihood that the Supreme Court will eventually take up the issue. While it seems like the “correct” constitutional methodology for evaluating the direct shipment of wine issue lies in the opinions of the district courts in New York, North Carolina, Texas, and Virginia, (as well as the Eleventh Circuit opinion) the Supreme Court’s protection of the “dignity” of the states emphasized in recent Eleventh Amendment jurisprudence indicates that the Twenty-First Amendment may trump the Commerce Clause and the economic protectionism of state direct shipment laws will endure until legislatures change them.

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