

REPRESENTING CAPITAL CLIENTS AND  
THE ELUSIVE QUEST FOR  
“MEANINGFUL ACCESS TO JUSTICE”

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*[The U.S. Supreme] Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.*

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*Meaningful access to justice has been [a] consistent theme of [our] cases.*

*Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985)

I. INTRODUCTION

All capital cases begin with a tragedy. Just as Cain bore a mark as the killer of his brother,<sup>1</sup> those who stand accused of murder as well as those judged as murderers bear a mark—a mark for breaking the social contract, for spilling blood. Unlike Cain’s mark, which was meant to protect him from retaliatory killing, the mark for some present-day murderers is a death prosecution or sentence. Whatever reason given for such punishment—retribution, deterrence, incapacitation,<sup>2</sup> or closure<sup>3</sup>—

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1. “Then the LORD put a mark on Cain so that no one who found him would kill him.” *Genesis* 4:15 (New International Version).

2. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (“The death penalty is said to serve two principal social purposes: retribution and deterrence . . .”). “Another purpose that has been discussed is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.” *Id.* at 183 n.28.

3. See FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 60 (2003); Gary Langer, *Death Penalty Ambivalence: Poll Points to Support for Execution Moratorium in U.S.*, ABC News, May 2, 2001, [http://abcnews.go.com/sections/us/DailyNews/poll010504\\_deathpenalty.html](http://abcnews.go.com/sections/us/DailyNews/poll010504_deathpenalty.html) (“Sixty percent also think the death penalty is fair because it gives satisfaction and closure to the families of victims . . .”).

when a State exerts all of its “judicial power to bear”<sup>4</sup> on an indigent capital defendant, the State must provide “[m]eaningful access to justice”<sup>5</sup> to those defendants.

Determining what constitutes “meaningful access to justice” in capital cases could serve as the basis of a symposium even longer and more varied than the topics discussed at the *Lawyering at the Edge* symposium. Forgoing the symposium approach, we can look to *Ake v. Oklahoma*<sup>6</sup> and the American Bar Association for guidance.

In *Ake*, the Supreme Court explained:

[The Court] 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 State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.<sup>7</sup>

While an indigent person is not entitled to “all the assistance that his wealthier counterpart might buy,” he or she must be given the “basic tools of an adequate defense or appeal.”<sup>8</sup> The basic tools can only be obtained through adequate funding for indigent defense. Because capital trials “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,”<sup>9</sup> adequate funding must be provided for the defense in both trial phases.

The American Bar Association has been instrumental in promulgating guidelines that set forth what raw materials are needed in capital cases. The Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases explain to practitioners, as well as those responsible for establishing and maintaining capital defense systems, what is necessary for indigent persons to have meaningful rather than mere nominal access to justice. The Supreme Court has called these Guidelines “well-defined norms” for effective capital

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4. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) (holding that an individual’s due process rights were violated when the State did not provide funding for a psychiatric evaluation when the accused was mounting an insanity defense).

5. *Id.* at 77.

6. 470 U.S. 68 (1985).

7. *Id.* at 77.

8. *Id.*

9. 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 GUIDELINES].

representation.<sup>10</sup> Newly adopted ABA Mitigation Guidelines provide even more direction about work that is paradigmatic to effective capital defense.<sup>11</sup>

Part II of this Article discusses *People v. Francois*, an example of lawyering at the edge—an unpopular client, a difficult case, and zealous advocates.<sup>12</sup> *People v. Francois*, a serial murder case under New York State’s death penalty statute,<sup>13</sup> is also an example of successful capital representation. Part III discusses the *Francois* case in relation to practice norms prescribed in selected ABA Capital Guidelines. Part IV of this Article details capital fee structures issues in New York and the resulting elusive meaningful access to justice in New York capital cases even during the time of *People v. Francois*.

## II. PEOPLE V. KENDALL FRANCOIS

### A. *The Beginnings of a Capital Case*

On August 28, 1998, newspapers reported on the formation of a new task force to “find seven missing women or the people responsible for their disappearance.”<sup>14</sup> The women were last seen in Poughkeepsie, New York, and sources stated that most had documented histories of

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10. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

11. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES (2008), in 36 HOFSTRA L. REV. (forthcoming June 2008).

12. There are no pending criminal proceedings arising from the facts of *People v. Francois*. Francois is aware of this Article and has consented to the author’s discussion of his case. Still, because the author served as co-counsel on *People v. Francois*, the facts of the case will be recounted using newspaper accounts as well as reported decisions to insure that no secrets or confidences are revealed. See N.Y. CODE OF PROF’L RESPONSIBILITY DR 4-101 (2007).

13. New York’s Death Penalty statute was adopted by Chapter 1 of the Laws of 1995, and it took effect on September 1, 1995. Capital Defender Office, <http://www.nycdo.org> (last visited Feb. 23, 2008). In addition to defining the crime of first degree murder, the statute provided two new penalties for persons convicted of first degree murder: death and life in prison without the possibility of parole. *Id.* In 2004, a provision of the New York death penalty statute was found unconstitutional and non-severable. *People v. LaValle*, 817 N.E.2d 341, 344 (N.Y. 2004). Because the legislature has not acted to repair the statute and the Court of Appeals declined to overrule *LaValle*, there is at present no operable Death Penalty statute in New York. See *People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007).

