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COMMENTARY ON COUNSEL'S
DUTY TO SEEK AND NEGOTIATE A
DISPOSITION IN CAPITAL CASES
(ABA GUIDELINE 10.9.1)

*Russell Stetler**

The size of today's 3525-prisoner death row¹ might have been greatly diminished if a simple warning sign had been posted in the mid-1970s:

WARNING:
CAPITAL TRIALS CAN BE HAZARDOUS
TO YOUR CLIENT'S HEALTH
AND MAY INVOLVE A GRAVE RISK OF DEATH.

The ABA's revised Guidelines have squarely addressed the importance of seeking and negotiating dispositions in capital cases as a core component of effective representation in matters of life and death.

Pleas have been available in the overwhelming majority of capital cases in the post-*Furman* era, including the cases of hundreds of prisoners who have been executed. There are no precise empirical data on this question. Plea negotiations are typically confidential, with both parties maintaining a posture of plausible denial if negotiations fail. The prosecutor may find it harder to argue to jurors that justice in a particular case requires a sentence of death if they know that he had offered the defendant a life sentence only weeks before. Defense counsel may not

* Russell Stetler has been director of investigation at the Capital Defender Office in New York since 1995. He began investigating capital cases in 1980 and served as chief investigator at the California Appellate Project from 1990 to 1995. Any unfootnoted factual assertions in this article are based upon personal knowledge acquired by the author during his extensive career as a capital defense investigator.

1. This figure is as of April 1, 2003. The Death Penalty Information Center maintains a list by year of the number of inmates on death row at <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#year> (last visited Aug. 22, 2003).

want to advertise her willingness to plead to first-degree murder if the case proceeds to trial and she is arguing to the jurors that the proof supports only second-degree. In addition, there are cases where a plea was acceptable to both sides, but negotiation never began because each side waited for the other to initiate discussions. ("There was never an offer," says the defense attorney. "She never came to me with anything," says the prosecutor.)

We do know empirically that approximately half of all death-penalty cases do not go to trial. In California, for example, where capital punishment was reinstated in 1977, 2,866 death penalty cases had been closed by the end of 1989—1355 (or 47 percent) without trial.² In New York, where capital punishment was reinstated in 1995, 41 death-noticed cases had been closed by the end of 2002—23 by means of pleas. Three death notices had been withdrawn and one defendant had died before trial, so plea dispositions were reached in 23 of 37 cases (62 percent), including two cases in which dispositions were reached *after* juries had returned first-degree verdicts in the first phases of capital trials.³ But these data merely establish how routine it is to resolve capital cases by negotiated dispositions. They do not begin to capture the cases that *could* have been so resolved.

There are four key players in resolving capital cases: victims' surviving family members, prosecutors, defendants, and capital defense counsel. The role of victims' survivors is unofficial in most capital jurisdictions. Most capital statutes do not invest these citizens with explicit influence over dispositions.⁴ But the need to heal their pain had become the principal rationale for capital punishment in the United States by the dawn of the twenty-first century.⁵ Support for a negotiated

2. Data compiled by the Office of the State Public Defender of California. See California Appellate Project, *Investigating Habeas Corpus Claims: Syllabus* (Summer 1994), at tab 7 (on file with author and Hofstra Law Review).

3. Data compiled by the New York Capital Defender Office and available on its website, www.nycdo.org. The cases resolved after first-degree murder convictions were in Kings County, *People v. Page* (Ind. 9833/96, Judge Hall) and *People v. Bonton* (Ind. 4152/98, Judge Lott). The Jermaine Page plea was reported by Joseph P. Fried, *Brooklyn Killer Takes Deal for Life in Prison*, N.Y. TIMES, Oct. 29, 1998, at B8. Jerry Bonton's plea was reported by Mike Claffey, *Killer Chooses Life over Death in Plea Agreement*, N.Y. DAILY NEWS, Apr. 12, 2000, at 3.

4. *But see* ALA. CODE §§ 15-23-61, 15-23-71 (2003) (requiring prosecution to notify and confer with victim's court-appointed representative prior to entering a plea agreement). Ordinarily, a victim's representative under § 15-23-61 would be a member or members of the victim's immediate family.

