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## Death Row Defense

Even though Minnesota doesn't have capital punishment, the state's bar gets high marks on its pro bono work representing inmates with death sentences.

By Michelle Lore

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Just four months before Joe Lee Guys was to be executed in Texas, Dorsey & Whitney partner Steven Wells stepped in to see if he could stop it. Guys had served as the lookout while two men robbed a grocery store and killed its owner. All three defendants were convicted of capital murder, but Guys alone received a death sentence.

Wells and fellow Dorsey partner Patrick McLaughlin immediately set to work, and, with the help of several other Dorsey attorneys, succeeded in getting the execution stayed. During the ensuing investigation, the legal team discovered that Guy's trial attorney had been suspended from practice five times for matters involving alcohol and drug abuse, as well as for lying to and stealing from clients. The team also learned that the investigator hired by Guy's lawyer had developed a conflicting relationship with the state's primary witness, the victim's

mother, who named the investigator the sole beneficiary of her estate six months after Guy's trial.

It took several years, but the Dorsey lawyers eventually convinced the 5th U.S. Circuit Court of Appeals that their client had not received effective counsel at the penalty phase of his trial. Following a federal court trial on the habeas proceeding, Guy's sentence was commuted in mid-2004 from death to life in prison.

"It is immensely satisfying," said Wells, a commercial litigator who has now worked on four death penalty cases. "You feel like you really made a contribution to the justice system and to somebody's life. I love what I do [in my everyday practice], but I don't save people's lives very often."



### Fair trials, good lawyers

Deeply embedded in the fight for justice for death row inmates is the American Bar Association's Death Penalty Representation Project. Robin Maher, director of the project, said that while the group recruits firms to assist prisoners on death row, it does not take a position on the death penalty.

"Our policy and the work we do here at the project are not about abolition. It's

# Death penalty cases are intellectually challenging and expensive

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about fair trials and good lawyers,” she said. “That’s a principle that almost every lawyer can get behind regardless of how they feel about the death penalty.”

Maher, who has been involved with the project since 2001, said she solicits help from large and small legal communities across the country for assistance in these cases and has been particularly impressed with the response she has received from the Twin Cities’ community.

“By any measure, its response to the crisis of counsel for those on death row has been extraordinary,” she said.

Local lawyers who agree to take on these matters say they do it because they care about justice, which is lacking in most death penalty cases. They contend that much of the problem lies in the dearth of resources dedicated to them.

“Death penalty cases are so hard and so taxing and the stakes are so high that a lot of time the cases don’t get the attention they deserve and defendants don’t get the representation they need,” said Minneapolis attorney David T. Schultz, who is currently working on his second death penalty case.

Wells said in many states with the death penalty, the chance that a poor, black defendant will have good representation is very low, in large part because the resources expended to defend them are insignificant.

“Justice is not done [in that situation],” he said. “To me, that’s terribly wrong from a societal standpoint.”

According to Minneapolis attorney Thomas Fraser, who is handling his second death penalty case, many southern states that allow capital punishment don’t have established public defense systems. Often, the lawyers appointed to the cases are inexperienced and inadequately paid so they are handicapped in their ability to effectively investigate and prepare a case, he said.

Fraser pointed out that some defendants also admit to things they didn’t do. Many suffer from mental illness and most of them are uneducated, inarticulate, not used to dealing with the authorities and don’t understand their

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— Robin Maher, director of the American Bar Association’s Death Penalty Representation Project.



rights or the significance of what’s happening, he explained.

“It’s doesn’t take much, except time and effort on the part of the police, to get false confessions,” said Fraser.

Lawyers say it’s not necessary to be opposed to the death penalty to take on a case.

“Whatever your views of the death penalty, it’s not something we should impose unless and until the defendant has had a full and fair opportunity to have representation,” said Schultz.

## On-the-job training

The work done by death penalty lawyers varies. In some cases they attack the procedures implemented at the guilt or innocence phase; in others, particularly where the evidence of guilt is strong, they focus on what happened during the mitigation, or penalty, phase of the process.

According to Wells, if guilt or innocence isn’t an issue, lawyers go in and determine how the client ended up in this situation. Does he have mental health issues? Was he physically or mentally abused? What was his family life like? Is he poor?