14. John Milgrim, *Police Intensify Search for 7 Women*, TIMES HERALD-RECORD, Aug. 28, 1998, at 5; see Shannon McCaffrey, *Police Baffled by Seven Missing Women in Poughkeepsie Area*, ASSOCIATED PRESS, Aug. 31, 1998.

prostitution or drug addiction.<sup>15</sup> The task force consisted of detectives from the City and Town of Poughkeepsie, as well as State police investigators.<sup>16</sup> The first of these women were reported missing in October 1996—almost two years earlier.<sup>17</sup> Also on August 28th, the police announced the disappearance of an eighth woman.<sup>18</sup> All but one of the missing women were white.<sup>19</sup> Most were 5'4" or shorter<sup>20</sup> and ranged in age from twenty-six to fifty-one years old.<sup>21</sup> Some folks “grumble[d] that the police did not take the case seriously soon enough because the women were prostitutes.”<sup>22</sup> An FBI profiler explained that prostitutes are “easy targets because they will get in a car with anyone.”<sup>23</sup> Police opined that “it’s very, very likely that [these women] are dead.”<sup>24</sup>

On September 1, 1998, police arrested Kendall Francois, a twenty-seven-year old, after receiving a tip from a woman who said “she had just escaped a confrontation with him.”<sup>25</sup> While being questioned about the confrontation, “[Francois] broke down, confessed to the killings and told investigators they could [find the remains of eight women] in the home he shared with his parents and younger sister.”<sup>26</sup>

Francois was a black male, described as well over 6'4" and about 300 pounds.<sup>27</sup> Francois was raised in Poughkeepsie, graduated from Arlington High School, and, after a brief stint in the Army, had come

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15. See Michelle Vellucci, *Another Woman Vanishes: Disappearance Coincides With New Task Force*, POUGHKEEPSIE J., Aug. 28, 1998, at 1A; see also McCaffrey, *supra* note 14; Milgrim, *supra* note 14, at 5.

16. See Milgrim, *supra* note 14, at 5.

17. *Id.*; Elana Ashanti Jefferson, *House Still Draws Crowds: Investigators Seek Clues at 99 Fulton Ave.*, TIMES HERALD-RECORD, Sept. 10, 1998, at 4.

18. Vellucci, *supra* note 15, at 1A.

19. *Id.* Ultimately, the investigation determined that all of Francois’s victims were white women. The body of Michelle Eason was not recovered at Francois home, and he was never charged with any crimes related to Ms. Eason. Michael Valkys, *Leads Sparse in Case of Missing Woman*, POUGHKEEPSIE J., Sept. 17, 2007, at 1A.

20. Vellucci, *supra* note 15, at 1A.

21. *Id.*

22. McCaffrey, *supra* note 14.

23. *Id.* While one newspaper attributed Francois’s capture to the numerous personality traits provided by the FBI profilers, the sole tip mentioned in the article was that “the Poughkeepsie killer . . . probably lived in the area.” Al Guart, *FBI Profilers Helped Cops Snare Suspect*, N.Y. POST, Sept. 3, 1998, at 24.

24. McCaffrey, *supra* note 14.

25. George Fletcher, Jorge Fitz-Gibbon & Bill Hutchinson, *Serial Killer Suspect Grabbed: Three Women Found Dead*, N.Y. DAILY NEWS, Sept. 3, 1998, at 5.

26. *Id.*

27. *Id.*; Welsh White, *Plea Bargaining in Capital Cases*, CRIM. JUST., Fall 2005, at 38, 42.

back to live with his parents in Poughkeepsie.<sup>28</sup> He had worked as a “school custodial worker and hall monitor” at local schools,<sup>29</sup> and was an intermittent student at Dutchess Community College.<sup>30</sup>

At the time of his arrest, Francois was described as “a real nice kid in high school—very polite;”<sup>31</sup> “too friendly with girls;”<sup>32</sup> “he was pretty cool. He was just nice;”<sup>33</sup> “strange;”<sup>34</sup> and “a mild-mannered type of person. Quiet. . . . Everyone is surprised by this.”<sup>35</sup>

Francois had been identified as a “potential target[] of an intensive probe into the [missing] women’s disappearances.”<sup>36</sup> In fact, in 1997, the police “gave him a polygraph test”<sup>37</sup> after the disappearance of the first several women and “[a] detective was even in his home for a brief period of time.”<sup>38</sup> His criminal history included one incident—“strangling and then sexually attacking a prostitute at his home,”<sup>39</sup> for which he plead guilty to third-degree misdemeanor assault and was “sentenced to 15 days in jail” in 1997.<sup>40</sup>

On September 9, 1998, Francois was arraigned on a single count of second degree murder.<sup>41</sup> Because of the ongoing investigation for the murders of the other seven women and the probability that first degree murder charges would be filed,<sup>42</sup> the Capital Defender Office (“CDO”) was appointed to represent Francois.<sup>43</sup>

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28. See Associated Press, *Poughkeepsie House of Horrors: Two Bodies Found, Six More Expected*, NEWSDAY, Sept. 3, 1998, at A5; Joseph Berger, *Poughkeepsie Man Linked to Slayings of Eight Women*, N.Y. TIMES, Sept. 3, 1998, at A1.

29. Fletcher et al., *supra* note 25, at 5.

30. Associated Press, *supra* note 28.

31. Michelle Vellucci, *Suspect: ‘Real Nice Kid’*, POUGHKEEPSIE J., Sept. 3, 1998, at 1A.

32. Associated Press, *supra* note 28.

33. Denise Buffa, Douglas Montero & Maggie Haberman, *Upstate Home Was Serial-Slay Tomb: Scary ‘Stinky’ is a 300-Pound Oddball*, N.Y. POST, Sept. 3, 1998, at 22.

34. *Id.* at 4.

35. Shannon McCaffrey, *3 Bodies Found in Ex-School Worker’s Home*, BUFF. NEWS, Sept. 3, 1998, at A13; Associated Press, *supra* note 28.

36. Larry Fisher-Hertz, *Hunt for Hard Evidence Delayed Arrest*, POUGHKEEPSIE J., Sept. 4, 1998, at 3A.

37. Michelle Vellucci & Larry Fisher-Hertz, *Families Await Next Step in Francois Case*, POUGHKEEPSIE J., Dec. 22, 1998, at 1A.

