SELF-CARE: HOW TO SAVE YOUR CLIENT'S LIFE WITHOUT LOSING YOUR MIND

Capital defense work exacts a terrible toll on the mind and on the body of the defense advocate. The following chapter attempts to describe how to care for yourself, mentally and physically, while still putting forth your best effort in the battle to save your client's life. The main focus will be on the psychological aspect of capital defense work: How can we, as capital advocates, give each case our best while, at the same time, not driving ourselves crazy?

Step One: Performing a Self-Assessment

A good first step, in our view, towards capital defense health, is to check your own pulse, literally and figuratively. Ask yourself these two questions: First, Why I am doing capital work? And, second, Am I up to it? If you can set your own mind a rest as to these two questions, you will avoid or mitigate many of the stresses of a capital trial.

Everyone who has ever defended a death penalty case has, at one time or another, asked themselves: Why me? Why I am doing capital work?

Each of us needs to ask ourselves this question, if only because, in the middle of some sleepless mid-trial night, the answer may tell you whether in fact you want to continue in this line of work.

Criminal law is a rough game. Death penalty criminal law is criminal law squared. Capital defense work inevitably involves demanding clients, nasty prosecutors, hostile victims, and tyrannical judges. Whatever else it is, it is not easy.

Off-hand, I can think of three motives for entering the capital field: idealism, money, and fame.

Many of us have been drawn into capital defense by our desire to abolish the death

penalty. Nothing is more noble than idealism in practice. I have often described the mission of my own office as the abolition of the death penalty, "one case at a time." But is this true? Will our efforts to prevent the deaths of our individual clients really lead to the abolition of capital punishment?

It could be argued that our efforts in our cases simply grease the cogs of the death machine. Particularly in these days of the post-reform death penalty, when the federal government and many states lavish money on capital defense, capital defenders have become – at least in part – "part of the system." The competent death penalty attorney replaces the incompetent bumbler, whose lack of care or skill might yield reversal on appeal. It has even been argued that lawyers, like physicians, should on moral grounds decline to take part in a system which is rotten to the core.

This argument has some force. We can hope that our efforts in certain highly publicized cases – the no-death verdicts for Juan Luna, Terry Nichols, Lee Boyd Malvo, and Mohamed Moussawi come to mind – will someday persuade somebody that the pursuit of the death penalty is as pointless as it is wasteful. But no one can turn that hope into a guarantee.

A passion, or even a rage, against state sponsored killing, can certainly help us work harder for our clients. Indeed, in the veins of even the most calloused, hardened, and cynical of capital defense attorneys must run some drops of abolition blood. And at the very least, abolition sentiment may be needed to fortify us against the assaults of the prosecution. I have never met a prosecutor in a capital case who did not privately, as well as publicly, support capital punishment. Their zeal flows, at least in part, from a feeling that death is right; our zeal must flow, at least in part, from a equally strong conviction that death is wrong.

But, in the last analysis, someone who embarks on capital defense in the hope of

abolishing the death penalty is likely to conclude after a course of years that she would have been better off pursuing that aim in the courts of public opinion, and not in courts of law.

The second reason for doing capital work is that it pays. And, in many states and in the federal courts, it has begun to pay fairly well. But very few people would enter the capital field for the money alone. And money inevitably tends to warp one's perspective on the work.

Attorneys paid by the hour to do capital cases have a strong incentive to put time and effort into proper preparation of the case; in this respect they may have an advantage over the underpaid, and overworked, public defender. But my own experience has been that they also have a strong subconscious bias against pleas or plea bargains, particularly when their desire to try a capital case matches their client's unrealistic expectations of victory. An attorney who is paid by the hour needs to check his moral compass hourly, so as to avoid trying a case to death.

In a capitalist society, or, for that matter in any society, no one needs to apologize for being paid for work; and, if they do it well, for being paid well. But all of us realize that no amount of money can compensate for the long hours and intense pressures of capital defense work. Anyone who enters capital work for the money will eventually leave, and do something else.

The third reason for doing capital work is that it makes us potentially famous, or at least makes us feel important. Capital cases get more attention than other cases. They put our names in the papers. They feed our good opinion of ourselves.

There is no harm in seeking glory by trying to save lives. But the "glamor" attached to a capital case is dangerous. It can warp our perspective. It tends to divide team members from each other, as each scrambles to take credit for victory, or evade blame for defeat. And in the end, it distracts our attention from the thousands of obscure capital defendants, each one distinguished

by nothing more glamorous than the fact that they have been accused of a horrible crime, for which the state is seeking their death. The true measure of a good capital attorney is the ability to labor well in obscurity, particularly when obscurity may help save your client's life.

