A VIEW OF THE ABA DEATH PENALTY DEFENSE REPRESENTATION *GUIDELINES* FROM THE PROSECUTION'S TABLE

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This Article considers the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("*ABA Guidelines*" or "*Guidelines*")[1] from a prosecutor's perspective.[2] In reviewing the *Guidelines*, I have restricted my focus to the investigation, guilt, and innocence phases of the process. If I possess any expertise in the subject matter, it is there.

Two recurring concerns tend to dominate discussions of the death penalty by prosecutors: first, the claims of ineffective assistance of counsel, and second, the length of time devoted to post-conviction

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1. Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003), 31 HOFSTRA L. REV. 913 (2003) [hereinafter *ABA Guidelines*].

2. Of course, there is no such thing as a common or typical prosecutor, at least not in any meaningful way. The best I can offer is my own thoughts, perspectives, or insights on the *Guidelines* in the context of capital litigation. These thoughts are the product of two years working on death penalty cases as a law clerk in law school and approximately thirty-seven and a half years as a prosecutor in a state that recognizes the death penalty. Though my state sanctions the death penalty, due to our limited population, it is rarely sought or imposed. During my forty years of practice, it has been ordered twice and carried out once. I have sought death on two occasions. In both instances, I dropped our election to seek death. On both occasions the defendants subsequently entered pleas of guilty to charges of murder in the first degree. In neither case was that by design at the time I took death off the table.

My experience with norms of practice among lawyers engaged in the practice of criminal law is derived from my own experience in practice and having served as a liaison to an ABA Criminal Justice Standards task force on the Prosecution and Defense Functions, a liaison to the ABA Criminal Justice Standards Committee, a member of the ABA Criminal Justice Standards Committee, and a member of the ABA Criminal Justice Section Council which approved submission of the Prosecution and Defense Function Standards to the ABA House of Delegates for their approval.

My comments, insights (or lack thereof), as well as any errors, are therefore mine and mine alone. I do not know if they are representative of a consensus or minority view.

review before the sentence is carried out. The latter concern is usually couched in terms of the need for finality. Taking the latter first, the concern about the length of time between sentencing and execution continues to be an issue among prosecutors despite passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[3] At the time, AEDPA was advertised as intended, among other things, to cure this problem. Part of AEDPA, for example, contained a provision limiting federal review from state capital cases.[4] If states adopted quality control performance standards in the post-conviction phase, deferential review would apply to state court determinations with respect to federal law and strict time limits would be imposed on habeas review. It is my understanding that only Arizona has adopted such performance standards.[5] But Arizona has not seen deferential treatment afforded in review of its capital cases because it has failed to follow the performance standards it adopted.

AEDPA has proven ineffective in reducing the length of time dedicated to post-conviction review. *Furman v. Georgia*[6] effectively placed a moratorium on the death penalty until *Gregg v. Georgia*,[7] where revisions to Georgia's death penalty statute remedied the unconstitutional aspects in *Furman*,[8] followed by *Lockett v. Ohio* when the bifurcated trial with a guilt and penalty phase and consideration of unlimited mitigating circumstances was created.[9] It wasn't until 1984 when executions resumed.[10] The average length of time from sentence to execution at that time was seventy-four months or just over six years.[11] By the time of the passage of AEDPA, the wait had grown to 125 months or ten years.[12] By 2012, sixteen years post-AEDPA passage, the time between sentence and execution had risen to an average of 190 months, or approximately sixteen years.[13] In 2013, (the last year I could find such numbers available), the average stay dipped to 186 months.[14]

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3. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 2 U.S.C., 3 U.S.C, 4 U.S.C., 5 U.S.C., 6 U.S.C., 7 U.S.C., 8 U.S.C., 9 U.S.C.).

4. *Id.* § 2264.

5. *See* Kent E. Cattani & Monica B. Klapper, *Representing the Indigent*, ARIZ. ATT'Y, Feb. 2002, at 36.

6. 408 U.S. 238 (1972).

7. 428 U.S. 153 (1976).

8. *Id.* at 196-98.

9. Lockett v. Ohio, 438 U.S. 586, 605 (1978); *Furman*, 408 U.S. at 239-40.

10. TRACY J. SNELL, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., CAPITAL PUNISHMENT, 2012 STATISTICAL TABLES 14 (2014), https://www.bjs.gov/content/pub/pdf/cp12st.pdf.

11. *Id.*

12. *Id.*

13. *Id.*

14. TRACY J. SNELL, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., CAPITAL PUNISHMENT,

In a 2016 Bureau of Justice Statistics report, published in April of 2018, it was noted that 2016 was the sixteenth consecutive year where the number of prisoners under a death sentence had declined.[15]

Neither the *Guidelines* nor defense counsel are "at fault" for such delays. To the contrary, it is not a fault of defense counsel to avail themselves of whatever relief the law provides in defense of their client. Where the objective of the representation is to preserve the client's life for as long as possible, utilizing all legal and ethical means available is a duty of defense counsel.