38. *Id.*

39. Fisher-Hertz, *supra* note 36, at 3A.

40. *Id.*

41. See Associated Press, *Police Identify 8th Body from Suspect’s House*, N.Y. TIMES, Sept. 8, 1998, at B7.

42. The Capital Defender Office was created by the statute when the death penalty was reinstated in New York in 1995. See N.Y. JUD. LAW § 35-b(3) (McKinney 2002). The Judiciary Law provides that individuals charged with (1) first degree murder and (2) those charged with second degree murder where “the district attorney confirms upon inquiry . . . that the district

The crime scene investigation at the family home lasted just about a month after Francois was taken into custody.<sup>44</sup> Eight bodies were eventually found in the Francois home.<sup>45</sup>

Francois was arraigned on a superseding indictment that contained eight counts of first degree murder, eight counts of second degree murder, and one count of attempted second degree assault.<sup>46</sup> At this time, Dutchess County District Attorney William Grady reserved decision on whether to seek the death penalty.<sup>47</sup>

In November 1998, the District Attorney asked the CDO to submit “any mitigation information the defense might request the prosecutor to consider in determining whether to seek the death penalty.”<sup>48</sup> This request was made despite conducting its own mitigation investigation starting near the time of Francois’s arrest. As one police officer said: “Because there is the potential that this could be a (capital) case, you have to know everything about the defendant’s entire life. It’s almost like we’re writing a biography.”<sup>49</sup>

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attorney is undertaking an investigation to determine whether the defendant can or should be charged with murder in the first degree,” and who are financially unable to afford “adequate representation or investigative, expert or other reasonably necessary services” are entitled to the appointment of counsel and other necessary services. *Id.* § 35-b(1). Types of appointed counsel explicitly authorized included the Capital Defender Office, entities the CDO entered into contract with, and individual lawyers qualified pursuant to Judiciary Law section 35-b. *Id.* § 35-b(2).

43. New York’s statute explicitly authorized the appointment of three types of capital counsel: (1) the Capital Defender Office; (2) legal aid offices, public defenders, or other not-for-profit legal offices that the CDO entered into contract with; and (3) qualified individual lawyers. *Id.* § 35-b(2).

44. Michelle Vellucci, *Police End Search at Scene of Killings: Neighbors Still Grapple with Tragedy*, POUGHKEEPSIE J., Sept. 30, 1998, at 1B.

45. John Milgrim, Elana Ashanti Jefferson & Oliver Mackson, *Francois Charges Add Up: Indictment Could Bring Death Penalty Trial*, TIMES HERALD-RECORD, Oct. 14, 1998, at 4. The victims were Wendy A. Meyers, Gina Barone, Catherine A. Marsh, Kathleen Hurley, Mary E. Giaccone, Sandra French, Audrey Pugliese, and Catina Newmaster. *Id.* Ms. Hurley was not originally thought to be among the victims. Associated Press, *supra* note 41, at B7. The body of Michelle Eason was not recovered at Francois’s home. *Id.* Francois was never charged or implicated with any crimes related to Ms. Eason.

46. *Francois v. Dolan*, 731 N.E.2d 614, 615 (N.Y. 2000).

47. District Attorney Grady had 120 days from arraignment in the trial court to decide if he was going to seek Francois’s execution. See N.Y. CRIM. PROC. LAW § 250.40 (McKinney 2002).

48. *Francois*, 731 N.E.2d at 615. New York’s statutory mitigators included defendant’s lack of criminal history, mental retardation or impairment, duress or domination, minor participation in the offense, and mental or emotional disturbance or influence of alcohol or any drug. N.Y. CRIM. PROC. LAW § 400.27(9) (McKinney 2005). Additionally, New York’s catch-all mitigating factor included “[a]ny other circumstance concerning the crime, the defendant’s state of mind or condition at the time of the crime, or the defendant’s character, background or record that would be relevant to mitigation or punishment for the crime.” *Id.* § 400.27(9)(f).

49. Vellucci & Fisher-Hertz, *supra* note 37, at 4A.

*B. An Altered Death Penalty and an Attempt to Plead Guilty*

On December 22, 1998, the New York Court of Appeals decided *Hynes v. Tomei*,<sup>50</sup> reviewing two trial courts decisions declaring New York's capital plea provisions unconstitutional.<sup>51</sup> Basing its decision on *United States v. Jackson*,<sup>52</sup> a unanimous court found New York's capital plea provisions violated the Fifth and Sixth Amendments of the United States Constitution because the provisions "authorized the death penalty only on the recommendation of a jury, while a defendant convicted of the same offense on a guilty plea or by a Judge escaped the threat of capital punishment."<sup>53</sup> Put another way, the plea provisions allowed those who plead guilty to capital murder to escape the risk of a death penalty thereby causing "the death penalty [to hang] over only those who exercise their constitutional rights to maintain innocence and demand a jury trial."<sup>54</sup> The Court:

- (1) severed the capital plea provisions to preserve the constitutionality of the death penalty legislation;<sup>55</sup>
- (2) concluded that a capital defendant could not plead guilty to first degree murder while a notice of intent to seek the death penalty was pending;<sup>56</sup> and
- (3) noted that its decision might well have an "ironic twist" of limiting capital defendants' opportunities to avoid the possibility of the death penalty.<sup>57</sup>

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50. 706 N.E.2d 1201 (N.Y. 1998), *cert. denied*, 527 U.S. 1015 (1999) (reviewing and reversing the decisions of the Appellate Divisions of the Second and Fourth Department in *Hynes v. Tomei*, 666 N.Y.S.2d 687 (App. Div. 1997), and *Relin v. Connell*, 674 N.Y.S.2d 192 (App. Div. 1998)).

51. *Hynes*, 706 N.E.2d at 1203. Individuals were allowed to plead guilty to first degree murder "with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole." N.Y. CRIM. PROC. LAW § 220.10(5)(e) (McKinney 2002).

52. 390 U.S. 570 (1968).

53. *Hynes*, 706 N.E.2d at 1204, 1209.

54. *Id.* at 1207.

55. *Id.* at 1208.

56. *Id.* at 1208-09.

57. *Id.* at 1209.

