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CAPITAL CASES

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Heart of the Deal: Ten Suggestions for Plea Bargaining

In August, Alabama electrocuted a man named Victor Kennedy. His case reflected many of the things wrong with the American death penalty. Kennedy, a young African American accused of sexually assaulting and killing an elderly white grandmother, was tried by an all-white jury. His lawyer, for want of training and resources, barely mounted a mitigation case in the penalty phase. Draconian technicalities then barred federal court review of trial ineffectiveness.

Victor Kennedy's borderline intelligence may have prevented him from fully appreciating the injustice of all these circumstances. But as he went to his death he did know one thing, and it could only have added to his pain: Before trial, Victor Kennedy was offered a plea to life without parole. And, despite ugly and overwhelming evidence in a small town case with execution written all over it, Victor Kennedy, borderline-retarded, proceeded to trial.

If you defend capital cases, before long you realize how often death sentences flow from a breakdown in the settlement process. Unfortunately, there is still no step-by-step, fail-safe recipe for capital case pleas. But, drawn from the experience of many lawyers working a wide range of cases, here are ten suggestions for effective plea bargaining. They cannot substitute for individual patience and ingenuity, but should provide some groundwork on which to build and improve.

1. Provide a Sober Perspective About The Danger of the Death Penalty

There are at least two common obstacles to the capital client's appreciation of his predicament.

First, we all come from a secular-materialist culture which denies death the way the Victorians denied sex. Faced individually with the threat of death, moreover, our clients react very much as do the terminally ill. They deny their condition. Such denial is initially healthy insofar as it may prevent panic and insulate against police intimidation.

Still, if left in place, it can interfere with wise plea bargaining. Denial must, therefore, be displaced -- not with dread and alarm but with a sober sense of the real (if distant) risk posed to the client's life.

One non-intimidating way to effect this change in perspective is to put the client's case aside and just talk "current events." Look at the trends in the courts, among candidates for office, and in the public mood. Discuss the current slant in media coverage of violent crime. Consider your local elections and your state's attorney general. Go over the newspaper and ask your client whether he thinks things are getting better for death row prisoners.

Second, martyrdom, as George Bernard Shaw noted, is the one way for the talentless to become famous. For many clients, the capital prosecution is a way to bask in societal attention. If they cannot be Bruce Willis or Michael Jordan, they will settle for being Gary Gilmore or Roger Coleman.

Such romanticized, delusional thinking can kill your client. So defuse his sense of grandeur. Demonstrate that executions are already becoming old hat in many places. Talk about the paltry coverage they are given in states where people are routinely put to death. Have your client name the last four people executed in your state.

2. Set Out an Initial Game Plan with Your Client and Identify Early On the Plea Bargain Possibility

The refusal of an appropriate plea bargain by the client represents a breakdown in his reasoned decision making. This should be no surprise, since his life has not likely been a series of logical judgments.

Still, such a breakdown can be avoided by signing your client on to a rational game plan early on, by making an agreement and reaching an accord on how you will proceed.

Tell your client how you will attempt to beat the case: (i) which motions will attack legal weaknesses in the indictment; (ii) what case law you will explore to see if capital murder is made out; (iii) how you will get all the discovery to which you are entitled; (iv) what guilt and penalty phase leads the client himself might provide and how you are going to investigate them; (v) what experts you will look to retain; (vi) when you are going to interview the police and the state forensic science folks; and (vii) which prosecutor you are going to broach a plea with, should that appear appropriate.

Be certain your client will not forego his liberty so long as he believes \ wishes\imagines that there is some lead or angle out there that could set him free. Don't expect him to heed your professional opinion as to the wisdom of a plea bargain unless that opinion is founded on both your overall experience and your leg work on his case. Indeed, absent a lot of leg work *69 you would be ethically remiss and morally adrift to support any kind of guilty plea.

Most capital defendants are under capital indictment because they are, among other things, risk-prone gamblers rather than prudent decision makers. These are not the guys you would retain to manage your pension portfolio. Knowing nothing about the evidence, they will wager (their lives) that something will break in their favor and bring an acquittal.

Only your firsthand account of the case against them, your interviews of state witnesses, etc., will impart a realistic sense of the odds.