A special form of the glory search is the search for the innocent capital defendant. These people exist. Some have been executed. But anyone who undertakes capital work must face the fact that, in the vast majority of instances, the evidence against your client is going to be very strong, and the chances of acquittal very slim. Anyone who enters the capital field solely in order to free the innocent will inevitably become disappointed, and quit.

So, then, why do capital work?

Obviously, this is a question which everyone must answer for him or herself. This is my answer.

I do capital work because I love it. I love the practice of law. I like motions. I like argument. I like cross-examination. I like talking to the client. I like talking to the client's family and friends. I like reading discovery. I like hashing the case over with my teammates. I like trying the case. I like pleading the case.

Full time capital defense work differs from other criminal defense work only in its intensity and longevity. You deal with fewer people, over longer periods of time. Someone who likes the variety of a diverse criminal practice will probably not be happy only doing capital cases, although they may enjoy doing several capital cases during the course of their career. But anyone who enters the field must possess the zest for combat, and the zeal for persuasion, which inform the work any competent advocate.

Your own answer to the question, why do capital work, may differ from mine. But the point is that you need an answer, and you need that answer before you begin the case.

The second question is: am I up to it: professionally and personally, physically and mentally.

If you are a lawyer, you need to assess your own abilities and experience, with rigor and with objectivity. If necessary, ask your friends and colleagues to help you with this assessment. And then, write it down on a piece of paper.

This self-assessment as to skills is particularly important for a defense lawyer in a capital case. Capital defense lawyers, like all defense lawyers, are control freaks. And we are lone wolves. We like to do everything ourselves. We trust no one. We like to think we are good at everything.

But, as other parts of this manual make clear, capital defense work is team work. The best defense is a team defense. In order to figure out where you best fit on the team, you need to rigorously assess what you do best, and should be done by you alone, and what you are better off delegating to other people. The capital lawyer who tries to do everything ends up doing nothing well. If you can figure out what you do best, and stick to it, you will minimize the stresses, strains, and frictions of capital defense work.

The second part of the self-assessment is personal. Again, ask yourself a series of hard questions. Can I bear being separated from my family (and you will be separated, even if you are trying the case two blocks from your home) for the four to eight weeks which any serious capital trial will take? Do I have significant others who need my time and attention during this period? Do I have potential problems – personal, financial, or legal – which will prevent me from putting forth my best effort? Am I in good enough physical health to withstand the rigors of a capital trial?

You can be a good capital lawyer without becoming a janissary, a fanatic, or a monk. You

can continue to have a personal life. But you need to know that your personal life is sufficiently happy and well-ordered that it can be interrupted for a substantial period of time.

Step Two: Setting up Life-Lines

After you have performed your self-assessment, set up some life-lines.

What do I mean by a life-line?

A life-line is some link to some other activity, interest, or person which can sustain you during a capital trial. You don't have to use your life line during the trial itself. It may be that you, like many of us, are so absorbed by the trial, that you cannot for that period put forth any effort that is not directly related to the trial itself. But, at the very least, during the long pretrial period, which lasts at minimum for months, and, more often, for years, you must establish a pattern of healthy activity which will sustain you until the end.

Obviously, a lifeline will depend upon your own habits, beliefs, activities, and interests. But there are some common denominators.

The most important life line is a confidant. A confidant is someone with whom you can share your feelings, even if you cannot ethically disclose to that person such matters as trial strategy or client confidences. Ideally, the confidant should not be your employee or your employer. It should be someone who is close to you, close enough to view you sympathetically, but at enough of a distance to be able to give you objective advice. It could be a parent, a spouse, a close friend, another lawyer, or a religious advisor.

In my own case, I have two major confidants: my wife, who is a criminal lawyer but who does not do capital work, and an older lawyer at my agency who is not in my chain of command. Between these two, I can always get good feedback.

The second most important life line is some healthy activity or interest.

The ideal form of activity, especially if it can be pursued to some extent during each day of the trial, is some form of physical exercise. You can relieve stress even as you review the events of the trial and plan your next move. If, like me, you suffer from an excess of "healthy animal spirits" (otherwise known as hyperactivity), routine physical exercise can promote a calm, poised, courtroom attitude and a persuasive demeanor.

Of course, there are some of us who agree with Robert Maynard Hutchins' adage that "whenever I feel the urge to exercise, I lie down and wait for it to go away." It does not really matter, however, if you physically exercise or not. Mental exercise – reading, crosswords, chess, or gossip – can provide the same relief. And any of these stress relievers will beat drugs or alcohol.