5. See FRANKLIN E. ZIMRING, *The Symbolic Transformation of American Capital Punishment, in THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 42, 51-63 (2003). Zimring characterizes this change of rationale as the "degovernmentalization" of execution in the United States from a state function for solely governmental purposes to a public service rendered for

disposition from the victims' family members provides an ideal cover for an unpopular prosecutorial decision. In the Matthew Shepard case in Wyoming, for example, Shepard's father gave his blessing to the decision to avoid a sentencing proceeding after Aaron McKinley was convicted of first-degree murder in a notorious gay-bashing hate crime. Dennis Shepard, Matthew's father, addressed the defendant as follows:

Matt became a symbol, some say a martyr, putting a boy-next-door face on hate crimes. . . . [Y]our agreement to life without parole has taken yourself out of the spotlight and out of the public eye.

Best of all, you won't be a symbol. No years of publicity, no chance of commutation, no nothing—just a miserable future and a more miserable end. It works for me.⁶

Prosecutors readily acknowledge that the opinion of the victim's family "will always be considered," even if it is not "dispositive" on the issue of settlement.⁷ Prosecutorial offices often have specialized staff or community volunteers to serve as liaisons to victims' family members. Capital defense counsel have learned from hard experience that they, too, need to understand the needs of the surviving family members, rather than assume that victims' families will automatically and uniformly desire execution.⁸ The spectrum of attitudes toward the death penalty is often mirrored within the extended families of homicide victims. The surviving families in notorious cases with large numbers of

the psychological benefit of those who have lost loved ones. *See id.* at 63. Professor Zimring traces the number of news stories that link the term "closure" to the subject of executions in a broad sample of U.S. print media from 1986 to 2001:

Prior to 1989, the term does not appear in death penalty stories in the United States. Its first and only mention in 1989 was followed by a year in which two stories use the term. By 1993, ten stories a year combine the topic "death penalty" and the word "closure," and thereafter the combination of "capital punishment" and "closure" grows almost geometrically to more than 500 stories in 2001.

Id. at 60.

6. Michael Janofsky, *Parents of Gay Obtain Mercy for His Killer*, N.Y. TIMES, Nov. 5, 1999, at A1 (excerpts from statement by father).

7. *See, e.g.*, Michael Bongiorno, *Section IV: What Moves Prosecutors*, in Virginia Capital Case Clearinghouse, Washington and Lee University School of Law, *Defending a Capital Case in Virginia XV: "Avoiding Death by Avoiding Trial,"* 114, 121 (CLE Syllabus April 4, 2003), (on file with author and Hofstra Law Review).

8. Homicide is blind to ideology and strikes among those on both sides of the death penalty debate. Indeed, blacks and whites are victims of homicide in roughly equal numbers, but support for capital punishment is lower among black than among white Americans. *See* U.S. Dep't of Justice, *Homicide Trends in the U.S.: Trends by Race*, at <http://www.ojp.usdoj.gov/bjs/homicide/race.htm> (last modified Nov. 21, 2002); Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1451 (1998).

victims have demonstrated this broad range of attitudes, as demonstrated by the emergence of powerful voices in support of reconciliation, such as Bud Welch, whose daughter perished in the Oklahoma City bombing.⁹

Even when there is a vocal family member advocating for execution, the rest of the family may feel differently. The degree of anger does not automatically correlate with a desire for capital vengeance. Thus, approaching the victim's family members must be part of counsel's efforts toward resolution.¹⁰ Counsel should not forget that they always have something to offer the victim's survivors, including finality, return of evidence, disclosure of information, remorse, dignity and understanding, punishment, protection, explanations of what happened and why, someone to talk to, and somewhere to vent their rage. Some victims' families have sought explicit apologies from defendants. Others have sought an opportunity for a face-to-face encounter with their loved one's killer as part of a negotiated disposition.¹¹

Other capital defense efforts must be directed toward persuading the prosecution that disposition is the prudent course. Prosecutors change their minds over time. Even if the prosecutor has made an early declaration that no plea is being offered, counsel should not accept that declaration as a permanent bar to settlement. Counsel needs to demonstrate first of all that the case will be litigated tirelessly. Pleas are often won by dint of sheer hard work. A creative motion practice requires more than boilerplate responses from prosecutors. Original