The decision did not explicitly address the possibility of an individual pleading guilty to a capital charge prior to the filing of a notice to seek death. In fact, when reporting on the decision, one newspaper wrote that “defendants can still plead guilty and receive a life-without-parole sentence—as long as they do so before prosecutors file a notice of intent to seek the death penalty against them. And, defendants can still plead to a lesser charge if prosecutors go along.”<sup>58</sup>

On December 23, 1998, the day after the *Hynes v. Tomei* decision, Francois made “an uncalendared appearance” in court and offered to plead guilty to every single count in the indictment.<sup>59</sup> Francois argued that “all defendants, including those charged with capital murder, [have] an absolute right to plead guilty to an entire indictment upon arraignment and at any time before verdict.”<sup>60</sup> The Dutchess County District Attorney “opposed acceptance of the plea” and, on Christmas Eve, 1998, filed notice of intent to seek the death penalty against Francois.<sup>61</sup>

The Court did not immediately decide to accept or reject Francois’s plea.<sup>62</sup> Indeed, the subject of the December 22, 1998 court appearance was not revealed in newspapers until January 1999.<sup>63</sup>

Dutchess County Court Judge Thomas Dolan rejected Francois’s offer to plead guilty to all of the charges in February 1999.<sup>64</sup> The defense team commenced an Article 78 proceeding to compel Judge Dolan to accept Francois’s guilty plea and the Appellate Division denied relief in July 1999.<sup>65</sup>

In May 2000, the Court of Appeals ruled that Francois could not plead guilty to avoid the death penalty without the consent of the Dutchess County District Attorney.<sup>66</sup> Otherwise, it would lead to “an

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58. Larry Fisher-Hertz, *Capital Plea Deals Overruled*, POUGHKEEPSIE J., Dec. 23, 1998, at 1A.

59. Francois v. Dolan, 731 N.E.2d 614, 615-16 (N.Y. 2000).

60. *Id.* at 616.

61. *Id.*

62. *Id.*

63. See, e.g., Larry Fisher-Hertz, *Francois Motion Sealed*, POUGHKEEPSIE J., Dec. 24, 1998, at 1A (noting the unscheduled court appearance, but unable to provide a reason for the appearance because the record was sealed, “at least temporarily”); John Milgrim, *Francois Makes Plea Bid to Avoid Death*, TIMES HERALD-RECORD, Jan. 6, 1999, at 3.

64. See Francois, 731 N.E.2d at 616; Heather Yakin & John Milgrim, *Bid for Murder Plea Denied: Judge Says Francois Can’t Avoid Death Penalty*, TIMES HERALD-RECORD, Feb. 12, 1999, at 5.

65. Francois v. Dolan, 693 N.Y.S.2d 198 (App. Div. 1999).

66. Francois, 731 N.E.2d at 616.

unseemly race to the courthouse between defense and prosecution to see whether a guilty plea or notice of intent to seek the death penalty will be filed first.”<sup>67</sup>

Newspapers reported that Francois’s trial was to start in a matter of months.<sup>68</sup>

### C. Resolution

An interesting thing happened on the way to trial, however. Francois pled guilty to all seventeen counts in his indictment on June 22, 2000, just over a month after losing his appeal in *Francois v. Dolan*.<sup>69</sup> He was sentenced to eight life sentences without the possibility of parole, eight consecutive sentences of twenty-five years to life, and one and one-third to four years for the attempted assault that led to his arrest.<sup>70</sup>

While Francois’s sentence was lengthy and guaranteed that he would die in prison, he avoided the penalty that the State had initially sought—death.

## III. ABA GUIDELINES IN DEATH PENALTY CASES

### A. The Guidelines Generally

The *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* provide a window into the type of high quality representation all capital defendants should receive.<sup>71</sup>

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67. *Id.* at 617.

68. *Court Upholds Rejection of Guilty Plea in Killings*, N.Y. TIMES, May 19, 2000, at B2.

69. 731 N.E.2d 614 (N.Y. 2000). Francois admitted to “strangling [eight women]” and “hiding all eight bodies” in his home. “Francois uttered the word ‘guilty’ 17 times.” Larry Fisher-Hertz, *Francois Pleads Guilty to Killing Eight Women*, POUGHKEEPSIE J., June 22, 2000, at 1A.

70. Patricia Doxsey, *Serial Killer Francois Gets Life in Prison*, DAILY FREEMAN, Aug. 8, 2000, at A2.

71. These Guidelines were first adopted in 1989, and are available at <http://www.abanet.org/deathpenalty/resources/docs/1989Guidelines.pdf>. In 2003, three years after Francois’s case was settled, the ABA adopted a revised edition of the Guidelines. The revised Guidelines are available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf>. This Article references the revised Guidelines. The Guidelines “embody the current consensus about what is required to provide effective defense representation in capital cases.” GUIDELINES, *supra* note 9, at Guideline 1.1, History of Guideline. It logically follows that *People v. Francois* should be guided by the revised Guidelines as opposed to those promulgated ten years before. Supreme Court precedent supports this conclusion. See *Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005) (discussing both the 1989 Guidelines and the revised edition in relation to

After all, the Supreme Court has repeatedly referred to them as ““guides to determining what is reasonable.””<sup>72</sup>

The Guidelines explain that a capital defense team should consist of no fewer than two attorneys, an investigator, and a mitigation specialist.<sup>73</sup> The Guidelines discuss in detail what the team must do in order to adequately represent its client and covers topics as varied as qualifications of defense counsel,<sup>74</sup> funding and compensation,<sup>75</sup> and the relationship with the client.<sup>76</sup>

This Part will highlight when the Guidelines take effect in the course of a case, the efforts that must be made on behalf of the client, the relationship between the client and the team, and attempts to negotiate a plea agreement.

The “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.”<sup>77</sup> This makes sense given the Guidelines’ stated goal of “ensur[ing] high quality legal representation for all persons facing the possible imposition or execution of a death sentence.”<sup>78</sup>

“Extraordinary efforts on behalf of the accused” must be made.<sup>79</sup> These efforts must not be aimed solely at the guilt phase for which counsel must contest the evidence the prosecution will use to try to prove the accused’s guilt beyond a reasonable doubt and develop evidence for the client’s defense case if he so chooses to offer one. Extraordinary efforts must also be expended towards the penalty phase. “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.”<sup>80</sup> Counsel must be inventive, creative and “raise every legal claim that may

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a lawyer’s conduct in a 1988 case); *Florida v. Nixon*, 543 U.S. 175, 191 & n.6 (2004) (citing the revised Guidelines when evaluating a lawyer’s conduct from 1984 and 1985).

72. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *Rompilla*, 545 U.S. at 387.

73. GUIDELINES, *supra* note 9, at Guideline 4.1(A)(1).

74. *Id.* at Guideline 5.1.

75. *Id.* at Guideline 9.1.

76. *Id.* at Guideline 10.5.

77. *Id.* at Guideline 1.1(B).

78. *Id.* at Guideline 1.1(A).

79. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-1.2(c) (3d ed. 1993).

80. GUIDELINES, *supra* note 9, at Guideline 1.1, commentary (discussing representation at trial).

ultimately prove meritorious;<sup>81</sup> otherwise there is the danger of default barring the defendant from gaining relief at a later stage in the proceeding.<sup>82</sup>

Capital counsel “should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.”<sup>83</sup> It is not enough to meet the client at arraignment and wait until the next court appearance to talk. “Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel’s entry into the case.”<sup>84</sup> Because a client is facing very serious charges, these initial meetings go a long way toward developing a relationship of trust and respect for the legal team as well as for the team’s opinions and advice. “[A] client will not—with good reason—trust a lawyer who visits only a few times before trial.”<sup>85</sup> Trust is essential given the stakes involved in the case and the nature of mitigating evidence that may be offered at the penalty stage of trial. Mitigation evidence<sup>86</sup> often involves very painful and disturbing memories in a client’s life. These painful and sensitive discussions can only take place in a relationship of trust. One cannot expect to go in, meet a client, and ask about any abuse the individual may have suffered. “Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client.”<sup>87</sup> Counsel should “engage in a continuing interactive dialogue with the client concerning all matters,” including “current or potential legal issues” and “potential agreed-upon dispositions of the case.”<sup>88</sup>

Capital counsel must also heed what the ABA calls “[t]he Duty to Seek an Agreed-Upon Disposition.”<sup>89</sup> Specifically, counsel throughout a case has an obligation to take all necessary steps to try to obtain a plea

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81. *Id.*

82. *Id.*

83. *Id.* at Guideline 10.5(A).

84. *Id.* at Guideline 10.5(B)(1).

85. *Id.* at Guideline 10.5, commentary (discussing counsel’s duty).

86. Recall New York’s statutory mitigating factors include issues relating to mental retardation, impairment, and “circumstance[s] concerning the crime, the defendant’s state of mind or condition at the time of the crime, or the defendant’s character, background or record.” N.Y. CRIM. PROC. LAW § 400.27(9) (McKinney 2005).

87. GUIDELINES, *supra* note 9, at Guideline 10.5, commentary (discussing counsel’s duty).

88. *Id.* at Guideline 10.5(C).

89. *Id.* at Guideline 10.9.1. *Arave v. Hoffman* highlights the importance of this issue. 128 S. Ct. 532 (2007). The Supreme Court granted a petition for certiorari to determine what remedy should be provided for ineffective assistance of counsel during plea bargain negotiations in a capital case. *Id.* at 532-33. However, in response to Mr. Hoffman’s motion for dismissal of his appeal on the merits, the Court dismissed the petition. *Arave v. Hoffman*, 128 S. Ct. 749 (2008).

agreement. Counsel must explore with the client “at every stage of the case . . . the possibility and desirability of reaching an agreed-upon disposition.”<sup>90</sup> Even “initial refusals by the prosecutor” or “a client’s initial opposition should not prevent counsel from engaging in an ongoing effort”<sup>91</sup> to negotiate a plea “that is in the client’s best interest.”<sup>92</sup>

### B. *The ABA Guidelines and People v. Francois*

The Guidelines state that a capital team should consist of no fewer than two attorneys, an investigator, and a mitigation specialist.<sup>93</sup> Without detailing the exact makeup of Francois’s defense team, the CDO employed trial lawyers and investigators (including mitigation specialists), which allowed a fully formed team to immediately start working on Francois’s case.<sup>94</sup>

The Guidelines take effect as soon as an individual is taken into custody.<sup>95</sup> For Francois, this was early September 1998. The CDO was assigned to represent Francois right after he was arrested.<sup>96</sup> Francois’s case is a good example of why the Guidelines should apply from the time an individual is taken into custody. If the Guidelines took effect at arraignment on capital charges, Francois would have been without capital counsel until mid-October 1998. If the relevant date was when the district attorney decided to seek the death penalty, Francois would have spent his first three months in jail without capital counsel, and the December plea offer would likely not have occurred. While the plea offer was not accepted, it did start a serious conversation about how *People v. Francois* could end without hearings or a trial. As early as December 1998, one victim’s family member was urging the District Attorney to settle the case.<sup>97</sup> With Francois’s plea attempt, this family

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90. GUIDELINES, *supra* note 9, at Guideline 10.9.1(B).

91. *Id.* at Guideline 10.9.1(E).

92. *Id.*

93. GUIDELINES, *supra* note 9, at Guideline 4.1(A)(1).

94. See Richard Pérez-Peña, *The Death Penalty: When There’s No Room for Error*, N.Y. TIMES, Feb. 13, 2000, at 3.

95. GUIDELINES, *supra* note 9, at Guideline 1.1(B).

96. Michael McCagg, *Police Link Slay Suspect to Women Who Vanished*, DAILY FREEMAN, Sept. 3, 1998, at 1.

97. Jessica Beasimer, *Victim’s Mother to Judge: Accept Francois’ Guilty Plea*, POUGHKEEPSIE BEAT, Feb. 5, 1999, at 1 (reporting on a letter to Judge Dolan asking that he accept Francois’s plea).

member's desire for a plea only grew stronger.<sup>98</sup> That was monumental and certainly did not hurt Francois's plea prospects.