Step Three: Anticipating the Pitfalls

Once you have performed your self-assessment, and set up your lifelines, you can also begin to anticipate some of the emotional and psychological pitfalls which await you during the course of a capital case. For those of you who have tried capital cases, some of what I have to say will seem obvious, but all of it may bear some thought.

The most common pitfall and psychological problem of any capital case is this. Ninety five per cent of your clients, or thereabouts, will tell you that if they cannot be acquitted they would rather die. Sometimes they will tell you that they do not want you to work on mitigation. Sometimes they will refuse good plea offers. Sometimes they will tell members of their family not to cooperate with you.

Especially if you are the attorney assigned to work on mitigation, this may be a little frustrating. And it may be especially frustrating if your trial partner or superior shares the same attitude. A common variant on this theme is the idea that the case is so bad that if the client is

convicted, any jury in the world is going to give the death penalty. So why work on mitigation?

And if the judge and the prosecutor are also on the side of death, it may seem that you, are the only person who thinks that it is important to save your client's life, even if he is going to convicted and spend the rest of his years in prison. You are alone in the world, urging a position that no one is interested in, advocating a point of view that no one wants to hear.

This is the true loneliness of the long distance capital defense runner. The only comfort I can give you on this point is this.

If you are patient and stick to your guns, everyone comes round in the end. Ninety five per cent of the ninety five percent of capital defendants who say they would rather die than spend their life in prison do not really mean it. The defendant's family does not really want to spend years of agony, waiting to see whether their loved one will finally be put to death. The prosecutor and/or the family of the victims secretly hope that they will be spared the pain and hard work of a major capital trial. Your partner, who thought the case was winnable at guilt-innocence despite the videotaped confession, fingerprint, and DNA, will suddenly change his mind when the verdict of guilty comes in.

In the end, you will be vindicated. I have never had a client yet who complained that I had saved his life, and, with luck, you won't, either.

The second psychological pitfall of doing a capital case is panic.

Particularly when it happens during trial, panic almost always stems from lack of preparation. And, as is made clear in other sections of this manual, there is no such thing as over-preparing for a capital trial. You need to remain flexible, you should never be committed to a script, and you should be prepared to change your strategy in response to mid-trial developments. But there is never any harm in writing out your cross-examination questions, your closing

argument, or your jury instructions. Once you have written a script for any phase of the trial, you can always throw the script away and speak from the heart. But if you have rehearsed sufficiently, you will not freeze.

The third pitfall, which is related to the second, is the adrenaline rush.

The excitement of any trial, but particularly a capital trial, naturally produces adrenaline. You feel more energized. The joy of combat, with its undertone of fear, changes your personality, for better and for worse. New ideas occur to you. You feel that you are making exciting new discoveries about the evidence as you hear it from the witness stand. You feel that you can read the jury like a book as they react to the evidence going in.

The danger of the adrenaline rush is that it also distorts your judgment. You think that you are thinking clearly. But often you are not.

The way to avoid the danger of the adrenaline rush, will reaping its benefits, is two-fold. First, good pretrial preparation will help you avoid making silly mistakes. Second, your trial partner or partners can provide a steadying influence, particularly if they are not so heavily involved in your particular phase of the trial.

The fourth pitfall, which is again related to the second and third, is the mid-trial delusion. This is a pitfall which applies only to the guilt-innocence phase.

No matter how bad the evidence, nearly every trial will feature prosecution errors, bad witnesses, or favorable surprises for the defense. And nearly every defense attorney will feel, at some point in the trial, that there is a real, even if slim, hope of victory.

There is nothing wrong with sharing in this delusion. There is nothing wrong with drinking the Kool Aid. Particularly if you are heavily involved in the guilt-innocence portion of the trial, it will energize you. It will make you fight harder and longer.

But in the back of your mind, particularly as you prepare for the life-death phase, you need to keep a little shrine of sanity, a little place for the possibility that the jury will convict. So that when the jury comes back with the guilty verdict, you can move on to your real job — saving your client's life.

And the last pitfall, of course, is the crushing blow of a death verdict.

Those of us who have had this awful experience can tell you what agony it is. And each of us must have our own way of dealing with it.

This is mine.

First, I never tell myself that I did my best and made no mistakes. Every death case, in my view, is potentially winnable. I, or someone on my team, made a mistake. I try to identify what the mistake was, so that I don't make it again.

Second, I think long and hard about preserving reversible error, and what, if any additional steps I must take to make a good record.

Third, I do my best to console myself, my teammates, my client, and my client's family.

And fourth, I look forward to the day, which I know will come, when neither my client nor anyone else will again be threatened with murder by the state, and when this chapter, and the system it describes, will be history.