
REPRESENTING BILL: THE ABA'S DEATH PENALTY REPRESENTATION PROJECT

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ABSTRACT

Despite opinions on the morality of the death penalty, it cannot be denied that impoverished defendants are often provided with minimal or negligent legal representation. The ABA Death Penalty Representation Project seeks to change that by recruiting volunteer lawyers to represent death penalty cases. The experience is difficult and sometimes demoralizing, but always life-changing.

Representing Bill

The ABA's Death Penalty Representation Project

By Robin M. Maher

Twenty years ago the American Bar Association recognized what had by then become an emerging crisis in our justice system. In case after case, indigent defendants charged with the death penalty were represented by overworked, overwhelmed defense lawyers who too often did not have the skills or resources to do a competent job. In the worst cases, defendants were represented by lawyers who were drunk, high on drugs, negligent, or so uncaring that they did nothing in the defense of their clients' lives. In short, there was nothing fair about the trials that were sentencing so many to death.

In response, the Death Penalty Representation Project was created to address these issues of counsel—to improve the systems that did not appoint good lawyers or properly fund their efforts, and when necessary, to recruit volunteer civil lawyers to represent a death-sentenced prisoner in his appeals.

Today, there is still no guarantee that a prisoner will be appointed counsel in postconviction proceedings. Most death penalty jurisdictions fail to provide adequate resources to the public defender offices that represent poor people. Some states rely on appointed counsel or the “lowest bidder” instead of funding and training public defenders. But an absence of meaningful standards and grossly inadequate funding and compensation almost guarantee that capital defendants will receive negligent representation. (Compensation for Alabama capital trial counsel: \$60/hour in court, \$40/hour out of court. *See* Ala. Code § 15-12-21 (2003). Compensation for Mississippi capital trial counsel: capped at \$1,000 (or \$2,000 if two attorneys are appointed), plus reimbursement of actual expenses. *See* Miss. Code Ann. § 99-15-17 (2003). In Florida, compensation for capital trial counsel is capped at \$3,500. *See* Fla. Stat. Ann. § 925.036 (West 2003). *See* 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 (1994).)

I travel the country in search of volunteer lawyers to work on death penalty appeals. We hold meetings in legal communities to talk about the urgent need for volunteers and describe how we will train and support lawyers to be effective advocates for those on Death Row. Everyone understands that a person sentenced to death without a lawyer is a terrible problem. But not everyone can or will help. For every one firm that says yes, at least ten others say no. Convincing a law firm to take a case sometimes takes months, and even years. Most civil lawyers cannot accept the cost and time and energy that such a task requires.

It is sometimes frustrating work. But trying to recruit volunteers is not the most difficult part of my job. That is nothing compared to telling a death-sentenced prisoner that I cannot help him. Every week I receive phone calls from frantic mothers and letters from prisoners and their families. They are often supplemented with pages and pages of painstaking, handwritten notes about their trial and potential issues for appeal. Many prisoners protest their innocence, expressing bewilderment at finding themselves on Death Row. Too many tell me how their trial lawyers failed them. They all ask the same thing: please, find a lawyer for my case. I always reply that I will do my best. But I also know that I cannot come close to finding enough lawyers for those who need them.

Without lawyers, the men and women on Death Row must defend themselves. To have any chance at justice, prisoners, most of whom are mentally ill, retarded, poorly educated, or illiterate, must file an appeal within a one-year statute of limitations or their claims will be lost forever. From their prison cells, Death Row prisoners try to litigate against the state's

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Note: *The author has changed the name of her client to protect his privacy.*

trained and experienced lawyers before time runs out. They have no resources and no legal skills. It is a hopeless contest.

Volunteer lawyers rescue the lucky ones. When we do successfully recruit a law firm, the results demonstrate the difference that an effective lawyer with adequate resources can make. Volunteer lawyers have obtained commutations, new sentences, and new trials. Some have even had the privilege of walking their wrongfully convicted client off Death Row to freedom. Not every lawyer can claim such a victory. Some clients have been executed. But all our volunteers, even those whose efforts are ultimately unsuccessful, describe their experience as a highlight of their career.