9. See ROBERT JAY LIFTON & GREG MITCHELL, *Murder Victims' Families*, in WHO OWNS DEATH? 197, 208-09 (1st ed. 2000). To learn about organizations that provide support and advocate reconciliation, see the web sites of Murder Victims Families for Reconciliation (www.mvfr.org) and Religious Organizing Against the Death Penalty (www.deathpenaltyreligious.org). Training in the concept of restorative justice is available at Eastern Mennonite University in Harrisonburg, Virginia, and the University of Minnesota School of Social Work.

10. See Russell Stetler, *Working with the Victim's Survivors in Death Penalty Cases*, THE CHAMPION, June 1999, available at <http://www.criminaljustice.org/public.nsf/championarticles/99jun06?opendocument>; see also ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.9.1, commentary n.249-51 and accompanying text (rev. ed. 2003) [hereinafter GUIDELINES].

11. See Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity That Has Come from Payne v. Tennessee*, 88 CORNELL L. REV. 517, 528-29 (2003). Burr cites the plea agreement in a highly publicized federal death penalty case, *United States v. Stayner*, in which the plea agreement incorporated provisions specifically addressing the needs of the victim's surviving family, including the desire that Stayner stop making public statements, that he be cut off from possible financial gain from film or literary rights to the story of the case and that, should they choose, they would have the opportunity to meet Stayner in the presence of a third-party facilitator. See *id.*

litigation raises novel issues and creates new risk of error. A plea can eliminate that risk. Aggressive defense investigation may expose proof problems and weaknesses in the state's case. In some jurisdictions, prosecutors seek defense input before making a final decision to seek the death penalty in eligible cases.¹² Early proffers about available mitigation evidence can create doubt about whether jurors will return a death sentence and can thus promote resolution even if the case is not decapitalized. Evidence of mental illness may favor resolution even if it does not constitute a legal defense to the crime, not only for its mitigating effect but also because the specter of competency could haunt the case at every procedural stage, including that of execution itself.¹³

Protracted litigation may lead to dispositions. There are numerous recent examples of resolution following conviction of first-degree murder,¹⁴ and an emerging tendency to resolve cases even during post-conviction proceedings.¹⁵

The client's attitude toward a plea is likely to change over time. Variants of Patrick Henry's "liberty or death" rhetoric (often

12. In New York, for example, prosecutors have 120 days from arraignment in the trial court to decide whether to seek capital punishment in first-degree murder cases and it is the norm to seek defense input in that period. See N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2002). The federal authorization procedure likewise provides for defense input locally and in Washington before a final decision is made to seek death. See U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-10.030 (input to local U.S. Attorney); *id.* § 9-10.050 (input to Washington), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrn.htm. Chicago-area prosecutor Joe Birkett recommended making this procedure the national norm in his capacity as president of the Association of Government Attorneys in Capital Litigation. See Lisa Olsen, *I Killer, 2 Standards*, SEATTLE POST-INTELLIGENCER, Aug. 7, 2001, at A1. Birkett and other experts recommend that prosecutors "eliminate knee-jerk decisions" and spot problems early to save time and money on appeals years later. *Id.* "Before deciding whether to seek the death penalty, prosecutors should require defense attorneys to submit mitigation packets—information on a defendant's mental state and upbringing that could evoke sympathy at trial." *Id.*

13. In the Unabomber case, a plea was accepted post-jury selection after the government's examination found Ted Kaczynski competent to stand trial but suffering from major mental illness. See William Glaberson, *The Unabomber Case: The Overview; Kaczynski Avoids a Death Sentence with Guilty Plea*, N.Y. TIMES, Jan. 23, 1998, at A1.

14. Examples include two cases in Brooklyn, New York—*People v. Page* (Ind. 9833/96, Judge Hall) and *People v. Bonton* (Ind. 4152/98, Judge Lott), *supra* note 3—as well as the Aaron McKinney case in Wyoming, *supra* text accompanying note 6, and the kidnap-murder case of Jimmy Jones in Pitt County, North Carolina. See CAPITAL UPDATE (Center for Death Penalty Litigation, Durham, N.C.), Apr. 2002, at 9.

