

Defending the Life-or-Death Case

by **Andrea D. Lyon**

More than 13 years ago, I wrote an article about defending a death penalty case. “Defending the Death Penalty Case: What Makes Death Different?” 42 *Mercer L. Rev.* (Winter 1991). The article was part description, part exhortation to my brother and sister defense counsel to work hard for their clients.

Then, late in 2004, the U.S. Supreme Court relied in part on that same article to deny relief to a death row inmate whose defense attorney had conceded his guilt at trial without his permission. *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551, 562 (2004). In many ways, this is emblematic of what it means to represent someone charged with a capital crime—things get turned upside down.

A capital defender represents someone who is unpopular (to say the least), charged with something awful (about which no one presumes innocence), in front of a judge who often is painfully aware of the visibility of the case (and therefore sensitive to his or her resultant political vulnerability.) On top of all this, you present the case to a jury from which your opponent successfully has had stricken for cause everyone who opposes the death penalty, and has stricken preemptorily everyone who has trouble with the concept. As of 1992, the defense gained the right to exclude for cause anyone who would always give the death penalty, but studies tell us that those jurors are much harder to unmask.

So how do you start to combat those problems, and what do you do? There are various categories of work that a capital defender must perform: organize, investigate, and prepare to try the case.

A death penalty case is really two trials. First, it’s a trial on the merits (Did your client commit the crime; if so, was it first degree murder; and if it was first degree murder, is it death-

eligible?). In some jurisdictions, the question of eligibility for the death penalty is answered at the trial on the merits. This means that in order for the prosecution to even ask for death, it must prove a first-degree murder as well as an aggravating factor that takes the case into the (theoretically) small group of cases where the death penalty can even be sought. Common aggravating factors are the first-degree murder of a police officer acting in the line of duty, or the first-degree murder of a woman during a rape.

Second, assuming the prosecution can establish both guilt and eligibility beyond a reasonable doubt, the jury then decides whether death is the appropriate choice of punishment. At this part of the trial, the prosecution may present aggravating evidence, some of which is prescribed by statute and some of which is not. Examples might include prior criminal record or other violent acts that were not charged or that did not result in a conviction, and victim impact evidence. Mitigation—reasons to punish with imprisonment rather than death—is any evidence that might tend to explain the client’s actions, family history, mental health issues, physical health matters, or the impact the client’s execution would have on his or her loved ones. The rules of evidence are relaxed at a penalty phase; in most states, this means that anything “relevant and reliable” is admissible. A capital defender thus faces the daunting tasks of investigating and preparing to meet the evidence against the client in the trial, as well as investigating and preparing to meet the aggravating evidence at a penalty phase, in addition to locating and presenting mitigating evidence—much of which is a matter of shame to the client and his family.

You may be thinking of taking on a case yourself on a pro bono basis. Or you may never try a case like this but simply want to know more about what it’s like. Or perhaps you think you might gain a tip or two for other sorts of litigation. Whatever the reason for your interest, I will try to share with

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you what it is possible to put into words. Trying a death case, however, is a bit like trying to describe childbirth—it's not that people don't believe you but that words simply cannot replicate the feelings—in this case, of being the person standing between someone and his death at the hands of the state.

In other litigation contexts, “shooting from the hip” might work occasionally. Our charm, intelligence, and good looks just might pull off a victory every now and then—although I would never advise this plan, even in the simplest of cases. Such a strategy in a capital case is, quite literally, deadly. Handling the inevitable unanticipated twists and turns of a capital case requires that you prepare everything you can in advance, keep track of what you have done, and think ahead to what needs to be done.

When you get a death penalty case, you should literally open two files: (1) one about the client's life and (2) one about the capital case. You have to start preparing to fight for your client's life right away, which means you have to do what we all hate to do: assume that we will lose and that the case will be a battle about the choice of punishment the jury will make.

The defense of a person's life cannot be undertaken alone.

Once you have done this, you must organize your file. There are many ways to do this, and rather than bore you with a recitation, let me give you two organizational tools.

One is a time line of your clients' life, starting literally from birth to the present time. The other is a witness index, which forces you to truly master the file and makes it accessible during trial. What I usually do is to paginate the discovery, such as putting the police reports in chronological order. You also will want to note every piece of paper that refers to, is authored by, or testified to by a witness. For example, you might have a heading as follows: *Witness Index, People v. _____, Case No. _____*. Make four columns going across the page and label them *Name of Witness, Type of Witness, Location in Police Reports, Transcripts and Other Locations*.

In order to make the most effective use of this index, alphabetize it by last name. The more complex the case, the more witnesses there are. The names of the authors of all reports must be indexed, as well as names of those who were interviewed—you may need to prove up an impeaching statement, and you need to be able to figure out *fast* who can do that for you. Alphabetizing is crucial when you have a big case with hundreds of witnesses. You cannot anticipate every single witness who might be called, especially if the prosecution is putting on fluff.