Performance standards, such as those provided by the *ABA Guidelines*, are a reasonable means of protecting the defendant-client's right to the effective assistance of counsel. The *Guidelines* offer an excellent tool for reducing ineffective assistance of counsel in capital litigation. Adherence to the *Guidelines* in both guilt and penalty phases provides a useful checklist for defense counsel in a capital case. The *Guidelines* are a relatively complete discussion of tasks, responsibilities, strategic decisions, and other issues to be considered by defense counsel, the members of the mitigation team, and successor counsel on appeal.[16]

The stated object of the *Guidelines* "is to set forth a national standard of practice for the defense of capital cases."[17] The U.S. Supreme Court has not acknowledged the *Guidelines* as providing that standard:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.[18]

Strickland v. Washington stressed that "American Bar Association standards and the like" are "only guides" to what reasonable means, not its definition.[19] One reason given by the Court for eschewing a list of rules that prescribe what is effective performance for defense counsel was the fear that, as soon as such specific rules are adopted, new circumstances will arise where counsel, in violating the prescription,

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2013 STATISTICAL TABLES 14 (2014), https://www.bjs.gov/content/pub/pdf/cp13st.pdf.

15. ELIZABETH DAVIS & TRACY J. SNELL, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., CAPITAL PUNISHMENT, 2016, at 2 (2018), https://www.bjs.gov/content/pub/pdf/cp16sb.pdf.

16. *See ABA Guidelines*, *supra* note 1, at 1047-48, 1055-70, 1076-78.

17. *Id.* at 919 (Guideline 1.1).

18. Strickland v. Washington, 466 U.S. 668, 688 (1984) (citing STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard Nos. 4-1.1 to 4-8.6 (AM. BAR ASS'N, 2d ed. 1980)).

19. *Id.* at 688; *see also* Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000) (quoting *Strickland*, 466 U.S. at 688).

behaves reasonably.[20] The Court in *Roe v. Flores-Ortega* repeated, "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices."[21] In my opinion, regular reference to the *Guidelines* will be of great assistance to defense counsel in seeing that those choices are reasonable.

The *Guidelines* are in two documents. The first document, adopted as policy by the ABA and published in 2003, is the previously mentioned *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. As its name suggests, its focus is on the performance and qualifications of counsel, and the supervision of the defense team by that counsel. The second document is the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* ("*Supplementary Guidelines*").[22] The *Supplementary Guidelines* focus on the development of the mitigation case. That does not mean that they are intended to be considered only for the penalty phase. Certainly they are meant for use in that phase, but they highlight as well the need to incorporate consideration of mitigation strategy into the guilt phase. Their goal is to weave in and out of all phases of the representation a unified and consistent defense throughout, at least to the extent possible. This makes sense and is representative of the sound advice found in the *Guidelines*.

Despite the Supreme Court's unwillingness to recognize the *Guidelines* (or any other set of standards for that matter) as the national standard, the *Guidelines* make every effort to cast themselves in that light. The Definitional Note following Guideline 1.1, for example, explains that the word "should" as used in the *Guidelines* is to be understood as "mandatory."[23] This is a convention normally reserved in legislation for the word "shall." The drafters do not, however, shy away from their claim of being "the national standard." "The History" following the first Guideline states that the "Guidelines are not aspirational."[24] This may explain the Supreme Court's attempt at

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20. *See Strickland*, 466 U.S at 688-89 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.").

21. *Roe*, 528 U.S. at 479 (citing *Strickland*, 466 U.S. at 688).

22. *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008) [hereinafter *Supplementary Guidelines*].

23. *ABA Guidelines*, *supra* note 1, at 919.

24. *Id.* at 920. By contrast, in the ABA Standards for Criminal Justice, the word "should" is used in the hortatory sense to connote strong encouragement to act in a particular way. *See* CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard Nos. 4-1.1(c) (AM. BAR ASS'N, 4th ed. 2015). It strikes me that perhaps the drafters of the *Guidelines* were bold enough to

limiting the *Guidelines* to one guide among many of what are reasonable norms of practice.[25]

In my opinion, these flourishes in the *Guidelines* are unnecessary. The *Guidelines* are very well done, comprehensive, and capable of standing on their own merit. The *Guidelines* have one consistent, overarching theme, namely, that clients facing execution receive "high quality legal representation" from their lawyers.[26] It is a credit to the Bar that defense counsel as a group would undertake to pursue excellence in representation of a category of cases with the complexity and demands of death penalty litigation. A goal that sets the norm at consistently providing "high quality legal representation" is consistent with the finest traditions of the Bar and our faith in the rule of law. It is also consistent with a standard of excellence and not mere competence. Here is one example. Toward the end of the commentary to the first Guideline appears the following: "[T]rial counsel . . . must raise every legal claim that may ultimately prove meritorious, lest default doctrines later bar its assertion."[27] In other words, defense counsel should not only know the existing state of the law, but must also attempt to anticipate the direction in which the law may be heading.

