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Jill Miller

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THE DEFENSE TEAM IN CAPITAL CASES

*Jill Miller, MSSW**

I started with this issue concerned about innocence. But once I studied, once I pondered what had become of our justice system, I came to care above all about fairness. Fairness is fundamental to the American system of justice and our way of life.¹

Fairness for those defendants facing the ultimate punishment of death requires that they be afforded zealous advocacy by competent counsel, and that counsel be provided with the resources necessary to effectively represent their clients. Stating that “[o]ur capital system is haunted by the demon of error, error in determining guilt, and error in determining who among the guilty deserves to die,” Governor Ryan cited many deficiencies in the justice system in Illinois, including poor lawyering and inadequate resources for defense counsel, in arriving at his decision to commute all death sentences.² Over the years the imposition of the death penalty has too often been a function of unqualified counsel or counsel who lacked the resources, including time, funding, and provision of investigative, expert and supportive services, to competently represent their clients, rather than a reasoned decision based on the circumstances of the crime and the background and character of the defendant.³

* Forensic Social Work Services. Any unfootnoted assertions in this Article are based upon personal knowledge acquired by the author during her extensive mitigation work experience in many different jurisdictions.

1. *In Ryan's Words: "I Must Act,"* DEATH PENALTY INFO. CTR., Jan. 11, 2003, at <http://www.deathpenaltyinfo.org/article.php?scid=13&did=551> (Comments of Ill. Governor George Ryan made at Northwestern University College of Law, following his commutation of the sentences of all Illinois inmates under sentence of death).

2. *Id.*

3. See Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. FIGHTING POVERTY 3, 18 (1996); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1844 (1994).

Courts addressing issues in capital cases have long affirmed the importance of individualized sentencing determinations and the need for a heightened degree of reliability when imposing the death penalty.⁴ Addressing this issue in 1976, the Supreme Court stated in *Woodson v. North Carolina*:

[D]eath is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind . . . [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.⁵

As one author who has written on the duties of counsel in capital cases stated, “[r]eliability’ has a stronger meaning in capital cases than it does in the ordinary criminal case, requiring that the death sentence be imposed in accordance with procedures, standards, and actual practices designed to assure that death will not be imposed capriciously or disproportionately.”⁶ In a series of decisions following *Woodson*, the Supreme Court gave direction to counsel in capital cases regarding their responsibilities in undertaking the defense of persons facing the death penalty. Several key decisions provided guidance to counsel regarding their duties in preparing for the penalty phase of capital trials by discussing the nature of mitigating evidence that should be considered. In *Lockett v. Ohio*,⁷ the Court wrote that the sentencer could “not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than

4. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

5. *Id.* at 303-05 (citations and footnote omitted).

6. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317 (1983) (footnote omitted).

7. 438 U.S. 586 (1978).

death.”⁸ In *Eddings v. Oklahoma*,⁹ citing Eddings’ emotional disturbance and turbulent family history, the Court concluded, pursuant to *Lockett*, that a statute could not preclude the sentencer from considering any mitigating factor or any relevant evidence, nor could the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.¹⁰

In 1986, in the case of *Skipper v. South Carolina*,¹¹ the Court ruled that the trial court erred in refusing to consider evidence of good adjustment to incarceration as mitigating.¹² The Court noted that while this evidence may not be relevant to the issue of culpability for the crime, it was relevant to the issue of the appropriateness of a sentence less than death.¹³ In *Penry v. Lynaugh*,¹⁴ the Court ruled that procedures for sentencing could not preclude the sentencer from considering and giving weight to such factors as mental retardation or childhood abuse.¹⁵ In that decision, Justice O’Connor noted the need for full consideration of all evidence that mitigates against imposition of the death penalty.¹⁶ The Court affirmed these concepts, and counsel’s duty in capital cases, in *Williams v. Taylor*,¹⁷ when it reversed a Virginia death sentence on the basis of ineffectiveness of counsel due to failure to investigate and present substantial mitigating evidence to the jury.¹⁸ More recently, in *Wiggins v. Smith*,¹⁹ the Court declared that counsel’s failure to fully investigate Wiggins’ background and present mitigating evidence of his fortunate “excruciating life history” violated his Sixth Amendment right to counsel.²⁰ The Court, citing *Williams* and its language on prevailing norms for thorough penalty phase investigation, including those reflected in ABA standards and guidelines, found that counsel’s actions could not be construed as strategic as counsel had failed to conduct a thorough social history investigation.²¹ The actions of counsel could not, according to the Court, be deemed reasonable as facts known to counsel

8. *Id.* at 604.

9. 455 U.S. 104 (1982).

10. *See id.* at 113-14.

11. 476 U.S. 1 (1986).

12. *See id.* at 6.

13. *See id.* at 7.

14. 492 U.S. 302 (1989).

15. *See id.* at 322.

16. *See id.* at 327-28.

17. 529 U.S. 362 (2000).

18. *See id.* at 398-99.

19. 123 S. Ct. 2527 (2003).

20. *Id.* at 2543-44.

21. *See id.* at 2536-37.

at the time would have led “a reasonable attorney to investigate further.”²²

These decisions clarify the responsibilities of counsel in a capital case, particularly as it relates to preparation for and presentation in the penalty phase. In addition to the usual requirements for trying a difficult homicide case, counsel in a capital case is required, pursuant to the revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, to thoroughly investigate the background and circumstances of the client in order to prepare a case for the penalty phase.²³ Given the severity and irrevocability of a death sentence, extraordinary obligations are properly placed on counsel to prepare and try such a case.

When the ABA first adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in 1989 (based on “Standards for the Appointment and Performance of Counsel in Death Penalty Cases” developed and adopted by the National Legal Aid and Defender Association in 1987),²⁴ they called for the appointment of two trial attorneys, qualified by training and experience,²⁵ and the provision of “investigative, expert, and other services necessary to prepare and present an adequate defense.”²⁶ At that time, the guidelines did not mandate a defense team that included an investigator and a mitigation specialist; however, commentary to the guidelines strongly supported the use of social workers or mental health professionals and investigators in assisting counsel.²⁷ Though investigators had typically been used by attorneys in major criminal cases, and the use of mitigation specialists was becoming increasingly common in capital cases, by the late 1980s the standard of care in capital cases had not yet evolved to the point where an investigator and mitigation specialist, in addition to two attorneys, were required. That has changed. Today, the defense team concept, in which clients are provided with two attorneys, a mitigation specialist, and an investigator, is well-established and has become the accepted “standard of care” in the capital defense community.²⁸

22. *Id.* at 2538.

23. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), Guideline 10.7 [hereinafter GUIDELINES].

24. NAT'L LEGAL AID & DEF. ASS'N, STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, (1988), available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_Death_Penalty.

25. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989), Guideline 2.1.

26. *Id.* at Guideline 8.1.

27. See *id.* at Guideline 11.8.6, commentary.

28. GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

I. WHY A TEAM

The trial of a capital case is an enormously complex and burdensome undertaking. In essence, it requires preparation for two trials—the trial on guilt/innocence and the trial for life in the penalty phase.²⁹ A study on the costs and quality of representation in federal capital trials, conducted by the Judicial Conference of the United States, noted that “[l]awyers in a death penalty case must prepare for both trials, and must develop an overall strategy that takes the penalty phase into account even in the guilt phase.”³⁰ The report stated that the nature of a capital case “transforms counsel’s role from start to finish.”³¹ The goal of saving the client’s life must be the top priority for the defense and must be considered in all other decisions made and actions taken by counsel from the inception of representation through the conclusion of the case.³² Guilt phase strategy must be coordinated with penalty phase strategy and must support the case in mitigation.³³ In capital cases,

[Clients’] lives depend upon the effectiveness of counsel . . . particularly at the penalty phase of the trial. The existence of a penalty phase in capital trials makes such trials radically different from ordinary criminal trials The guilt trial establishes the elements of the capital crime. The penalty trial is a trial for life. It is a trial *for* life in the sense that the defendant’s life is at stake, and it is a trial *about* life, because a central issue is the meaning and value of the defendant’s life.³⁴

The skills and expertise required to effectively represent a capital client are broad and multi-disciplinary in nature, thus requiring a team approach.³⁵ The team must be assembled in a manner that takes into account the specifics of the case and the needs and characteristics of the client.³⁶ At least two attorneys are required, though in some cases it may be advisable to have more than two. There are several reasons for this

29. See Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 488 (1995); Goodpaster, *supra* note 6, at 303.

30. SUBCOMM. ON FED. DEATH PENALTY CASES, COMM. ON DEFENDER SERVS., FED. DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEF. REPRESENTATION I.B.(1) (May 1998) [hereinafter FED. DEATH PENALTY CASES] (adopted by the Judicial Conference of the United States on Sept. 15, 1998), available at <http://www.uscourts.gov/dpenalty/1COVER.htm>.

31. *Id.* at I.B.(4).

32. See Goodpaster, *supra* note 6, at 320.

33. See GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

34. Goodpaster, *supra* note 6, at 303.

35. See GUIDELINES, *supra* note 23, at Guideline 10.4, commentary.

36. See *id.* at Guideline 4.1, commentary.

two-attorney requirement. As Goodpaster points out, the trial for life is very different in form and issues addressed than the trial on guilt, and requires different skills and expertise than those generally possessed by attorneys handling non-capital criminal cases.³⁷ The body of law governing trials of capital cases is complex. It is constantly developing and changing. Given the possibility that the ultimate penalty, death, will be imposed, it is crucial that every fact and allegation be investigated and every possible issue be researched, raised, and litigated.³⁸ Some defense teams find it necessary to assign a third attorney whose sole responsibility is to handle motions.³⁹ Requiring at least two attorneys allows the defense to solicit the involvement of counsel who possess the different skills and areas of expertise required for the particular case.⁴⁰

The other two core members of the defense team are the investigator and the mitigation specialist.⁴¹ The team may then be expanded to include experts and consultants, as needed, and always includes support services, such as secretaries, paralegals, and law clerks.⁴² All persons providing services on behalf of the client should be considered and treated as members of the team. They are all essential in the effort to save the client's life.

The possible introduction of evidence on prior criminal offenses and unadjudicated conduct in the penalty phase of the trial imposes an extra burden on counsel.⁴³ All prior offenses and unadjudicated acts must be investigated, challenged and/or mitigated.⁴⁴ It is possible that several mini-trials will take place during the penalty phase. In addition to investigating the life history of the client and preparing the case in mitigation, counsel must address the evidence presented in aggravation by the prosecution, and be prepared to challenge and mitigate it.⁴⁵ Capital trials generally involve much more extensive use of experts than non-capital cases, including use of experts at both the guilt and penalty phases.⁴⁶ The work of all experts and non-attorney team-members must be directed and monitored by counsel.⁴⁷ The trial of a capital case requires skills and expertise not generally possessed by attorneys, most

37. See Goodpaster, *supra* note 6, at 303-04.

38. See GUIDELINES, *supra* note 23, at Guideline 10.7, commentary.

39. See *id.* at Guideline 10.4, commentary.

40. See *id.*

41. See *id.* at Guideline 10.4(C)(2)(a).

42. See *id.* at Guideline 4.1, commentary.

43. See *id.* at Guideline 10.7, commentary.

44. See *id.*

45. See *id.* at Guideline 10.11(A).

46. See *id.* at Guideline 4.1(B).

47. See *id.* at Guideline 10.4(B).

notably for the investigation of the offense and the extensive investigation of social history that must be done. This includes the ability to analyze and understand the significance of that history in terms of the effects of various factors and experiences on the client's development and behavior.⁴⁸ The capital offense and other charged offenses must be thoroughly investigated.⁴⁹ In addition, prior offenses and uncharged misconduct must be investigated.⁵⁰

Millard Farmer, an attorney who assisted with the Team Defense Project in Georgia in 1976, was one of the first to articulate the team concept in capital defense work.⁵¹ The project employed an interdisciplinary approach and strategies that reached beyond the courtroom in representing its clients.⁵² Use of the defense team concept in the trial of capital cases ensures that clients facing the death penalty will be provided with representation that includes the combination of skills and expertise required for high quality advocacy. The exchange of views and perspectives of the various members of the team can produce more effective strategy. In addition, utilizing a team approach means that the burden of responsibility for saving the client's life will be shared. The trial of a capital case can be extraordinarily demanding and stressful. The team becomes a support system for each member. As the commentary to Guideline 10.4 states,

The team approach enhances the quality of representation by expanding the knowledge base available to prepare and present the case, increases efficiency by allowing attorneys to delegate many time-consuming tasks to skilled assistants and focus on the legal issues in the case, improves the relationship with the client and his family by providing more avenues of communication, and provides more support to individual team members.⁵³

II. ASSEMBLING THE TEAM

The newly revised ABA Guidelines provide that the defense team should be comprised of no fewer than two attorneys, an investigator, and a mitigation specialist.⁵⁴ At least one member of the team should be

48. *See id.* at Guideline 10.7, commentary.

49. *See id.* at 196.

50. *See id.* at 204.

51. *See Team Defense: The Holistic Approach, an Interview with Millard Farmer*, NLADA BRIEFCASE, Mar. 1979, at 16.

52. *See id.* at 18.