It is remarkable to be of service to someone who needs you so desperately. I know, because that was my experience when I became a volunteer lawyer 13 years ago.

* * *

I was just a baby lawyer when I met Bill, a frightened twenty-one-year-old sentenced to death in a Southern state. At my urging, my law firm had agreed to handle the appeals of a Death Row prisoner who did not have a lawyer. Like almost all the volunteer lawyers I recruit today, I didn't have any criminal law experience but was horrified at the idea of someone sentenced to death without a lawyer to represent him. I wanted to help.

I had never been to a prison before meeting Bill, and Death Row was intimidating. I was thoroughly frisked, and allowed to carry a single notebook and pen. A guard appeared, leading my new client, still in shackles. We sat at a small table together, and shook hands as if we were meeting socially instead of on Death Row. I remember that he wore glasses that were too large for his face. He was slightly built and unfailingly polite. He called me "Ma'am," which unnerved me. I was just six years older than he was. I learned he was the same age as my younger sister, their birthdays just days apart. He had been sent to Death Row for a crime he was convicted of committing when he was just 16 years old.

We talked that first day about many things—his case, the appeal we intended to file, and his family. Like many law

firm volunteers, I made the mistake of trying to talk about the legal issues right away. But I needed first to earn his trust. I had lots of questions about his trial but Bill also wanted to talk about other things—what he would do when he got out of prison, for example. What kind of life he would lead, and his dream of a wife and family. It made me uncomfortable to talk about these things because I knew that the chance that Bill would ever get out of prison was remote. It felt dishonest to indulge a fantasy that he would someday be free. I later learned the importance of hope. It is the only thing that sustains those on Death Row.

Two years later I was one of the lawyers who handled the evidentiary hearing in connection with Bill's state postconviction appeal. We were assigned to the same trial judge who had sentenced Bill to death five years earlier, presenting evidence that he and the jury had never seen because of the incompetence of Bill's appointed trial lawyers. Those lawyers had been paid a flat fee of one thousand dollars each for a trial that lasted less than a day and a half. Almost no defense had been presented. We were confident we could do better this time.

My colleague and I spent weeks preparing our experts and witnesses, outlining our arguments and discussing our legal strategies. We were typical litigators, engrossed in the law and procedure. On the night before the hearing, Bill's mother called my hotel room at about 10:00 p.m., as we reviewed our notes one last time. I described to Bill's mother what would happen the following morning in the courtroom, and told her Bill had been transferred to the local jail so that he could be present. I was focused on the logistics and thinking about the order in which we would call our witnesses. Suddenly, and unexpectedly, she interrupted me and started crying. "Don't let anything happen to my boy," she pleaded. "Please."

I remember feeling at that moment as if time were standing absolutely still. I could hear the sound of her voice and her tears in my ear and nothing else, except my pounding heart. At that moment I felt the profound impact of what I was doing. This was not civil litigation about money or contracts. We had a life in our hands.

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What happened tomorrow and the next day would either save Bill or condemn him. It was terrifying. I remember hearing myself promise that I would do everything in my power, and hanging up the phone with trembling hands.

Our hearing of three days lasted twice as long as Bill's entire trial. The judge barely seemed to be paying attention, asking us to repeat our objections or requests when we needed a decision from him. In the middle of our hearing, the judge interrupted our presentation to call another teenaged defendant into the courtroom and sentence him to death. It seemed to foreshadow the hopelessness of our task to see another young man condemned while we argued that Bill's life should not be forfeited.

An agonizing year went by while we waited for the decision. When it came, we found that the judge had meticulously gone through all the issues we had raised on appeal and found them to be defaulted, without merit, or harmless error. In other words, we lost. Quite convincingly. It was a lesson in the politics of the death penalty in the South, where its popularity and the reality of electoral politics too often trump meritorious legal issues.