The Francois defense team was inventive, proactive, and obviously had developed a relationship of trust with Francois. Within twenty-four hours of *Hynes v. Tomei*, Francois was advised about this brand-new decision relating to New York's death penalty statute.<sup>99</sup> Within twenty-four hours of *Hynes v. Tomei*, Francois was in court attempting to plead guilty.<sup>100</sup> Because *Hynes v. Tomei* was silent as to what should be done in cases in this specific procedural posture, Francois's attempt to plea would clarify the case's meaning. This claim of a right to plead guilty prior to a death notice being filed was strenuously and exhaustively litigated for over a year. While time may not heal all wounds, it does have the effect of cooling passions after tragic crimes such as the ones to which Francois eventually pled guilty. This cooling period certainly did not hurt Francois's ability to plead guilty.

Suppose the team did not hit the ground running, and had not yet started serious investigation in his case; could the team have met its ethical obligations to evaluate the evidence of his case and make an assessment about the likelihood of success by going to trial? Recall the added complexity of capital litigation and the two phases of trials. The CDO—with its trial lawyers, in-house investigators, and mitigation specialists—had the capacity to do all types of preliminary work in order to make an assessment about the feasibility of a plea.

Can a defense team know what is in the client's best interest unless it conducts guilt and penalty phase investigation, assesses the information gathered, and gets to know the client? No. So in addition to explaining the legal process to the client and his family, the team must get to know the client, his family and his friends; seek and review all discovery from the prosecution; decide what experts to at least consider for the case; look for all potential witnesses to the crime(s); track down and interview people who spoke to the media or police officers; start identifying potential witnesses for both guilt and penalty phases of the trial; and obtain privileged documents which contain information relating to the client and his family.

Imagine it is December 22, 1998, the day *Hynes v. Tomei* was decided. And imagine Francois's team visiting him to discuss the decision and possible actions in his case. If it were their second or third

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98. *Id.*

99. *See supra* notes 59-61 and accompanying text.

100. *Id.*

or even sixth visit, how difficult would it have been to ask, much less convince, Francois to plead to an indictment that guaranteed he would never leave prison?

Looking through the lens of the Guidelines (and discussing when they should take effect), what efforts should be made on behalf of clients, the defense team's relationship with the client and the importance of pursuing negotiated dispositions? Francois had access to the basic tools discussed in *Ake v. Oklahoma*. Francois had meaningful access to justice.

#### IV. THE ELUSIVE QUEST FOR MEANINGFUL ACCESS TO JUSTICE

##### A. Problems Even in New York

Given the result in *People v. Francois*, many would ask what is elusive about the quest for meaningful access to justice in New York. After all, *People v. Francois* was an unqualified success and New York had the CDO—hailed as the “gold standard”<sup>101</sup> in capital defense. What is left to discuss?

First, *People v. Francois* was not New York's only capital case. District Attorneys considered seeking the death penalty in close to 900 cases from 1995 to 2005, death notices were filed in fifty-eight cases, and eighteen individuals went to trial on capital charges.<sup>102</sup> Ultimately, seven men were sent to New York's Unit for Condemned Prisoners, also known as Death Row.<sup>103</sup>

Second, while Francois had meaningful access to justice and less than ten percent of cases where prosecutors considered seeking death were death-noticed, there were funding developments in New York which negatively impacted capital clients' access to the necessary tools to successfully litigate a capital trial. Before looking to those developments, it is instructive to look at New York's criminal defense funding in general.

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101. Pérez-Peña, *supra* note 94, at 3.

102. Capital Defender Office, Summary (FAQs), [http://www.nycdo.org/caseload\\_041231\\_answers.pdf](http://www.nycdo.org/caseload_041231_answers.pdf) (last visited Feb. 17, 2008) (covering Sept. 1, 1995, through Dec. 31, 2004). The cases that were death-noticed and did not go to trial include cases where death penalty notices were withdrawn, pleas were obtained, and cases that could not proceed as capital cases because of *People v. LaValle*. *Id.*

103. *Id.*

### B. Funding in Non-Capital Cases

From 1986 to 2003, the rate of compensation for assigned counsel in New York Criminal Courts and the Family Court was “\$40 per hour for work performed in-court and \$25 per hour for work performed out-of-court.”<sup>104</sup> By 2000, “the fees [were] at a lower level than that paid by all but one other state in the nation.”<sup>105</sup> New York’s situation was called “a deplorable situation for a state with a longstanding commitment to providing its citizens equal access to justice.”<sup>106</sup> New York’s non-capital criminal defense costs “are borne by the counties” and not the State.<sup>107</sup>

Finally, in May 2003, the felony rates were increased to \$75 per hour with no distinction between in-court and out-of-court work.<sup>108</sup> Even after the rates were increased, New York’s indigent defense system has been called “severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation” guaranteed by the New York and United States Constitutions.<sup>109</sup>

The funding inadequacies in non-capital cases certainly affected the State’s fiscal attitude about the financial commitment it owed to capital clients. There were serious concerns from the very beginning.

### C. New York Capital Funding

When New York enacted the death penalty in 1995, it created the Capital Defender Office—a state-wide, state-funded office.<sup>110</sup> The CDO provided direct representation to capital clients as did qualified private

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104. HON. JONATHAN LIPPMAN & HON. JUANITA BING NEWTON, N.Y. STATE UNIFIED COURT SYS., ASSIGNED COUNSEL COMPENSATION IN NEW YORK: A GROWING CRISIS 1, 5 (2000).

105. *Id.* at 1. That one state was New Jersey (paying \$30 per hour in-court and \$25 per hour out-of-court). *Id.* at 6. New Jersey, unlike New York, “has an extensive statewide public defender office and relies on assigned counsel” in no more than 10% of cases. *Id.* According to a Spangenberg Group report on non-capital felony attorney rates, New York’s rate was lower than Alabama which paid \$50 per hour for in-court work and \$30 per hour for out-of-court work; Georgia paid \$60 per hour in-court and \$45 per hour out-of-court; and Louisiana averaged \$42 per hour. *Id.* at 6 nn.15-16.

106. *Id.* at 1.

107. *Id.* at 5.

108. 2003 N.Y. Sess. Laws 231 (McKinney).

109. COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., INTERIM REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 16 (2005).

110. N.Y. JUD. LAW § 35-b(3) (McKinney 2002).

counsel (commonly referred to as “35-b counsel”), legal aid offices, public defender offices, and other not-for-profit defenders.<sup>111</sup>

When New York’s death penalty statute went into effect on September 1, 1995, 35-b counsel were assigned to represent a number of clients soon thereafter. It took New York over a year to approve capital fee schedules, depriving 35-b counsel and their entire defense team pay during that time.<sup>112</sup>

New York’s death penalty statute established the method for determining capital fee schedules. Screening panels in each of New York’s four judicial departments<sup>113</sup> were to “promulgate and periodically update, in consultation with the administrative board of the judicial conference [the four presiding justices of each judicial department and the Chief Judge of the Court of Appeals] a schedule of fees.”<sup>114</sup> The fee schedules were to be approved by the Court of Appeals, but only after “invit[ing] the submission of written comments from interested parties.”<sup>115</sup>

At the outset, there were drastic disagreements about what constituted adequate fees. In the fall of 1995, the Administrative Board recommended “\$125 an hour for lead counsel and \$100 an hour for associate counsel,” while two panels recommended between \$250 and \$300 for lead counsel and \$225 and \$250 for associate counsel.<sup>116</sup> The Fourth Department panel did not suggest rates but “objected” to the Administrative Board’s recommendation; the panel expressed concern about attracting qualified counsel because an informal survey found that lead counsel normally made between \$175 and \$185 an hour and junior lawyers between \$140 and \$150 an hour.<sup>117</sup> Additionally, the First

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111. *Id.* § 35-b(2). Payment for all capital counsel was through the State’s Budget. See James Dao, *Pataki Aide Assails High Fees to Defend Poor in Death Cases*, N.Y. TIMES, Mar. 13, 1996, at B5.

112. Daniel Wise, *Pay Rates for Capital Counsel Adopted by Court of Appeals*, N.Y. L.J., Nov. 22, 1996, at 1.

113. N.Y. JUD. LAW § 35-b(5)(a) (McKinney 2002). Each screening panel was to have four members—two appointed by the CDO Board and two by the presiding justice of each judicial department. *Id.*

114. *Id.*

115. *Id.* Schedules were to be “promulgated and approved after reviewing the rates of compensation generally paid in the department to attorneys with substantial experience in the representation of defendants charged with murder or other serious felonies, and shall be adequate to ensure that qualified attorneys are available.” *Id.*

116. Daniel Wise, *Panels Split on Legal Fees in Death Cases: Proposals Vary from \$125 to \$300 for Lead Counsel*, N.Y. L.J., Nov. 15, 1995, at 1.

117. *Id.*

Department panel believed that there should be fees promulgated for paralegals as well as law clerks on a sliding scale.<sup>118</sup>

After much back and forth, agreement between the Administrative Board and the Screening Panels was finally reached on the fee schedules in November 1996: \$175 per hour for lead counsel and \$150 per hour for associate counsel.<sup>119</sup> No distinction was made for work done in-court and out-of-court. The fee schedules included rates for paralegals and auxiliary counsel.

From the very beginning, the proposed 35-b rates were called “disgraceful” by then-Governor Pataki<sup>120</sup> and “preposterous” as well as a “grave train” by his counsel.<sup>121</sup> It was argued that “the people [including judges, former prosecutors and law professors] who had proposed the fees were trying to undermine the death penalty law by making it prohibitively expensive.”<sup>122</sup> One screening panel member—who was a former state Supreme Court Justice from Manhattan—commented: “[t]he cost will really be enormous . . . . But so is the consequence.”<sup>123</sup> Another panel member said: “I don’t know what price the Governor’s office thinks a life is worth.”<sup>124</sup> Despite justifications for the rates,<sup>125</sup> the Governor’s criticism was relentless.

The State did not relent with its criticism of the fees even after they were approved. Because of its disagreement, monies were not immediately released to pay 35-b counsel. A January 2, 1997 letter from the State Budget Division to the CDO stated that they would not “make appropriations available for disbursement [in capital cases] until [they were] assured that reasonable safeguards exist in the payment process to avoid [payment of paralegal and auxiliary counsel] expenditures which, in [their] view, are not authorized by the statute.”<sup>126</sup> The Budget Division’s opinion about paying paralegal and auxiliary counsel fees was made in consultation with the Governor’s Counsel.<sup>127</sup>

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118. *Id.*

119. Wise, *supra* note 112, at 1.

120. *Id.*

121. Dao, *supra* note 111, at B5.

122. *Id.*

123. *Id.*

124. *Id.*

125. These justifications include concerns that death cases would be so time-consuming as to make it impossible for lawyers to handle other cases and that the state should be obligated to pay for the best lawyers when death is the punishment. *Id.*

126. Daniel Wise, *Capital Case Assistants Refused Pay by Pataki: Lawsuit Likely Over Paralegal, Associate Fees*, N.Y. L.J., Jan. 14, 1997, at 1 (first alteration in original).

127. *Id.*

The CDO was advised that an acceptable safeguard was to submit no vouchers including requests for reimbursement of paralegals or auxiliary counsel.<sup>128</sup> The CDO took into consideration that over one hundred 35-b lawyers had been assigned to capital cases from September 1995 to January 1997.<sup>129</sup> In order to pay those who had worked and were continuing to work on potentially capital cases, the CDO agreed to withhold all requests for compensation for auxiliary counsel and paralegals.<sup>130</sup>

In September 1997, less than a year after the original fees were approved, the Court of Appeals asked the screening panels to “reexamine capital counsel fees.”<sup>131</sup> The Administrative Board “recommended a bifurcated compensation scheme, reducing the lead counsel hourly rate to \$100 for services before the prosecution announces its intent to seek the death penalty and \$125 for post-notice representation. The Administrative Board also recommended reducing the associate counsel rate to \$75 pre-notice and \$100 post-notice.”<sup>132</sup>

The First Department Screening Panel never recommended any changes to the fee schedule, despite “extended consultation.”<sup>133</sup> The other three screening panels recommended changes in June 1998—nine months after the Administrative Board’s suggestion.<sup>134</sup>

The CDO Board, which normally did not comment on the fee schedules, urged the Screening Panel not to distinguish between work done before and after a filed death notice because it would send the wrong message to assigned counsel.<sup>135</sup> This advice was ignored.