53. GUIDELINES, *supra* note 23, at Guideline 10.4, commentary (footnote omitted).

54. *See id.* at 10.4(C)(2)(a).

qualified to screen persons for mental or psychological disorders or impairments.⁵⁵ Though there are variations in how teams are assembled, lead counsel is generally responsible for assembling the team, including selecting the remaining members.⁵⁶

A. *Lead and Co-Counsel*

Lead counsel in a capital case is chosen in one of three ways: as a staff attorney in a defender office who is assigned the case; as appointed counsel by either a court or an appointing authority;⁵⁷ or as counsel retained by the client. It is rare for a person of means in this country to face the death penalty.⁵⁸ Consequently, there are few retained attorneys in capital cases. Co-counsel, or “second chair,” may be chosen by a program administrator, appointed by a court, selected by the lead counsel, or retained.⁵⁹ Based on the needs of the case, the two attorneys then select the rest of the team.⁶⁰ In addition to an investigator and a mitigation specialist, the team may include an additional member who possesses mental health skills and expertise.⁶¹

The attorneys chosen to represent the capital client must be qualified by training and experience to undertake such representation and provide high quality advocacy. The ABA Guidelines address the issue of qualifications in Guideline 5.1, detailing the areas of knowledge and skills that counsel must have.⁶² In federal capital cases, there is not only a statutory requirement that two attorneys be assigned, but also a requirement that “at least [one] shall be learned in the law applicable to capital cases”⁶³ The study of costs and quality of representation in federal capital cases, cited above, reported that judges and lawyers interviewed for the study “attested to the importance of the statutory ‘learned counsel’ requirement,” and the “importance of ‘doing it right the first time.’”⁶⁴ This requirement assures that every client facing the

55. *See id.* at 10.4(C)(2)(b).

56. *See id.* at 10.4(C)(2)(c).

57. *See id.* at Guideline 10.4(A).

58. *See* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 562-63 (1995).

59. *See* GUIDELINES, *supra* note 23, at Guideline 10.4(A).

60. *See id.* at Guideline 10.4(C)(2)(a).

61. *See id.* at Guideline 10.4(C)(2)(b).

62. *See id.* at Guideline 5.1.

63. 18 U.S.C. § 3005 (2003).

64. FED. DEATH PENALTY CASES, *supra* note 30; *see also* ABA Task Force On Death Penalty Habeas Corpus, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 63 (1990) (noting that counsel in capital cases must be knowledgeable about complex constitutional law as well as procedures unusual to capital cases).

federal death penalty has at least one attorney who is experienced in the trial of capital cases. This should be the practice in all capital cases, regardless of the jurisdiction.

Counsel is responsible for the conduct of the case, and has the duty to direct the work of the defense team in such a way that it provides high quality representation.⁶⁵ Counsel allocates responsibilities among the members of the team, determining, based on the needs of the particular client and case, who will assume the various roles and duties.⁶⁶ Every case is different, and requires different skills and expertise.⁶⁷ Counsel must consider this in choosing the investigator, mitigation specialist, and other experts.⁶⁸ In virtually every capital case, there are socio-economic differences between the client and the defense team.⁶⁹ There are often racial and cultural differences as well.⁷⁰ Cases present different factors that must be understood and addressed, such as mental retardation, mental illness, trauma, or substance abuse.⁷¹ Language and ethnic heritage issues, including the need for an international investigation, are factors that must be addressed.⁷² The characteristics and functioning, including impairments, of the client are important considerations.⁷³ All of these factors, including the ability of the team to relate to and gain the trust and confidence of the particular client, must be taken into account when choosing the other core members of the team and when retaining other experts.

B. Investigators

Standards for criminal defense representation in non-capital as well as capital cases are clear about counsel's duty to fully investigate every case for the determination of both guilt and sentence.⁷⁴ A skilled and trained investigator is an essential member of the core team in capital

65. See GUIDELINES, *supra* note 23, at Guideline 10.4(B).

66. See *id.* at Guideline 10.4(B)(1).

67. See *id.* at Guideline 4.1, commentary.

68. See *id.* at 143.

69. See Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan./Feb. 1999, available at <http://www.nacdl.org/public.nsf/ChampionArticles/99jan04?OpenDocument>.

70. See *id.*

71. See GUIDELINES, *supra* note 23, at Guideline 10.5, commentary.

72. See *id.* at 188.

73. See *id.* at 187-88.

74. See *id.* at Guideline 10.7; ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-1.4 (1992); NAT'L LEGAL AID & DEF. ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEF. REPRESENTATION, Guideline 4.1 (1994).

cases.⁷⁵ The investigator must thoroughly investigate the charged capital offense and any other offenses charged in the case, regardless of any statement or admission made by the client, or evidence of overwhelming guilt.⁷⁶ Counsel cannot be expected to challenge the elements of the capital offense, statements by the client or other witnesses, forensic evidence, or the conduct of law enforcement or the prosecution absent a thorough, independent investigation by the defense team.⁷⁷ Nor can they assert affirmative defenses without such investigation.⁷⁸ Attention recently paid to the large number of wrongfully convicted persons released from death rows across the country underscores the need for better defense investigation.⁷⁹ While counsel also has a duty to interview witnesses, attorneys may not necessarily have the specialized investigatory skills generally possessed by trained criminal investigators.⁸⁰ Counsel cannot act as a witness; therefore, even when they do conduct interviews, they should have a third person present should they need to present testimony regarding such matters as conflicting statements, recantations, etc.⁸¹ This third person should generally be the investigator.

Investigators in capital cases have additional duties relating to the penalty phase of the trial. If prosecutors intend to present evidence in aggravation of prior criminal offenses or prior unadjudicated acts of misconduct, these should also be thoroughly investigated.⁸² Counsel has a duty to challenge and/or mitigate the evidence in aggravation.⁸³ In some cases, working with investigators, attorneys have challenged prior offenses in habeas proceedings and have had criminal convictions reversed, thus precluding prosecutors from introducing this evidence as aggravation during the penalty phase.⁸⁴ In addition to these duties, and depending on the needs and makeup of the team, the investigator may have a role in working with the mitigation specialist in conducting the

75. See GUIDELINES, *supra* note 23, at Guideline 10.4(C)(2)(a).

76. See *id.* at Guideline 10.7(A)(1).

77. See, e.g., Lisa Kemler, *Friend of the Court*, THE CHAMPION, Apr. 2002, at 45 (“[A] full investigation is necessary to evaluate the strength of any mitigating evidence in order to develop an effective strategy for the penalty phase. . . .”).

78. See *id.*

79. See generally Adam Liptak, *Number of Inmates on Death Row Declines as Challenges to Justice System Rise*, N.Y. TIMES, Jan. 11, 2003, at A13.