“That’s what humanizes or may explain to a jury why someone ended up the way they did,” said Wells. “That’s a big part of what we do as death penalty counsel — figure out whether that case got made at trial and if it didn’t, why not.”

Some lawyers are hesitant to work on the cases because they don’t think they are qualified. But practitioners say that even civil litigators can provide excellent representation if they are given guidance and resources.

Wells said that handling a death penalty case is unlike any other kind of case. “There are a lot of landmines and it’s very easy to step on one,” he said.

But at the same time, he continued, there are many organizations, including the ABA project and the Advocates for Human Rights, that will assist attorneys and provide them with support, training and resources.

“You quickly learn that any lawyer is better than no lawyer at all,” said Fraser, who admitted he was hesitant to take on his first death penalty case. “Hard work can overcome a lot and you can be of substantial assistance to people who obviously have a great need for help.”

## A rollercoaster

In addition to being intellectually challenging, the cases are enormously expensive and usually take many years.

“You have to almost assume it’ll take a decade,” said Fraser. “The process is slow. It takes a long time to get a final result.”

For those reasons, lawyers say that to do a good job they need the help and the support of their law firm.

Wells said that in the Guy case, the state of Texas paid the trial lawyer \$50,000 to handle the case, but that his law firm invested \$2 million — in out-of-pocket expenses and lawyers’ time — to undo the mistakes in the first trial.

“It’s expensive, it’s time consuming and it can be immensely frustrating,” said Wells. “And it’s heart-wrenching at times. It’s not for the faint of heart either; some of the crimes that were committed are pretty awful.”

### 'An emotional rollercoaster'

Perhaps the biggest challenge in taking on a death penalty case is dealing with an unsuccessful result.

Fraser's first death penalty case, which he worked on for more than 11 years, ended with his client's execution.

The procedural history of the case resembles a movie script. Fraser's client was found guilty of breaking into a home and fatally stabbing a woman. For years, the case wound its way through the state court system before ending up in federal court.

Fraser and his team finally managed to convince a conservative federal District Court judge to overturn their client's death penalty sentence, only to have it later reinstated by the 5th Circuit. Two

Robin Maher, director of the ABA Death Penalty Representation Project, will be the keynote speaker at the Minnesota Justice Foundation's Annual Awards Celebration on Oct. 29 at International Market Square in Minneapolis. For reservations, call 612-625-1584 or e-mail [admin@mnjustice.org](mailto:admin@mnjustice.org).

hours before their client was to be executed — as he was walking down the hall for his last meal — they obtained a stay from the U.S. Supreme Court. Three months later, however, the high court issued a one-sentence order denying their petition for certiorari.

Fraser and his team declined to attend their client's execution. "We decided no point would be served by going there," he explained.

Maher said that when recruiting lawyers to help on these cases she often hears concern over the possibility of their client being executed. Her response is that while it's incredibly painful, they will at least have delivered the kind of representation that client deserved.




Minneapolis attorney Steven Wells was able to get his client off death row after proving that he had received ineffective assistance from his trial lawyer during the penalty phase of his trial. (Photo: Bill Klotz)

"This work is about giving a death-sentenced person a chance at justice that he or she will never otherwise have," she said.

Fraser took a year off before getting involved in another death penalty case, primarily because he needed a break from the emotions it stirred. It now ap-

pears that the case he's been working on for the past decade is going to have a much happier ending — he expects that DNA evidence is going to completely exonerate his client in the near future.

"It's a tremendously rewarding experience," he said. "But it's often an emotional rollercoaster." 

## Economy causing states to re-evaluate death penalty

The tough economic times appear to be causing some states to re-evaluate their use of the death penalty.

According to Robin Maher, director of the American Bar Association's Death Penalty Representation Project, many states are beginning to understand the expense involved with the death penalty.

As they are struggling with their budgets, they are looking at how much money is being spent to pursue a case and carry out an execution, which is often millions of dollars, she said. "It's been a real awakening, I think, for jurisdictions to understand where all of that money is going and to think about ways that money could be spent elsewhere."

New Mexico, for example, recently abolished the death penalty, in part because of the costs involved, said Maher.

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