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128. *Id.*

129. *Id.*

130. It took until May 2002—almost seven years after the first lawyer was assigned a capital case—to resolve this dispute and allow for payment of auxiliary counsel and paralegals fees. *Mahoney v. Pataki*, 772 N.E.2d 1118, 1119-20 (N.Y. 2002).

131. *N.Y. State Ass’n of Criminal Def. Lawyers v. Kaye*, 755 N.E.2d 837, 838 (N.Y. 2001).

132. *Id.* at 838-39. These rates are very similar to those first proposed by the Board in the fall of 1996. *Id.* at 838.

133. *Court of Appeals: Notice of Public Comment Period*, N.Y. L.J., Aug. 13, 1998, at 10.

134. *Id.*

135. Memorandum from the Capital Defender Office Board of Directors to the Screening Panel Members (May 1, 1998) (on file with author). After the fees were reduced, the CDO issued a press release reiterating its concern that the new “two-tiered rate [signaled] denigration of defense work undertaken prior to a district attorney’s death notice.” Associated Press, *Legal Fees Cut in Death Cases*, NEWSDAY, Dec. 24, 1998, at A52.

Despite near uniform opposition,<sup>136</sup> this change was adopted. One commentator noted: “One cannot help wondering what pressure was exerted on the screening panels . . . to recommend a reduction in assigned counsel fees when legal fees generally have not fallen.”<sup>137</sup> Another described the reduction as “an action long sought by Gov. George E. Pataki and other proponents of the death penalty.”<sup>138</sup>

On December 16, 1998, the Court of Appeals issued an Order approving the revised fee schedules in the following amounts: \$125 per hour for lead counsel’s post-notice work; \$100 per hour for associate counsel’s post-notice work; \$100 per hour for lead counsel’s pre-notice work; \$75 per hour for associate counsel’s pre-notice work.<sup>139</sup>

#### D. *People v. Francois and New York Fees*

When Francois was arrested in September 1998, the disturbing prospect of 35-b counsel not being paid anything for their services had ceased. While they still were not reimbursed for paralegal and auxiliary counsel services, 35-b counsel at least knew they would be paid for their own work. Unfortunately, there were the unsubtle messages from the Governor’s office suggesting that the fees were just part of a get-rich scheme for defense lawyers. If one worked too hard on capital cases at such exorbitant rates, you were complicit in bankrupting the system.

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Among those submitting comments opposing the rate cuts, during the comment period . . . were eight bar associations, two law school deans, a judge and four members of the panel responsible for setting the rates. Only the Governor’s counsel, James McGuire, endorsed the proposals that judges be given flexibility to provide lower levels of compensation.

Daniel Wise, *Cut in Death Case Pay Widely Opposed*, N.Y. L.J., Oct. 14, 1998, at 1. Statistical evidence compiled by the Capital Defender Office “suggest[ed] that many attorneys would continue to handle capital cases at rates lower than those currently in place, but not as low as those under consideration.” *Id.*

137. Michael A. Cooper, *Counsel Fees in Capital Cases: A Rush to Execution*, N.Y. L.J., Oct. 14, 1998, at 2.

138. Alan Finder, *New York’s Highest Court Cuts Fees for Defense Lawyers in Death Penalty Cases*, N.Y. TIMES, Dec. 24, 1998, at B5. This reduction is by itself troubling, but when compared to rates paid by the State for other legal fees, it defies belief. For example, in 1987, Governor Pataki himself paid a “blended rate” of \$175 per hour for the white-shoe firm of White & Case LLP to represent him in *Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997) (affirming governor authority to appoint a special prosecutor to supersede Bronx District Attorney in a capital case). Other rates include \$175 to \$300 per hour for bond counsel hired by the State Dormitory Authority; and \$250 per hour for Metropolitan Transportation Authority lawyers. LIPPMAN & NEWTON, *supra* note 104, at 6.

139. N.Y. State Ass’n of Criminal Def. Lawyers v. Kaye, 755 N.E.2d 837, 838-39 (N.Y. 2001).

Additionally, the controversy relating to lowering the capital counsel fee schedule was in full swing. Almost more troubling than a reduction of the fees was the distinction between work done before death notices and that done after. The proposed fees placed a higher value on work done after a prosecutor decided to seek death. How was this supposed to impact the request for mitigation evidence that district attorneys often made prior to a death declaration? Such a request was made in Francois's case and many of the 900 potentially capital cases in New York.

If Francois was represented by 35-b counsel instead of the CDO, would that lawyer have been impacted by the fee discussions? What about the other capital clients whose cases were pending during this period? What psychological effect might this differential have had on a solo practitioner? Was this distinction sending the message of the Guidelines—that one must begin to work on these cases from the very beginning?

What effect would the pay differentials have had on the initial meeting with clients? Would the team have visited clients as often and for more than a cursory period of time? Would the proposed rates help effectuate the Guideline relating to developing a relationship with your client? Or would the differential cause lawyers to think pre-notice work is not as important?

*Ake v. Oklahoma* discussed the imperative for indigent defendants to obtain the basic tools for an adequate defense. How can a system expect to provide basic tools when it denies pay to defense teams for over a year? What message is sent when soon thereafter, fees are reduced?

It is impossible to ignore the likely influence these fee disputes would have. Even the most committed, dedicated lawyer would think twice about her work and her strategy from an economic perspective. That economic pressure would certainly affect adherence to the norms established by the ABA Guidelines.

## V. CONCLUSION

New York's Death Penalty is no more. Where there was a death row that housed seven men, it no longer houses anyone. And none were removed by execution.

Despite this great success, the highly charged fee-setting process and the reduction in fees suggest that, even in New York, meaningful access to justice is elusive.