

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

*Eric M. Freedman\**

I. INTRODUCTION

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

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

---

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

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

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

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

*Id.*

articulating the standard of care that capital defense counsel are to follow.<sup>2</sup>

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

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

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

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

---

2. Dozens of state and federal death penalty cases considering the performance of defense counsel cite the ABA Guidelines as authority. *See, e.g.,* *Rompilla v. Beard*, 545 U.S. 374, 387 & n.7 (2005). *See* ABA, *Cases that Cite to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, available at [http://www.abanet.org/deathpenalty/resources/docs/List\\_of\\_Cases\\_that\\_cite\\_to\\_GL\\_MAR\\_2008.doc](http://www.abanet.org/deathpenalty/resources/docs/List_of_Cases_that_cite_to_GL_MAR_2008.doc) (last visited June 1, 2008).

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

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

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

[t]he interest in insuring that the decision of the government to execute a person in the name of its citizens is based upon the most complete factual and legal picture belongs not just to each individual actor in the legal system—including judges and victims as well as defendants and prosecuting and defense attorneys—but to society as a whole.<sup>4</sup>

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

## II. THE SUPPLEMENTARY GUIDELINES PROJECT

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

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

---

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

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

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

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

---

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

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

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

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

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

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

12. *Id.* at 774.

The next piece is *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities* by Lawrence J. Fox,<sup>13</sup> a nationally prominent expert in legal ethics who in his capacity as Chair of the ABA Death Penalty Representation Project in 2003 moved the adoption of the ABA Guidelines by the House of Delegates. The ABA Guidelines<sup>14</sup> and the Supplementary Guidelines<sup>15</sup> both emphasize that it is counsel—and not any non-lawyer member of the team—who “bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case.”<sup>16</sup> Fox describes the many respects in which counsel’s specific obligations under these codes are either direct implementations of or logical corollaries to deeply-rooted provisions of the Model Rules of Professional Conduct that would bind counsel in any event. Correspondingly, the ABA Guidelines and Supplementary Guidelines illuminate the requirements of the Model Rules in the particular context of capital representation. So, to take just one of his numerous examples of mutually-reinforcing professional responsibilities deriving from these separate sources, counsel not only have “an obligation to insist upon making requests [for needed resources] *ex parte* and *in camera*”<sup>17</sup> flowing from the ABA Guidelines and Supplementary Guidelines, but also “as a matter of the highest ethical imperative . . . have a duty under [Model Rule 1.6] to go to the limit to defend the confidentiality of the legal and factual investigative work of the defense team.”<sup>18</sup>

### III. THE IMPORTANCE OF MITIGATION TO THE JUDICIAL SYSTEM

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

---

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

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

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

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

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

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

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

cases.”<sup>20</sup> Chillingly, Judge Bowen sat on the court that affirmed the death sentence of Walter McMillian, which had been imposed by a trial judge who overrode the recommendation of the jury for a sentence of life imprisonment. “At the time, I felt absolutely certain that he was guilty of the crime. Later, however, thanks to the investigation conducted by Bryan Stevenson of the Equal Justice Initiative”—who was operating completely pro bono since, in violation of the ABA Guidelines,<sup>21</sup> Alabama does not provide counsel for state post-conviction representation<sup>22</sup>—

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

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

---

20. *Id.* at 812.

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

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

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

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

25. *Id.* at 821.

26. *Id.* at 833.

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

#### IV. IMAGINING MITIGATION

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

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

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

---

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

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

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

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

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

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

---

29. *Id.* at 844.

30. *Id.* at 842, 843.

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

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

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



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

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

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

## V. OBTAINING MITIGATION

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

---

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

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

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

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

Among the many aspects of this duty are the obligation to select appropriate non-legal team members<sup>38</sup> and to provide them with strategic direction.<sup>39</sup> The next article, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*,<sup>40</sup> addresses those topics. The authors are Dr. Richard G. Dudley, Jr., a private psychiatrist with a clinical and forensic practice who also teaches at New York University School of Law and at the City University of New York Medical School, and Pamela Blume Leonard, a long-time mitigation specialist now working with homicide victims' surviving family and friends through the Georgia Council for Restorative Justice at Georgia State University School of Social Work in Atlanta.

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

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

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

---

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

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

40. Richard G. Dudley, Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008).

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

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

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

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

The process they describe begins with a recognition that a foreign country may acknowledge a person as a national on a basis that is not intuitively obvious to American counsel.<sup>45</sup> If so, the person may be entitled to rights under both bilateral and multilateral treaties.<sup>46</sup> In any event, conducting a mitigation investigation abroad will surely pose unique logistical difficulties. But it may benefit from the unique resources that foreign governments will provide<sup>47</sup> if—but only if—counsel discharge the established duty of identifying and exploiting those resources.<sup>48</sup> Having done so, counsel need to integrate the results of the investigation into a narrative that enables decision-makers to comprehend the impact of the client's foreign background on the course of his life.

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

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

---

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

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

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

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

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

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

50. *Id.* at 1021.

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

As the article documents, accumulated experience has shown the wisdom of the suggestion in the ABA Guidelines<sup>52</sup> that outreach to the survivors works best when facilitated by a well-qualified intermediary who is specifically engaged as an expert for that particular purpose and is not otherwise a member of the defense team. Indeed, because of such intermediaries' unique ability to provide a service that could not be as well-performed by any other method, "[r]etaining victim liaisons . . . is becoming a necessary part of the practice of defending clients in capital cases."<sup>53</sup>

## VI. PRESENTING MITIGATION

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

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

---

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

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

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

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

55. John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035 (2008).

56. *Id.* at 1036.

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

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

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

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

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

---

57. *Id.* at 1042.

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

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

60. Mark E. Olive & Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 36 HOFSTRA L. REV. 1067 (2008).

under the ABA Guidelines and Supplementary Guidelines: reviewing de novo the work of prior counsel<sup>61</sup> and the completeness of official files,<sup>62</sup> as well as the accuracy of the factual premises underlying the adverse determinations in the client's case to date;<sup>63</sup> re-thinking their prior theories and devising new ones in light of changed circumstances;<sup>64</sup> and seizing openings to reach agreed-upon dispositions.<sup>65</sup>

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

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

---

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

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

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

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

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

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

67. See Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325, 342 (2003).

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