So let the client know how each step of preparation and investigation is going, draw him into the process so that he himself sees -- as a jury sees for itself -- what has to be done.

3. Make Sure You Get an Offer

The vast majority of criminal matters do not go to trial; they settle. Yet, when capital charges are brought, lawyers behave oddly. The atmosphere becomes charged. Opposing counsel take to the trenches.

Some defense lawyers, in this climate, fear they will signal weakness by inquiring into a possible plea bargain. When the prosecutor shares this fear of possibly showing weakness, a case can take on a life of its

own. Both trial counsel and prosecutor can end up trying a case they both privately thought should be settled.

This need never happen. In almost any case, there are two ways of getting an offer.

. Hard Sell

Defense counsel can usually coax the state into broaching the possibility of a deal. Counsel can make clear early on that proceeding to trial will, given the human life in the balance, necessarily be difficult and expensive. The initial filing of 30 or 40 motions -- to ensure a representative venire, a fully recorded record for appeal, adequate funds for various mitigation experts, a judge free of racial bias, etc. -- constitutes a down payment on the constitutional rights so often trampled in capital jurisdictions; it signals that there will be no poor man's justice or death-on-the-cheap. Such an initial filing also can represent a very effective invitation to negotiate.

. Soft Pedal

If vinegar doesn't bring the state to the table, try a kinder, gentler tack. Inform the prosecutor that, because this is a capital case, ineffectiveness of counsel could someday be an issue. Some courts, and all those meddlesome post-conviction lawyers, insist that effective representation requires exploration and communication of plea bargains. You, therefore, need to negotiate to cover yourself. So what's the offer and if there is none, why not? If answers are not forthcoming, properly share your concerns with the judge; bring her or him into the process.

Remember, finally, that more than one prosecutor out there has some deep, if politically well-hidden, ambivalence about the death penalty. They know that death cases are appealed and reviewed for years on end. They may also harbor some religious or moral compunction about needlessly killing even the guiltiest human being when life imprisonment is possible. Such ethical reservations, naturally, ease the plea bargaining process, if that process is initiated.

4. Do Not Take a Client's Uninformed 'No' for an Answer

Imagine a patient, say one not known for his mature judgment, resting in his hospital room. A doctor comes in. The doctor tells the patient that the biopsy came back positive, that there is a malignancy, that almost certainly the only way to save the patient's life is to amputate a leg. The patient, rather fond of dancing, replies that he does not want to lose his leg. The doctor just says "OK, it's your decision" and leaves to arrange for a discharge.

Now surely it's the patient's right to refuse the amputation. But a professional lends guidance, perspective, and the strength to make difficult decisions. He does not abdicate this duty out of a false sense of respect for patient (or client) autonomy. He exercises independent, professional judgment.

The client, not the lawyer, does the time. The decision to plead or not belongs to the client, in the final instance. The attorney, however, is obliged to insist that his client make a decision that is informed and mature rather than blind, impulsive or stubborn.

5. To Assure a Mature Decision Is Being Made -- Make the Odds Clear and Assume Nothing

We know how bad things are. (That's why we want the plea taken.) The client, though, will only know what we tell him. So state what for you

is the obvious:

- . Explain death qualification and its impact on each stage, as well as the perfunctory nature of voir dire.

- . Discuss the expertise and track record of your adversary.

- . Ponder the reaction jurors will have to the state's inevitable gory slide-show.

- . Recall weaker cases where the jury happily meted out a death sentence in no time flat.

- . Talk about clients now on death row who passed up deals and their current regret.

- . Note your governor's policy on clemency.

- . Explain that plea bargain is a no risk contract and go through the mechanics.

6. Speak Bluntly and Insist on Rational Answers

There is no point in speaking in the euphemisms society employs so that it can kill prisoners with a clear conscience. *70 Be blunt. But don't lecture at your client with the answers. Rather, make him give the answers to the questions raised by his no-plea position.

- . Talk Plainly

"Why are you killing yourself?"

"How will your family deal with the execution?"

"What will your son feel when he reads the paper?"

"Why put them through the ordeal?"

- . Walk through the days/hours leading up to the execution and how the method brings about death.