Another example of the *Guidelines* seeking to ensure high quality legal services consistent with "prevailing norms of practice" is Guideline 9.1.A.[28] It requires that government provide funds necessary to support the full cost of high quality representation.[29] It may also be the likely reason that only one state has adopted the performance standards under AEDPA that would put federal courts on a tight calendar for habeas

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believe that, despite the Supreme Court's stated unwillingness, if you aspire to set the national standard, maybe you should act as though that is what you have done. Given the Supreme Court's reservations about the capacity of any set of rules to anticipate and provide an answer to every set of circumstances, I wonder if this advances those aims. It seems to draw some scorn from unsympathetic members of the Court. For example, Guideline 10.7 requires that counsel's investigation include all periods of the client's life, beginning from "conception." *ABA Guidelines*, *supra* note 1, at 1022. Certainly some pre-natal events, e.g., injury or exposure to toxins, may be of relevance to issues in mitigation or, conceivably, an affirmative defense. To follow that with a requirement that the investigation include counsel contacting "virtually everyone" acquainted with the defendant and his or her family and obtain records regarding the client's "parents, grandparents, siblings, cousins, and children." *Id.* at 1024-25. But all in all, if this is a conceit, it is a minor one.

25. It may be that, despite the "one guide among many" language of what may be considered reasonable norms of practice, the *Guidelines* authors insistence that they constitute a national standard may be an intentional effort to avoid localized norms from watering down the quality of representation appropriate for the task at hand.

26. *ABA Guidelines*, *supra* note 1, at 919, 921, 930, 939.

27. *Id.* at 927.

28. *Id.* at 981.

29. *Id.*

review.[30] It is likely the reason why that one state has failed to comply with its own performance standards.[31] The apparent unwillingness of legislatures to provide this level of funding—which given the nature of the capital sanction, even the most rudimentary notions of justice would seem to demand—undermines the legitimacy of the death sentence far more than a legion of dedicated defense teams could achieve.

Guideline 9.1 calls for full funding of all aspects of the defense for defendants who are indigent.[32] Similarly, the commentary quotes ABA Standard for Criminal Justice Standard 5-1.6: "Government has the responsibility to fund the full cost of quality legal representation."[33] It proposes that government provide funding for defense services "that maintains parity between the defense and the prosecution . . . ."[34] In my opinion, the principle is correct but the explanation is wrong. When it speaks of "parity," it talks about "parity" in terms of "workload, salaries, and resources necessary to provide quality legal representation."[35] In this way, its focus is placed on spending, dollar for dollar. Focusing on things like "benefits, technology, [and] facilities"[36] doesn't suggest parity as much as an arms war. To my mind that is a misguided notion of "parity." Some level of spending for those things might be critically necessary to achieve parity. But if state investigators are equipped with Apple iPhone X smart phones, must the defense investigators have the same, or can they perform effectively with their Apple iPhone 8 smart phones?

Rather than look at "parity" as a dollar for dollar spending battle to see who goes broke first, I think it is more desirable to look at "parity" in terms of leveling the playing field. It may be more important for defense counsel to hire consulting forensic experts to tell her she needs two experts to testify to errors by the prosecution experts than an upgrade to existing office equipment technology. I would assume that there are times the defense needs an expert to tell them they need an expert to testify and why. The prosecution can easily call the person who did the testing and get an analysis of the defense expert's report or testimony. It seems this may not be the case for the defense, and they may not be able to discuss the report of the prosecution's expert with their own expert,

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30. *See* John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 275 n.93 (2006) (citing Spears v. Stewart, 283 F.3d 992, 1007 (9th Cir. 2002)).

31. Blume, *supra* note 30, at 275 n.93 (quoting *Spears*, 283 F.3d at 1007).

32. *See ABA Guidelines*, *supra* note 1, at 981.

33. *Id.* at 984 (internal quotation marks omitted) (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard No. 5-1.6 (3d ed. 1992)).

34. *ABA Guidelines*, *supra* note 1, at 985.

35. *Id.*

36. *Id.*

free of charge. Parity should mean funding that levels the playing field. If that means dollar for dollar spending, then so be it.

The *Guidelines* reflect "prevailing norms of practice." In measuring the fit between "prevailing norms" and the *Guidelines*, we can compare the *Guidelines* in a capital case against standards not exclusive to death penalty litigation, namely, the Model Rules of Professional Conduct[37] and the Criminal Justice Standards on the Defense Function.[38] Here are some examples.