80. See GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

81. See *id.*

82. See *id.* at Guideline 10.7, commentary.

83. See *id.* at Guideline 10.11(A).

84. See generally, *Johnson v. Mississippi*, 486 U.S. 578 (1988).

social history investigation.⁸⁵ The investigator can assist in obtaining life history records and locating persons who may be sources of social history information.

C. Mitigation Specialists

The fourth member of the core defense team is the mitigation specialist. Counsel's duty in a capital case to thoroughly investigate the background and circumstances of the client's life and to present all relevant mitigating evidence mandates the conducting of an extensive life history study, as well as an analysis of the factors and forces that influenced the client's development, including personality and behavior.⁸⁶ The history must be multi-generational in nature, assessing the effects of heredity and the inter-generational transmissions of patterns of behavior, and must be broad in scope.⁸⁷ It involves investigation that goes beyond the individual, family, school, and neighborhood to include an examination of socio-economic, political, cultural, and environmental influences in the client's life.⁸⁸

The social history investigation and psycho-social assessment should be conducted by a professional with skills and expertise not generally possessed by attorneys.⁸⁹ It should be done by someone with an understanding of child and human development, including the manner in which development is influenced and the person shaped by heredity and environment.⁹⁰ Skills in interviewing and information gathering, including the collection and analysis of life history records, are essential.⁹¹ The interviewing techniques employed in the social history investigation are different from those generally taught in law schools and employed by lawyers.⁹² Knowledge regarding human development and factors affecting it are necessary in order to know what questions to ask, what information to obtain, and how to make sense of that information. An awareness of the indicators of such things as cognitive impairments,

85. See, e.g., Michael L. Perlin, "The Executioner's Face is Always Well Hidden": *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. Sch. L. Rev. 201, 223 (1996) (citing the New York City Capital Defender Office's use of both "typical fact investigators" and mitigation specialists in conducting social history investigations of all death penalty clients).

86. See Guidelines, *supra* note 23, at Guideline 10.7, commentary.

87. See *id.* at 203.

88. See generally, Stetler, *supra* note 69; Haney, *supra* note 58; Jill Miller, *Expanding the Spheres of Mitigation Evidence*, CAPITAL REPORT (Nat'l Legal Aid & Defender Ass'n), Sept./Oct. 1995.

89. See GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

90. See *id.* at Guideline 10.7, commentary.

91. See *id.*

92. See *id.*

mental illness, childhood abuse and trauma, and substance abuse and dependence is essential. The person conducting interviews must have the skills and expertise to assist the client, family members, and others in disclosing private, shameful, and sensitive information.⁹³ The professional most commonly performing these duties in capital cases is the mitigation specialist.⁹⁴

The retention by counsel in capital cases of professionals to assist in preparation for the penalty phase by conducting a social history investigation emerged in the 1970s and early 1980s, most notably in Florida and California.⁹⁵ George Kendall of the NAACP Legal Defense Fund noted that mitigation specialists were first used in jurisdictions where money was available to counsel to retain the services of persons skilled in interviewing clients and collateral sources, locating and obtaining records, and assessing the significance of life history events.⁹⁶ By the mid to late 1980s, the concept of the mitigation specialist, or the use of social workers, mental health professionals, or other trained professionals, was well established.⁹⁷ Today, employment of a mitigation specialist on the capital defense team is an accepted standard of care in federal and military cases, and should be in all jurisdictions and cases.⁹⁸ The study of costs of representation in federal capital cases reported that, “[w]ithout exception, the lawyers interviewed . . . stressed the importance of a mitigation specialist to high quality investigation and preparation of the penalty phase.”⁹⁹ While the primary reason for having mitigation specialists is that they have skills in conducting social history investigations and psycho-social assessments that lawyers do not, the study also noted that it is more cost-effective to use mitigation specialists as the hourly rates approved for them are generally substantially lower than those authorized for attorneys.¹⁰⁰

The role of the mitigation specialist in a capital case is to assist counsel by conducting a thorough social history investigation and psycho-social assessment; identifying factors in the client’s background

93. *See id.*

94. *See id.* at Guideline 4.1, commentary.

95. *See* Jill Miller, Assessment of Performance and Supervision of Mitigation Specialist in State of New Jersey vs. Anthony DiFrisco, (Mar. 4, 1998), (on file in New Jersey v. DiFrisco, County of Essex Indictment # 2280-5-87) [hereinafter Assessment].

96. *See id.*

97. *See id.*

98. *See* FED. DEATH PENALTY CASES, *supra* note 30; Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON U. CIV. RTS. L.J. 199, 228 (2002).

99. FED. DEATH PENALTY CASES, *supra* note 30.

100. *See id.*

or circumstances which indicate the need for expert evaluations; assisting in identifying the types of experts needed and locating appropriate experts; providing background materials and information to other experts to enable them to perform competent and reliable evaluations; consulting with counsel regarding the theory of the case and penalty phase strategy, thereby ensuring coordination of the strategy for the guilt phase with the strategy for the penalty phase; and working with the client and the client's family while the case is pending.¹⁰¹ The mitigation specialist can advise counsel on lay and expert witnesses to call in the penalty hearing, as well as on other types of evidence to present, such as records, documents, timelines, genograms, photos, or physical evidence.¹⁰² If qualified, the mitigation specialist may testify regarding the results of the social history investigation and assessment.¹⁰³ Citing the relaxed standard of evidence in the penalty phase, the Court in *Wiggins v. Smith* commented that the mitigation specialist's social history report may have been admissible under Maryland law and the specialist could have testified to its results.¹⁰⁴ The mitigation specialist can also play a role in developing and implementing a strategy to negotiate a settlement of the case that avoids the possibility of a death sentence.¹⁰⁵

Over the years, various models of providing the services performed by the mitigation specialist have developed, with practices varying from one jurisdiction to another. Sometimes, the mitigation specialist has the qualifications to do all the tasks specified above. In other cases, the mitigation specialist is primarily an information gatherer, and the results of the investigation are analyzed by another professional, such as a psychologist or clinical social worker. In some jurisdictions, particularly where capital defense services are primarily provided by defender programs, a mitigation investigator may collect records, locate witnesses, conduct some initial interviews, and then turn the product over to a more qualified and experienced mitigation expert to conduct further interviews and analyze and develop the information. Some organized defender programs have mitigation specialists on staff. In other cases, the mitigation specialist is retained on a case-by-case basis.

101. See GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

102. See *id.*

103. See Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, INDIGENT DEFENSE (Nat'l Legal Aid & Defender Ass'n), July/August, 1999; Affidavit of Jill Miller, prepared for the Nat'l Legal Aid & Defender Ass'n (1991) (on file with Hofstra Law Review); Assessment, *supra* note 95.