15. Post-conviction resolution includes both cases which are resolved by plea after habeas relief has been granted and others which have been disposed of during the pendency of habeas proceedings. E.g., James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, apps. C & D (June 12, 2000), available at <http://www2.law.columbia.edu/instructionalservices/liebman/>; see also GUIDELINES, *supra* note 10, at Guideline 10.9.1, text accompanying note 243.

paraphrased as “free me or fry me”) are normal for capital defendants at some stage of the litigation. Such speeches are no excuse for counsel to give up the hope of settlement. Denial and despair need not be permanent. Counsel should also take care not to broach the subject of plea prematurely. Waiver of constitutional rights and other legal remedies (such as the right to appeal or to seek parole or commutation of sentence), acceptance of responsibility and agreement to a life sentence involve the gravest decisions a client could ever be asked to make, and the discussion can only commence when counsel has established a relationship of trust. The barriers to trust between capital clients and counsel typically include race, class, age, gender, nationality, religion, social values, sexual orientation, political views, etc.¹⁶ Overcoming these barriers takes patience above all else.

In his article on plea bargains, *Heart of the Deal*, Kevin M. Doyle includes a section headed *Take Off Your Watch*, which explains the patience required of a capital defense attorney:

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.¹⁷

Steven Zeidman has referred to this patient process as “client-centered counseling,” noting that there is a counseling continuum from neutrality

16. When confronted with statistical discrepancies suggesting that pleas were more available to white defendants than black in federal capital prosecutions, Attorney General Ashcroft's Justice Department argued that “[i]t takes two to make a plea agreement.” U.S. Dep't of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis, and Revised Protocols for Capital Case Review*, June 6, 2001, Part III.B, available at <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>. As noted at the outset of this commentary, in my view dispositions involve not just two players, prosecutors and clients, but victim's family members and capital defense counsel as well. Often, three of the four parties are white, while the client is more often than not a person of color. Diversity in the capital defense team is desirable for a variety of reasons, but it is essential to facilitate communication about plea decisions.

17. Kevin M. Doyle, *Heart of the Deal: Ten Suggestions for Plea Bargaining*, THE CHAMPION, Nov. 1999 at § 9, available at <http://www.criminaljustice.org/public/nsf/championarticles/99nov08?opendocument>.

at one end to vigorous urging at the other.¹⁸ Professor Zeidman urges attorneys to offer their opinions about the advisability of pleas and to attempt to persuade clients to accept their recommendations, especially in view of “the prevalence of mental illness, drug and alcohol use and addiction, and other factors” which may impair clients’ abilities “to make a decision of this magnitude without the guidance and input of counsel.”¹⁹

Winning trust by working the case means more than filing motions. Investigation resonates in the client’s world. His friends on the street know that his defense team is out there, whether it is checking out alibis or canvassing the crime scene. Pursuing the client’s leads and suggestions may prove futile, but it builds credibility nonetheless. Life-history investigation not only unearths mitigation evidence but also identifies the support system that may motivate a client to want to live, even behind bars. This investigation also provides counsel with insight into any mental disorders that may affect the relationship with the legal team and the client’s ability to come to terms with his case realistically. Clients often judge counsel by whether they keep small promises—to call a family member, bring a copy of a motion, or visit again on a certain date.²⁰ Counsel should be mindful about keeping their word on the smallest details.

Building a relationship of trust helps counsel to understand what matters to the client—his hopes and fears. Many clients want dignity for themselves and their loved ones. Many fear prison violence (especially sexual violence) and most fear isolation and abandonment. Counsel should address the fears directly, with accurate information about prison life on and off death row. Counsel should also use the mitigation investigation to identify the long-term support that can sustain a life-sentenced prisoner, the friends and family members who will be there long into the future. These individuals can be positive influences during plea discussions. Many capital defenders have come to recognize that most of the influences outside the defense team and its identified allies are toxic. Clients are typically exposed to nothing but bad advice in their jail settings. Other inmates (including “jailhouse lawyers”) and staff

18. See, e.g., Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998). Professor Zeidman also elaborates on the implications of *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996), which held that counsel’s opinion as to the desirability of accepting or rejecting a proffered plea comprises constitutionally required advice. See *id.* at 882-94.