For example, if you have prepared your cross-examination outline for Officer Roberts, the first officer on the scene, and then you hear the prosecution call Officer Smith as its initial witness, you can go to your index and find out that Smith was the second officer on the scene. Roberts is likely on furlough, so you can simply transfer your scene-setting questions to Smith. If you don't have the index, you will spend all of Smith's direct examination madly paging through police reports to find out who he is and what he said before.

You also need to spend the time necessary to organize your team. One thing that is certain, the defense of a person's life cannot be undertaken alone. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) (Guidelines) prescribe standards for the composition of the defense team in capital cases. Guideline 4.1 states:

Guideline 4.1—The Defense Team and Supporting Services

A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.
2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

1. Counsel should have the right to have such services provided by persons independent of the government.
2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

These guidelines are available at: www.abanet.org/deathpenalty/DPGuidelines42003.pdf.

The commentary to the guideline brilliantly explains the need for all of these requirements, the most important of which is a diverse team and teamwork. By “diverse” I mean in terms of both training and life experience. While it is foolish to ignore the effects of race, class, and culture on your client, it is equally foolish to ignore their effects on you. And to adequately prepare for the case, you need to have regular team meetings, put yourself and your team on a schedule, and make time to brainstorm the case.

Investigation of the underlying charge is your starting point for learning the facts. The Guidelines 10.7A and A.1 state:

Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

In an ideal world, this would be not only a laudatory goal but also possible to do with adequate resources. Perhaps one day it will be, but in the meantime, as a capital defense attorney, you

have a great deal of work to do and some decisions to make.

It is almost impossible to interview every witness who might have information about a case, so choices have to be made. The easiest and most logical place to start is to make an index of every person you would like to interview and prioritize the list. I prefer to list the evidence in the order from the best to the worst for the prosecution. If I cannot investigate everything, I skip the stuff in the middle and investigate both ends of the continuum.

Organize the investigation in much the same way as the rest of the file. I am a great believer in lists or indexes as a way of keeping up with the facts of the case, and I often use what I call an “investigation index” just to help me keep track. Across the page, I have columns for *Name of Witness*, *Address/Phone*, *Type of Witness*, *Dates of Contact & with Whom*, and *Comments*.

If you use an index like this (or something like it of your own devising), you have to be sure to write down when you saw the witness, or tried to, and who was with you. This may become important later when you need to call a “prover” (the person you brought with you to hear what the witness had to say—just in case) if a witness changes his or her story or you are accused of intimidating witnesses by showing up to interview them.

The Comments section is based on the assumption that you probably have a lot of cases and simply cannot remember everything about them, let alone what the witnesses were like for each. This is particularly true if you go to interview a witness who then refuses to speak to you—which he has an absolute right to do. Nonetheless, you have seen him, maybe even formed an impression of him; but before he asked you to leave he said nothing substantive, thus not necessitating an investigation memo to the file. Don’t you want to hold on to that impression? If she greets you in a slovenly, purple dress, if he looks high (and like he’s been high for some time), don’t you want to remember that later when this case is ready for trial? That’s what the Comments section is for—your impressions jotted down can be useful in devising your cross-examination.

Next comes the investigation of the client’s life. This aspect of the investigation has two basic goals: (1) to provide evidence consistent with any theory you develop concerning your client’s lack of or lesser degree of culpability; and (2) to provide the sentencer a full, reliable, and accurate understanding of your client. The investigation should begin with an interview of your client, but it should never end there. Often clients have problems that prevent them from giving you the kind of history you need. It is important to explore your client’s life with people who knew him before and since the crime, and to dig up all the written reports and other documents you can find about him.

When you interview your client, bring with you releases for the records that you will want to gather. Be aware that many states have rigid requirements before records, especially medical records, can be released. Be sure to check the statute so that you include any mandatory language in the release. Assure your client that, unless and until there is a decision to use the records in evidence at some point in the future, they will remain confidential.

Lawyers are used to conducting narrow and focused interviews. When the goal of the interview is to probe someone’s most private world, this technique is counterproductive. You

need to frame your questions in a non-leading, open-ended way to elicit answers with true range and emotional content. You will learn more about your client if you ask “What was your relationship with your father like?” than if you ask “Did your father ever beat or molest you?” Obviously, follow-up questions can be more narrow. Suspend judgment to allow your client to feel free to tell you the most awful truth about his life. But do not expect your client to tell you what your theory of the case and/or mitigation ought to be. It is very unlikely that he will have great insight (or any insight at all) into his own behavior.

It can be difficult to maintain a balance between respecting your client’s privacy and obtaining the information that will give you the insight into your client’s life. Your job is to create an environment where the client will choose to share the information you need to defend his case and to save his life. You do that by being trustworthy and nonjudgmental. Give him tasks to do: preparing his life history and identifying issues for you. Whether you need to be stern or understanding or some combination of the two will depend on the client. Remember: You may ask him questions that no one ever asked before. He may never have had to think about certain aspects of his life and how they came to affect his later behavior. For some clients, the experience may be revelatory the way that therapy can be. Go slowly. Let your client absorb things slowly, and watch for emotional overload.