104. See *Wiggins v. Smith*, 123 S. Ct. 2527, 2543 (2003).

105. See GUIDELINES, *supra* note 23, at Guideline 10.7, commentary.

Plans for providing representation in capital cases should allow for different models of performing the duties of the mitigation specialist, as long as the essential investigation and preparation is done and the team includes professionals with the necessary skills and expertise.

Mitigation specialists currently practicing in capital defense work have a variety of educational backgrounds. While a graduate degree in social work has come to be viewed as the most preferable training for mitigation work, there are many competent mitigation specialists who do not have a social work background, but who, by virtue of their training and experience, are able to capably provide most of the services discussed above.¹⁰⁶ Recently, a number of lawyers who have worked as counsel on capital cases have chosen to focus on mitigation work. Any plan for the representation of capital defendants should not exclude these very capable mitigation professionals. However, the plan does need to assure that the defense team is comprised of persons able to perform the myriad of responsibilities required for effective advocacy in a capital case, including those specified for the mitigation specialist.¹⁰⁷ Hence, the requirement that at least one member of the team be qualified by training and experience to screen clients for the presence of mental or psychological disorders or impairments.¹⁰⁸

Capital clients present a host of impairments and/or life experiences that affect their development and behavior, including, for example: developmental, cognitive, and mental impairments and disorders; histories of physical, sexual, and psychological abuse; histories of neglect, trauma, and maltreatment; and alcohol and drug abuse or dependence.¹⁰⁹ They may have physical conditions, manifesting symptoms that mimic mental illness or which affect behavior.¹¹⁰ They may have a history of toxic exposure, either in utero or during their developmental years.¹¹¹ The mitigation specialist or another team member must be aware of the indicators of various conditions, have the expertise to detect and investigate these conditions, and be skilled at getting the client, family, and others to disclose information regarding these factors.¹¹² For these reasons, if the mitigation specialist does not

106. See FED. DEATH PENALTY CASES, *supra* note 30.

107. See GUIDELINES, *supra* note 23, at Guideline 10.4, commentary.

108. See *id.* at Guideline 10.4(C)(2)(b).

109. See *id.* at Guideline 4.1, commentary.

110. See Phyllis G. Coleman & Ronald A. Shellow, *Comply With the Americans with Disabilities Act: Judicial Nominating Commission Must Ask About Conduct, Not Disability*, 70 FLA. B.J. 56, 57 n.24 (1996).

111. See *id.*

112. See *id.* at Guideline 10.7, commentary.

have the necessary mental health training and skills, the team must include a person who does.¹¹³

D. Experts and Other Professionals

Virtually all capital cases require the involvement of other experts to assist in preparation for and presentation of evidence at both the guilt and penalty phases of the capital trial, including in rebuttal.¹¹⁴ The ABA Guidelines call for counsel in capital cases to have the assistance of all expert, investigative, and other professional services reasonably necessary.¹¹⁵ The principle of counsel's right to expert assistance was established in *Ake v. Oklahoma*,¹¹⁶ in which the Supreme Court stated that "a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."¹¹⁷

In capital cases both the prosecution and the defense rely more extensively on experts than in other criminal cases.¹¹⁸ A wide range of experts may be needed in both phases of the trial, depending on the specifics of the case. In the guilt phase, the types of experts needed might include pathologists, medical examiners, serologists, fingerprint or ballistics experts, DNA experts, hair or fiber experts, etc.¹¹⁹ Testimony of mental health experts, such as psychiatrists or psychologists, may also be introduced in the guilt phase if mental status is an issue. In the penalty phase, again, a wide range of experts might be called upon by the prosecution and defense.¹²⁰ While mental health experts—psychiatrists, psychologists, neuropsychologists, and clinical social workers—are the most common, many other types of experts, including non-traditional ones, might be needed by the defense to prepare and present the case in mitigation.¹²¹ Experts on such factors as alcohol and substance abuse, fetal alcohol syndrome, trauma and maltreatment, or risk assessment may be required.¹²² If the client was exposed to toxins, such as lead or agricultural chemicals, in utero or during the developmental years, a

113. *See id.* at Guideline 10.4(C)(2)(b).

114. *See id.* at Guideline 4.1, commentary.

115. *See id.* at Guideline 4.1(B).

116. 470 U.S. 68 (1985).

117. *Id.* at 77.

118. *See* FED. DEATH PENALTY CASES, *supra* note 30.

119. *See id.*

120. *See* GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

121. *See id.* at Guidelines 4.1 commentary & 10.4, commentary.

122. *See id.* at Guidelines 4.1, commentary.

toxicologist might be called.¹²³ The effects of substance abuse or toxins on the brain might be addressed by a neuro-pharmacologist.¹²⁴ Cultural experts may be needed as well as experts to address the psycho-social consequences of racism, poverty, exposure to violence, gang membership, the urban environment, incarceration or placement in juvenile institutions.¹²⁵ This is just a sampling of the types of experts that might be called upon to explain the client's life history and behavior.

In recent years, counsel in capital cases have increasingly relied on the assistance of jury consultants and victim liaison consultants.¹²⁶ The latter is a person specifically trained to work with victims of crime, who, on behalf of the defense, reaches out to the families of victims in capital cases.¹²⁷ Jury consultants provide a range of services to counsel in capital cases, such as drafting and analyzing questionnaires for the jury panel, assisting in preparing voir dire questions, and advising counsel on challenges and strikes of jurors.¹²⁸ Lawyers in federal capital cases view the availability of jury consultants as a top priority.¹²⁹ The capital defense community has long known that jury selection—impaneling a jury that is likely to vote for life—is one of the most important duties of counsel.¹³⁰ Since *Payne v. Tennessee*,¹³¹ defense attorneys have had to anticipate and prepare for victim impact evidence that is now allowed in the penalty phase.¹³² The families of victims can be a driving force in the prosecution's decision to seek the death penalty or the prosecution's willingness to offer a plea in exchange for a life sentence.¹³³ Victim liaison consultants are a link between the client, the defense team and the victim's family.¹³⁴ They can provide information to the family about

123. See Michael Posnor, *Life Death and Uncertainty*, BOSTON GLOBE, July 8, 2001, at <http://deathpenaltyinfo.org/article.php?scid=17&did=417> (citing the use of, among others, two toxicologists, a jury consultant, a venue analyst, two mitigation specialists, a statistician, a neuro-psychologist, a behavioral psychologist, a psychiatrist, and an endocrinologist in one Massachusetts capital case).