19. *Id.* at 909.

20. See GUIDELINES, *supra* note 10, at Guideline 10.5, commentary n.180-82 and accompanying text.

often encourage them with false hopes and misleading comparisons to other cases. Clients need to be reminded that the other prisoners and correctional officers are not privy to the evidence in the case when they offer cavalier advice to roll the dice at trial.

Clients need a reality check about the evidence in their case and the serious risk of execution. They need to understand that the desire for life grows over time. Letters from older prisoners can sometimes help to explain this process. Clients need to know about the whole trial process and how it is weighted against them (especially the proneness of death-qualified jurors towards conviction). Clients need to understand how post-conviction safety nets have been removed and how rarely clemency powers are exercised. As Kevin Doyle has noted, counsel “is obliged to insist that his client make a decision that is informed and mature rather than blind, impulsive or stubborn.”²¹

Discussions of plea negotiations often neglect to mention how counsel themselves can be an obstacle to resolution. As the number of post-*Furman* executions approaches a thousand, counsel need to remind themselves that executions are real. Death-qualified juries return death sentences—often arbitrarily, often subject to momentary passions and abiding prejudices. It is self-deception to look at a death-authorized case and pretend that “it’s not a death case.” Congress and the courts have removed many of the safety nets. Capital trials involve a grave risk of death.

Nonetheless, every case is potentially negotiable at some point in time. No case is automatically destined for death, but every death-noticed case runs a grave risk of reaching a penalty phase and returning a death sentence. One of the great capital litigators from Illinois, Andrea Lyon, always reminds capital counsel facing a sentencing jury that “you can’t sell what you wouldn’t buy.”²² That maxim is equally true in the context of plea discussions. Counsel will not persuade anyone else—prosecutor, client, or victim’s family members—that a plea is appropriate unless sincerely convinced in her own heart.²³

Risk aversion is not enough to reach the conclusion that a plea is appropriate. Counsel must confront the evidence of guilt directly, thoroughly and critically. Independent investigation must test this

21. Doyle, *supra* note 17, § 4 (“Do Not Take a Client’s Uninformed ‘No’ for an Answer”).

22. Andrea Lyon, Keynote address at the Eighth Annual Federal Habeas Corpus Seminar (Aug. 21, 2003).

23. Cf. GUIDELINES, *supra* note 10, at Guideline 10.5, commentary n.183-85 and accompanying text (discussing the importance to effective capital defense advocacy of knowing the client well).

evidence, regardless of what the client has admitted or denied in confidence. Counsel must be able to tell the client her independent evaluation of how the evidence will come in. A client must never suspect that counsel is recommending a plea because he has told counsel he is guilty in the sacred trust of attorney-client confidences. Clients need to see the hard work, the meticulous investigation and the courage to advocate zealously in pretrial proceedings.

The defense team must speak with one voice. The client will often want to hear from all the team members before making a momentous decision about a plea. He may have greater trust in a nonlawyer who has had better success in building rapport and trust and overcoming divisive barriers. It is crucial that there be no mixed messages or inconsistent signals within the team. Sometimes it is helpful to go outside the team to enlist additional allies—a colleague who has lost a client, perhaps even witnessed an execution, or a member of the client's family or community who will be supportive over the long haul.

The revised ABA Guidelines place proper emphasis on the need to take every possible step towards resolving capital cases for a sentence less than death, once counsel has independently evaluated the evidence supporting conviction. The capital defense bar, in turn, should honor the practitioners who excel in this highly specialized art. There is no glory and little personal satisfaction in standing beside a client who is allocuting to a guilty plea that will send him to prison for the rest of his days. It is important to honor the brilliant lawyering, tenacity, dedicated teamwork and humble honesty that win these resolutions in seemingly hopeless cases. One of the finest capital defense litigators of this generation was congratulated on winning a life sentence at a penalty proceeding, but he responded with great modesty that he had failed at his effort to resolve the case by means of a plea. The ABA has wisely given that perspective the recognition it deserves.

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