Earlier, in the discussion of "parity," I included a reference to "workload."[39] This is an area where considerations of "parity" and the need to level the playing field, on both sides, should be paramount. It is also an area reflective of already existing and "prevailing norms of practice." Guideline 6.1, entitled Workload, says the following: "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."[40]

Standard 4-1.8 of the ABA Criminal Justice Standards for the Defense Function,[41] titled "Appropriate Workload," provides:

> (a) Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel's workload is approaching or exceeds professionally appropriate levels.
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> (b) Defense organizations and offices should regularly review the workload of individual attorneys, as well as the workload of the entire office, and adjust workloads (including intake) when necessary and as permitted by law to ensure the effective and ethical conduct of the defense function.
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> (c) Publicly-funded defense entities should inform governmental

37. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2018).

38. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (AM. BAR ASS'N, 4th ed. 2015).

39. *Supra* text accompanying note 35.

40. *ABA Guidelines*, *supra* note 1, at 965.

41. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard No. 4-1.8.

> officials of the workload of their offices, and request funding and personnel that are adequate to meet the defense caseload. Defense counsel should consider seeking such funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a publicly-funded defense office or other defense counsel, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief.[42]

"Competent representation" in a capital case would, under the *Guidelines*, equate to "high quality legal representation."

The *Guidelines* are careful to make the distinction between a consulting expert and a testifying expert. This is a distinction that is critical for counsel to understand when it comes to the duty to protect communications.[43]

The *Guidelines* identify the parameters of a complete investigation both in terms of timing and scope. They suggest that the investigation begin even before the lawyer-client relationship exists and that the scope of that investigation (in terms of mitigation, at least) look back as far as the time of conception. That may strike some as extreme, until you consider the Adverse Childhood Experiences ("ACE") study conducted by the Center for Disease Control and Kaiser Permanente and its findings.[44] When considering certain affirmative defenses in the guilt

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42. *Id.*

43. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2018) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."). *Compare ABA Guidelines*, *supra* note 1, at 952 (Guideline 4.1.B.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."), *with* CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard No. 4-1.4(a) ("Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client's confidences and the unique liberty interests that are at stake in criminal prosecution."), *and* Standard No. 4-4.4 ("Relationship with Expert Witnesses").

> (a) An expert may be engaged to prepare an evidentiary report or testimony, or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only. . . .
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> (g) Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed.

CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard No. 4-4.4.

44. *See About the CDC-Kaiser ACE Study*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/violenceprevention/acestudy/about.html (last visited Nov. 10, 2018). *See generally* Vincent J. Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to*

phase or mitigation in the penalty phase, injury *in utero* and pre-natal exposure to certain toxins may be highly relevant.[45] Certainly that period of time should be closely examined. Understandably the waiver of any rights during the investigative stage should always be closely scrutinized, particularly while the context of events is still fresh. The *Supplementary Guidelines* for the multi-disciplinary mitigation team offer a number of avenues to pursue in addition to the facts beyond what happened at the time of the killing.[46] The investigative checklists in either set of guidelines I found to be excellent and are worthy of regular referral.[47]

Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study, 14 AM. J. PREVENTATIVE MED. 245 (1998).

45. *See ABA Guidelines*, *supra* note 1, at 1022.

46. *Supplementary Guidelines*, *supra* note 22, at 679.

47. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *see also* CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard No. 4-4.1 ("Duty to Investigate and Engage Investigators").

> (a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.
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> (b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.
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> (c) Defense counsel's investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client's best interests, after consultation with the client. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.
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> (d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.
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> (e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made *ex parte* if appropriate to protect the client's confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.

CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard No. 4-4.1.

At the outset, I suggested that the most frequent complaints I have heard with respect to death penalty litigation are: (1) the lengthy delays experienced as a result of post-conviction review which frustrate finality, and (2) the claims of ineffective assistance of counsel.[48] While the Supreme Court of the United States may not recognize the *ABA Guidelines* as "the standard" in death penalty representation,[49] the *Guidelines* go a long way in identifying the "prevailing norms" and recurring issues which must be considered if criminal defendants facing death are to receive effective representation. Regardless of one's views on capital punishment, if such a penalty exists, it should be carried out with all of the dignity, respect, and equity which our system of laws can muster. Excellence in defense representation is the yardstick by which dignity, respect, and equity may be measured. Delays may be symptomatic of that excellence. On the other hand, adherence to the *Guidelines* may facilitate the adoption and implementation of quality control performance standards in the post-conviction phase that would permit the deferential review by federal courts that AEDPA envisioned, reducing the much complained about delay from the prosecution bar.

48. *Supra* text accompanying notes 2-3.

49. Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000); Strickland v. Washington, 466 U.S. 668, 688 (1984).