124. See *id.*

125. See *id.*

126. See FED. DEATH PENALTY CASES, *supra* note 30, at I.B.(7) (describing the role of jury consultants in capital cases); Kristin Grunewald & Priya Nath, Note, *Defense-Based Victim Outreach: Restorative Justice in Capital Cases*, 15 CAP. DEF. J. 315, 334 (2003) (describing the role and responsibilities of victim liaison consultants).

127. See GUIDELINES, *supra* note 23, at Guideline 10.7, commentary.

128. See FED. DEATH PENALTY CASES, *supra* note 30.

129. See *id.*

130. See GUIDELINES, *supra* note 23, at Guideline 10.10.2, commentary.

131. 501 U.S. 808 (1991).

132. See *id.* at 827 (holding that there is no constitutional bar to the admission of victim impact evidence).

133. See GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

134. See generally Grunewald & Nath, *supra* note 126.

the process, the role of defense counsel and team members, and the client's circumstances and background.

Counsel's need for investigative and expert assistance exists regardless of the source of funds for representation, whether that source be the courts, defender programs, or the client. The Guidelines make clear that even when counsel is retained, if the client is unable to afford such services, funds should be made available by the appointing authority, be it a court or defender program.¹³⁵ The federal study on costs, citing a report on costs of the Defender Services Program of the U.S. Department of Justice, noted that prosecution resources are the driving force in capital representation costs.¹³⁶ Prosecutors have virtually unlimited resources for investigation and experts.¹³⁷ Law enforcement, crime lab, and other services are available to them.¹³⁸ They do not have to request funds from the court or a funding authority as the defense does.¹³⁹ In many jurisdictions, particularly in the "death belt"¹⁴⁰ of the South, it remains very difficult for counsel to convince courts and appointing authorities to provide necessary resources.¹⁴¹ One author points out that "[t]he inexperience and resource-poor defense of the indigent capital defendant is in marked contrast to the experienced and resource-rich team of the prosecution."¹⁴² Further, counsel should have the ability to seek and obtain funds for services independent of the government.¹⁴³ Counsel should make all requests for experts and funds *ex parte*.¹⁴⁴ Where this is not permitted, counsel should continue to litigate the issue. Requests for experts have the effect of revealing trial strategy. Counsel should not be forced to reveal this to the prosecution.

Guideline 4.1 makes reference to the need to provide counsel with other ancillary services reasonably necessary.¹⁴⁵ This includes such persons as secretaries, paralegals, law clerks, and interpreters.¹⁴⁶ These

135. *See id.* at Guideline 9.1.

136. *See* FED. DEATH PENALTY CASES, *supra* note 30, at I.B.(5).

137. *See id.*

138. *See id.*

139. *See* Kreitzberg, *supra* note 29, at 514.

140. The "death belt" refers to the southern states of America, particularly Florida, Georgia, Texas and Louisiana, those states carrying out nearly two-thirds of all executions in the United States in the early 1990s. *See Death Penalty in the United States of America: A Summary*, at <http://www.abolitionnow.de/status.-usa.htm> (last updated July, 2002).

141. *See generally*, Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863 (1996).

142. Kreitzberg, *supra* note 29, at 514.

143. *See* GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

144. *See id.* at Guideline at 10.4, commentary.

145. *See id.* at Guideline 4.1(B).

146. *See id.* at Guideline 9.1, commentary.

are often the forgotten people on the capital defense team whose work is essential to the provision of effective representation. It is important for counsel to make these professionals feel like they are valued members of the team. They should be kept informed about the facts and progress of the case so that they are invested in providing the best work they can in support of the representation of the client. Every person on the team provides necessary and valuable services.

In recent years, there appears to be an increase in the number of foreign nationals facing the death penalty in the United States.¹⁴⁷ Counsel has special duties when representing foreign nationals, chief among them to make sure the client has the ability to communicate with the relevant consular office in compliance with Article 36 of the Vienna Convention on Consular Relations.¹⁴⁸ When English is a second language or a language unknown to the client, counsel should seek to have at least one team member who is fluent in the primary language of the client.¹⁴⁹ This is generally not difficult when that language is Spanish. It can be quite difficult for other languages. Thus, an interpreter may become part of the team. The interpreter is the team member through whom the rest of the team must then establish a relationship with the client, the client's family, and possibly other interviewees or witnesses. Care should be taken in choosing the interpreter. Fluency in the language is only one consideration. The relationship skills of the interpreter and cultural considerations must also be taken into account in choosing an interpreter, so as to avoid barriers to obtaining information, especially private and sensitive information.¹⁵⁰

E. *The Client*

Finally, but very importantly, the client must be a key member of the defense team.¹⁵¹ It is the client whose life is at stake in the capital case. The client has important decisions to make in the process, including whether to plead or testify. Other decisions regarding the conduct of the case are the responsibility of counsel, but should be made with the knowledge and support of the client. Team members need to

147. See *Foreign Nationals and the Death Penalty in the United States*, DEATH PENALTY INFO. CTR., as of Aug. 6, 2003, at <http://www.deathpenaltyinfo.org/article.php?did=198&scid=31#background> (last visited Aug. 24, 2003) (reporting a current total of 119 foreign nationals on death row in the United States). More than half the condemned foreign nationals are of Hispanic origin. See *id.*

148. See *id.* at Guideline 10.6(B)(1).

149. See *id.* at Guideline 10.5, commentary.

150. See *id.*

151. See *id.* at Guideline 10.5.

develop a relationship of trust and confidence with the client in order to gain cooperation in preparing and presenting the most effective case for life.¹⁵² Counsel has a duty to keep the client informed of the progress of the case, including the development of the strategies for both the guilt and penalty phases.¹⁵³

III. TEAMWORK: ENSURING EFFECTIVE ADVOCACY

Obtaining the necessary resources and assembling the team is only a first step for counsel in the representation of the capital client. Counsel must take steps to ensure that the members of the team work together in a constructive and productive manner to provide effective representation. It is counsel's duty to assemble the team, clearly define roles and responsibilities of members, direct and monitor the work of the team—including all experts, and establish the communication and decision-making processes.¹⁵⁴ There must be a process for resolving issues when consensus cannot be reached.¹⁵⁵

When choosing members for both the core team and the extended team, counsel should have an understanding of the specific needs of the client and the case. Both can differ in particular ways that affect the type of skills and expertise required by team members. Factors such as the cognitive and mental functioning of the client, racial and ethnic heritage of the client, and specifics of the homicide(s) being charged should be considered when choosing team members and experts. The particular skills and expertise of potential team members must be matched to the needs of the case.¹⁵⁶ Counsel should obtain information from and about each person being considered. A frank discussion about training, experience, skills, and work styles should take place. For example, some mitigation specialists are able to testify, while others either are not qualified or have a policy of not testifying. Counsel needs to consider this in choosing a mitigation specialist.