Nonetheless, we proceeded with several rounds of appeals through the state court system in the years that followed. We researched and argued and repeatedly briefed every issue, turning in hundreds of pages of pleadings. As the years went by, Bill and I spent time talking on the phone and exchanging letters. I visited him at least once a year at the prison, where we would sit together at the same small table where we had first met.

As we both grew older, our relationship changed. It was sometimes difficult to walk the line between being Bill's friend and his lawyer. My professional instincts told me that I should be careful to maintain professional distance, but Bill needed so much more. A Death Row client is not like any other client. Bill was kept in a small cell 23 hours a day, allowed out just one hour a day to exercise. His access to the outside world was extremely limited. He was regularly confronted with the executions of men he knew, men who had become his friends. On the days an execu-

tion was scheduled he would ask the prison doctor for a sleeping pill so he could get through the night and not have to see the lights flicker when the electrical current was turned on.

I watched the skinny young man I first met grow into an impressive adult. When he arrived on Death Row he was so frightened that he used to eat the letters we sent him, afraid that someone would read them. He became used to his environment, and even hardened to it—soon he had been on Death Row nearly as long as he had lived on the outside. He assumed a position of responsibility in a prisoner-run organization. He read voraciously, and developed strong opinions about the news and politics that he loved to debate with me. But the years in prison also took their toll. His letters were sometimes dark and despondent, full of rage and unhappiness. I started opening his letters with a sense of dread, not knowing the mood he was in when he wrote them. He would sometimes lash out at me, and it made me feel helpless that I could do nothing to alleviate his sadness and depression. But he signed each of his letters to me with "love." That he still had the capacity to love anyone, after all those years of isolation and deprivation, was an amazing and humbling thing to witness.

One particular correspondence stands out in my mind. I received a card in the mail from Bill, which was not usual; but when I opened it, I saw that it was a hand-colored Mother's Day card. Confused, I opened it to see the words: "Why? Because I am your son."

There was so much in those words for me. I once again felt the weight of my task. I worried every day that I would fail him, screw up his case, and cost him his life. It was a feeling that never left me. I know now that it is a part of this work to carry that burden. But I have never for a moment regretted being Bill's lawyer.

Our appeals continued, moving slowly but always without success. Then in May 2005, the Supreme Court of the United States decided that executing people who committed crimes when they were juveniles was unconstitutional. Bill was one of 72 men whose death sentences were commuted to life in prison without the possi-

bility of parole. He will pay a heavy price for his crime, but he will not be executed.

I called the prison and left a message for Bill to call me, and in the meantime, I called his mother. I will never forget the sound of joy in her voice when she heard the news and shouted and cried with relief. Bill, however, seemed almost stunned by the news, and was so quiet I wasn't sure he was still on the line. And then he said, very softly, "Thank you for keeping me alive to see this day. I know so many others did not."

In the end, there was no brilliant legal strategy or maneuver that saved Bill. As his lawyers, we just kept him alive and gave him the chance he needed, until the law and society's view of justice changed. The contribution of every volunteer lawyer is to give his or her client that chance at justice, and to restore the hope that has left so many on Death Row.

When I recruit volunteer lawyers, I tell them about my experience and let them listen to other lawyers who have represented someone on Death Row. I see in them what I once was; someone who sees injustice and wants to do something about it. I am proud that we at the Death Penalty Representation Project help lawyers become the heroes they never knew they could be.

Every one of our volunteers tells me what I already know—that representing someone on Death Row is a life-changing experience. It is hard work, emotionally and intellectually challenging, and not always successful. But each volunteer becomes part of a community that works to ensure that justice is not only for the rich and privileged. It is also for those whom society has forgotten and condemned. My commitment to that principle makes it possible for me to get on one more plane and fly to the next city, where I will try to recruit another law firm. This is work that provides its own reward, and I am privileged to be part of it, just as I am privileged to be Bill's lawyer. ■

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For more information please visit www.abanet.org/deathpenalty/.

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