- . Keep Asking Questions

Make the client explain his position. Make him tell you why, for instance, his professed moral innocence is a reason for him not to save his life. Have him detail how he will vindicate his name from the grave and what role he can play in his kids' lives once he is dead. Insist he tell you why he must self-destructively defy a system for which he has no respect. Identify who he is going to teach a lesson by going to the execution chamber and what he is going to prove. Let him defend his decision in light of the fact that straight murder is the best he can hope for and, under the habitual felon statute, that will mean life without parole in any event. Challenge senseless responses and then keep coming back to these questions.

7. Enlist Allies

- . Capital Experts

Get a specialist to tell horror stories and/or inform client that his trial is a disaster waiting to happen. A second opinion is always helpful. And the input of an outsider can provide a face-saving out where a stalemate has developed between client and primary counsel.

. Family

Prepare the family beforehand by presenting the facts and odds honestly. But have a meeting of everyone together so there is a common understanding that it is plea or die.

Have parents explicitly ask the client to save his life for their sake. Make the client say he will not give his parents the gift of saving his life. Yes, that is hard-ball. But, as Stephen Sondheim observes, "nice is different than good." And, if you don't pull out all the stops, you will only regret it on the eve of an execution.

. God

With the client who has found religion, talk about God (at least assuming you yourself are not faith-impaired). This talk constitutes a very effective channel of communication and an opportunity to connect on a very personal level. Take down the wall that keeps your spirituality separate from your lawyering and say why you think the client's saving his life with a plea is what God wants.

Emphasize the good that the client can do, witnessing to the Lord, in general population. Explore the problem of the client's setting himself up so state officials can sin by taking his life. Christians can consider the fact that even Jesus asked the Father "if it is possible, let this cup pass by." Ponder what Mary had to go through at the foot of the cross. Assure your client that God works in mysterious ways and that, at the moment, your lawyering for a plea is the mysterious way.

Last, if your client comes back with a fatalistic: "It's in God's hands," remind him what Reverend King taught: Those who shoulder their burdens in God's plan have faith; those who expect God to do everything have only superstition.

8. Commiserate

Many of our clients have a strong sense of their victimhood. Society, parents, teachers, employers, judges and lawyers are all responsible for their plight. Whatever philosophical balance you strike between determinism and free choice, be ready to commiserate with your client about the raw deal life has dealt him.

More, tell him about the raw deal he is about to get. Discuss the willingness of state witnesses to lie and how often capital cases bring out the absolute worst in prosecutors and judges. The system, in short, is about to victimize your client as never before -- unless he takes the plea.

9. Take Off Your Watch

You earn the trust of your client primarily by working your case and, secondly, with patience. Be ready to spend hours and days with a client to persuade him to save his life, to make the right decision for himself and to own it fully.

Filibuster, plead, argue, cajole. Sometimes cry. Sometimes just sit and wait out your client's angry silences. Don't get frustrated. Don't give up.

If you are in a rush, forget it. You'll only confirm what your client suspects: that you don't care, that you want the plea to save you work, not to save his life

10. Be Honest with Yourself

Trial is a blast, a rip. When you are "in the zone" your grasp of evidence goes from the mechanical to the organic; every new twist registers instantly as hurtful, helpful, or both.

All your radar is cranking; every good counterpunching reflex is in play. Obstacles become opportunities. Difficulties become helpful diversions. Setbacks become launching pads.

The seams between style and substance, craft and creativity, rhetoric and reality all melt away. Your energy is boundless; your endorphins are staging a firework display in your brain. Within ethical bounds, you are the writer, director, and lead. Indeed, you are the hero! Right? This magazine is not The Helper, The Mouthpiece, or even The Advocate. It's The **Champion!!** We ride the white steed! We slay, salvage, and save. Why would you make a living any other way?

OK, but here is the lousy truth: In many, if not most, capital jurisdictions the majority of death cases should be settled. Prosecutors don't usually select their shaky cases for capital trial. And little justifies praying for life the night before a penalty phase when it was yours for the asking at the outset. As Jed Stone, a great Chicago trial lawyer and capital litigator, says, "In the capital universe, the Planet Trial is a place you don't want to visit unnecessarily."

So be honest with yourself. Yes, you love trial work. And nobody likes to beg a prosecutor for mercy; we would all rather fight him for justice. But in those cases that should plead, saving lives has to come first.

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