Roles and responsibilities of each team member need to be clearly defined at the beginning of the case.¹⁵⁷ The team should, however, be flexible and able to make adjustments as necessary. There must be ongoing and open communication among team members. Counsel

152. *See id.* at Guideline 10.5(A).

153. *See id.* at Guideline 10.5(C).

154. *See id.* at Guideline 10.4(B)-(C).

155. *See generally*, Adele Shank, *Building the Defense Team* (unpublished training handout for the Ohio Public Defender Commission, on file with Hofstra Law Review) (n.d.).

156. *See* GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

157. *See* Shank, *supra* note 155.

should establish the process of team communication. This could regular meetings, regular memos to team members, phone consultations, or any other methods, as long as regular communication occurs. Counsel should create an atmosphere which encourages open communication and the exchange of ideas and different perspectives on how to address various issues. Conflict or differences of opinion can be healthy and can produce new ideas and better ways of doing things. However, there has to be a decision-making process and means of resolving differences. Counsel is ultimately responsible for the conduct of the case and for making final decisions on strategy.

Counsel must make clear to all members of the team that they are agents of counsel in the representation of the client. The same privileges that exist between the attorney and client, and for attorney work product, extend to other team members. Counsel has a duty to explain this, particularly to extended team members such as experts or consultants who may not understand the privileges that apply in criminal cases.¹⁵⁸ For team members who do not work in the same office as counsel, it is wise to have an agreement in the form of a contract or letter of retainer that specifies this along with the control of the product and what the team member should do if the prosecution requests any work product. All team members need to know the discovery rules governing the case, including under what circumstances persons may be required to turn over material from their file or reveal information they have learned.¹⁵⁹ Counsel must know what information is in the possession of every potential witness, including the investigator, mitigation specialist, and other experts, in order to make informed decisions about who should testify, as the privileges are waived once someone becomes a witness. Counsel must also provide direction to every team member, including experts, about what information should be put in writing, the form of the writing, and when to do it.

Counsel has a duty to monitor and direct the work of the team.¹⁶⁰ While other team members may possess knowledge and skills essential to the provision of effective advocacy in capital cases that the attorneys do not, it is counsel's duty to make sure that each member of the team is fulfilling their responsibilities in a competent manner. Counsel must possess sufficient understanding of the roles and duties of other team members to supervise their work and ensure that each team member, including each expert, is performing their job effectively and in a timely

158. See GUIDELINES, *supra* note 23, at Guideline 4.1, commentary.

159. See *id.*

160. See *id.* at Guideline 10.4(B).

manner. Counsel should assess the progress being made by the investigator and mitigation specialist and provide feedback and direction on other sources or avenues to pursue.¹⁶¹ The investigator and mitigation specialist have a corresponding duty to keep counsel informed as to the progress of their work.¹⁶² Courts have not yet granted defendants in capital cases the right to the effective assistance of experts.¹⁶³ It is counsel's duty to be sure that experts retained are competent, and that they do their job in a thorough, professional, capable, and timely manner.

The involvement of a mitigation specialist from the inception of the case is critical for several reasons.¹⁶⁴ The social history investigation should begin immediately, and the client should be screened for mental and emotional impairments as soon as possible. This can be done by the mitigation specialist, if qualified, or the team member with mental health skills.¹⁶⁵ This is important because there may be issues relating to the client's competency or mental functioning.¹⁶⁶ Counsel needs information regarding the client's cognitive, mental, and emotional functioning in order to assess conduct in the offense, during interrogation, and in custody, and to begin to develop the trial and penalty phase strategy.¹⁶⁷ All members of the team need to understand the client's functioning in order to develop a relationship of trust and confidence with the client, and to secure the client's cooperation in efforts to save his or her life.¹⁶⁸ Attorneys generally do not have the training or expertise to assess clients' cognitive and mental impairments.¹⁶⁹ They expect these impairments to present themselves with obvious features. If the client "looks normal," they assume that he or she is normal. Symptoms of mental illness are not always present or evident, nor are indications of low cognitive functioning. Persons who are mentally retarded learn to mask their impairment and strive to look normal.¹⁷⁰ A team member who is skilled in recognizing indicators of impairments must see the client very early in the process.¹⁷¹ The team must then pursue other sources of information by obtaining records and conducting interviews in order to

161. See Assessment, *supra* note 95.

162. See *id.*

163. See, e.g., Poyner v. Murray, 964 F.2d 1404, 1418 (4th Cir. 1992).

164. See GUIDELINES, *supra* note 23, at Guideline 10.7, commentary.

165. See *id.* at Guideline 4.1(A)(2).

166. See *id.* at Guideline 4.1, commentary.

167. See *id.*

168. See *id.* at Guideline 10.5, commentary.

169. See *id.* at Guideline 4.1, commentary.

170. See *id.* at Guideline 10.5, commentary n.181.

171. See *id.* at Guideline 10.7, commentary.

determine the nature of the presenting problem(s) and the possible types of expert assessments that might be indicated.¹⁷²

The mitigation specialist and/or member of the team with mental health skills can then advise counsel on the type of experts that should be retained in the case, and can assist in locating appropriate experts.¹⁷³ Counsel should generally not retain other experts, including mental health experts, until sufficient social history investigation has been conducted to determine exactly what types of experts are needed. The traditional use of a psychologist or psychiatrist may not necessarily be appropriate. In a Ninth Circuit habeas case, the court, citing counsel's "failure to investigate the combined effects of [the petitioner's extraordinary exposure to neurotoxicants, neurological impairments, and personal background," ruled that such a failure constituted ineffective assistance of counsel at the penalty phase, and further held that "[c]ounsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult."¹⁷⁴ Furthermore, the court stated that counsel must present experts with all relevant information to enable them to conduct competent and reliable evaluations.¹⁷⁵ Experts need documented and corroborated social history information in order to do this.¹⁷⁶

Federal and military statutes, as well as those of several states, have formalized procedures for presenting mitigation evidence to the prosecution or authorizing authority early in the process to prevent the case from proceeding as a capital case.¹⁷⁷ The early involvement of the mitigation specialist in conducting the social history investigation may provide counsel with information and arguments to present to the decision-making entity regarding why the death penalty should not be authorized or sought.¹⁷⁸ Even where there are not such formalized procedures, it may be possible to convince the prosecution to forego seeking the death penalty based on information provided.¹⁷⁹ The information may also be used in seeking a negotiated settlement of the

172. *See id.* at 202-03.

173. *See id.* at Guideline 4.1, commentary.

174. *Caro v. Calderon*, 165 F.3d 1223, 1224, 1226 (1998). The client in *Caro* had been examined by four mental health experts, none of whom was a neurologist or toxicologist. *See id.* at 1226.

175. *See id.* at 1226.

176. *See Stetler, supra* note 69; Lee Norton, *Toward a Better Understanding of the Importance of Psychosocial Histories in Forensic Evaluations*, *ADVOCATE*, Sept. 1996, at 80.

177. *See GUIDELINES, supra* note 23, at Guideline 10.9.1, n.244.

178. *See id.* at Guideline 10.9.1, commentary.

179. *See id.*

case prior to trial.¹⁸⁰ Such strategies should be undertaken carefully and based on counsel's knowledge and judgment regarding the process and persons exercising authority to authorize the death penalty, as they have the effect of revealing the case in mitigation to the prosecution.

The relationship between defense team members and the client can have a critical effect on the outcome of the case. It is essential that team members, especially counsel, establish a relationship of trust and confidence with the client in order to obtain the client's cooperation in the efforts to save his or her life.¹⁸¹ Clients come to the situation with many vulnerabilities and impairments.¹⁸² They generally are poor, and, therefore, have no choice in who represents them in a matter in which their life is at stake.¹⁸³ They feel powerless in the situation.¹⁸⁴ Trust is often a significant issue. Clients may have trust issues that are derived from their life experiences. They may see the defense team as another arm of the government that is trying to kill them.¹⁸⁵ The defense team must work hard to earn and maintain the client's trust.

There are often many barriers to communication, understanding, and trust between the client and team members.¹⁸⁶ Clients are generally from a different socio-economic background and environment than team members.¹⁸⁷ There may be differences of race, class, ethnicity, language, religion, and culture.¹⁸⁸ Cognitive and mental impairments interfere with the client's ability to relate to others and to understand and accept guidance from counsel.¹⁸⁹ Histories of trauma, maltreatment, deprivation, and substance abuse affect the emotional functioning of the client and create barriers to trust and cooperation.¹⁹⁰ The fact of incarceration and facing the death penalty exacerbates existing impairments and creates anxiety and stresses of its own, further interfering with the client's mental and emotional functioning.¹⁹¹ Clients

180. *See id.*

181. *See id.* at Guideline 10.5(A).

182. *See id.* at Guideline 10.5, commentary.

183. *See Stetler, supra* note 69.

184. *See Lee Norton, Working Effectively with Capital Defendants: Identifying and Managing Barriers to Communication, in KY. DEP'T PUB. ADVOC., MENTAL HEALTH & EXPERTS MANUAL (6th ed. 2002); Rick Kammen & Lee Norton, Plea Agreements: Working with Capital Defendants, ADVOCATE, Mar. 2000, available at <http://dpa.state.ky.us/library/advocate/mar00/plea.html>; Stetler, supra* note 69.

185. *See* GUIDELINES, *supra* note 23, at Guideline 10.5, n.181.

186. *See Stetler, supra* note 69.

187. *See id.*

188. *See id.*

189. *See* GUIDELINES, *supra* note 23, at Guideline 10.5, commentary.

190. *See Kammen & Norton, supra* note 184.

191. *See id.* at Guideline 10.5, commentary.

are often in denial about the seriousness of their situation and the very real possibility of the death penalty.¹⁹² They may want to focus primarily on winning the case in the guilt phase, and may want to avoid thinking about or preparing for the penalty phase. As one author put it, the team must understand the client's behaviors as "diagnostic of the wounds they carry."¹⁹³

Team members must make every effort to bridge the barriers between the team and the client. They must strive to understand the client's experience and view of the world and then use this understanding to develop ways to communicate with the client and gain the client's trust and cooperation. Research and consultation with mental health, cultural and community experts can aid the defense team in understanding the client's experience and functioning. It may be advisable to add a consultant to the defense team to address these issues. These same lessons apply to the team's communications and relationships, including those taking place during the investigation throughout both phases of the case, with family as well as others in the case and in the client's life. Explaining the client's functioning and behavior, in light of socio-economic, environmental, political, cultural, racial, ethnic, and religious factors is as important as addressing cognitive, mental, and emotional factors.

The theory of the case and trial strategy for both the guilt and penalty phases is developed based on the work of the members of the team. Counsel must strive to coordinate the strategy for the guilt phase with that for the penalty phase, and should incorporate penalty phase strategy into every aspect of the case.¹⁹⁴ The paramount goal at all times is to save the life of the client. Research indicates that, despite instructions to the contrary, jurors have a tendency to make up their minds about punishment during the guilt phase.¹⁹⁵ Efforts should be made to introduce evidence in mitigation of punishment during the first phase of the trial.

Counsel should consult with team members regarding the mitigation strategy, including challenges to aggravation, witnesses to call, and other evidence to present, as well as specific mitigators to include in verdict forms. While the case is pending, it is likely that the

192. See *id.* at 188.

193. See Norton, *supra* note 184 (italics omitted).

194. See GUIDELINES, *supra* note 23, at Guideline 1.1, commentary.

195. See generally, William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998).

investigator and mitigation specialist will have spent the most time with potential witnesses, including the family of the client. Counsel cannot abdicate responsibility for maintaining relationships with the client, family, and witnesses to the investigator and mitigation specialist.¹⁹⁶ It is counsel who must obtain the most compelling testimony from witnesses. Witnesses must be comfortable in disclosing information, particularly of a private and sensitive nature, to the person who conducts their examination at trial.

IV. CONCLUSION

The defense team in a capital case is charged with the responsibility of making the case for life on behalf of the client. Working together, the team develops and presents the client's story in a compelling and persuasive manner which will both explain the client's conduct in the offense and convince the jury of the value of the client's life. The case for life must be presented in a manner which enables the jury to understand the mitigating value of the evidence and give it appropriate weight in determining punishment. The defense team's job in persuading the jury to vote for life was perhaps best articulated by Clarence Darrow in his closing argument in the Leopold and Loeb trial:

If there is such a thing as justice it could only be administered by one who knew the inmost thoughts of the man to whom they were meting it out. Aye, who knew the father and mother and the grandparents and the infinite number of people back of him. Who knew the origin of every cell that went into the body, who could understand the structure, and how it acted. Who could tell how the emotions that sway the human being affected that particular frail piece of clay. It means more than that. It means that you must appraise every influence that moves them, the civilization where they live, and all society which enters into the making of the child or the man! If your Honor can do it you are wise and with wisdom goes mercy.¹⁹⁷

196. See GUIDELINES, *supra* note 23, at Guideline 10.5, commentary.

197. Douglas O. Linder, *Famous American Trials: Illinois v. Nathan Leopold and Richard Loeb*, at http://www.law.umkc.edu/faculty/projects/ftrials/leoploeb/LEO_SUMD.HTM (closing argument of Clarence Darrow in the trial of Leopold and Loeb in 1924).