You must also interview the client’s family and household. This has several purposes: (1) to get information concerning the facts of your client’s life; (2) to give you the opportunity to make your own assessment of your client’s family life; (3) to get information that may assist you in supporting a mental health professional’s findings; (4) to get information concerning the official investigation of the crime and the conduct of the case by the police; and (5) to involve the family in the case.

Family members’ involvement can be key for the following reasons:

- At a sentencing hearing, they make good witnesses.
- Their presence during trial creates an atmosphere in which it is easier to save your client’s life.
- Family support can help make your client more self-assured and a better witness if he needs to take the stand.
- Family support can prevent your client from engaging in self-destructive behavior (e.g., acting out violently in prison or court).

Before you interview your client’s family members, be sure to have in mind some of the different possible reactions they may have. They may mistrust you as a result of prior experiences with lawyers they believe did not do a good job. They may be people who see lawyers as awesome, intimidating authority figures. They may be overly protective of your client. They may be ashamed of your client’s behavior or feel deeply betrayed by him. They may seem indifferent to the whole affair. They may be suppressing their feelings about your client and his criminal behavior, or they may be totally immersed in them. They may be sophisticated enough to understand exactly why you are asking these questions, or they may have no idea why you are interviewing them. Begin to establish a relationship with members of your client’s family that will enable them to confide in you. Explain that what they ordinarily would consider negative information about your client may help him in these circumstances. You may need the assistance of others skilled in interviewing or coun-

seling to help break through barriers that may be caused by the situation itself or may have their origins in class, race, and ethnic differences.

Keep in mind your possible reactions to the family. You may be sensitive about intruding on their privacy. You may have a strong need to believe people or think the best of them. You may be angry at them because of something your client told you. They may trigger a reaction in you that relates more to your own family and upbringing than to what your client may have experienced. You cannot escape your own mind and emotions, but you can try to know enough about them to maintain some objectivity in assessing the people you meet.

No matter what the circumstances, certain suggestions apply generally to the conduct of your interviews. Hold them at each family member's home, so each will feel more com-

Photographs may give important clues about family alliances.

fortable and you can observe how the family lives. Explain exactly who you are, how you came to be your client's attorney, and why you are there. Explain the legal process sufficiently so that each will understand that your asking "character" questions doesn't mean you have given up on the trial—quite the opposite; these facts might help to develop a defense for trial as well as sentencing.

Carefully explore the question of abuse and intra-family violence through individual interviews—even if your client denies any history of abuse or violence. If your client denies such a history, question the accuracy of his denial with nearly every family member. If your client admits a history of family violence, plan the interviews to confirm the accuracy of your client's account, to provide greater detail about the incidents and their character, and to determine the effects on intra-family relationships. All family members, including the abuser(s), should be interviewed. Obviously, the interviews need to be carefully planned and ordered, with the suspected abuser generally being the last interviewee. Siblings, especially those who have undergone psychotherapy or are now distanced proximately or emotionally from the family, frequently are the most likely to open up. A close second is a more distant relative (e.g., an aunt, uncle, or cousin) who was near enough to know the inner workings of the family but has sufficient distance from the immediate family to be able to disclose it. Close, longtime friends of the family, or neighbors, may also be a good source of information but are less likely to have actually observed any incidents of violence or abuse.

Review with the members of your client's household some of the same questions that you've gone over in your interviews with your client. You want to know whether your client's recollections are similar to the others'. If they are not, try to understand why there is a discrepancy (difference in memory or difference in perception, for example), and figure out what

is the truth.

In individual interviews, also ask what the family member's relationship was and is like with your client. How much time did they have together? During what periods of your client's life? How did they relate? Do they visit or write now? Why or why not? What was their relationship like at the time of your client's arrest and before the trial? What did he or she think when told of your client's arrest?

There also is one set of questions about your client's life that he cannot answer for you: those that deal with his early life, which he cannot recall. Look at the pictures of family members that are displayed in each home. Ask to see pictures of your client if none are readily visible. Photographs may give you important clues about affections and alliances that are not openly discussed by the family.

A word here about family support: The presence of your client's family is very important to your ability to win the death penalty hearing. Try to enlist their support and aid early in the process, and make it as easy as possible for the family to come to court, visit your client, and talk with you.

Making the Record

Preparing your case is a separate activity from investigating it. Motion practice is a large part of that preparation. A major reason for filing and litigating motions is to win them, of course. You hope that the confession will not come in, that the eyewitness will not be allowed to point the finger at your client, that the hearsay about your client won't be admitted at trial, or that the judge agrees that this should not be a death case. And sometimes we actually win these motions. But often we do not, and it becomes discouraging to continue to file and litigate them, particularly in an unfriendly forum or in spite of a large caseload.

Nonetheless, file any motion for which there is a good faith basis. It is the right thing to do for your client, it just might work, and, very importantly, it may lay the groundwork for a successful appeal. If you do not object to improper evidence or trial conduct, it will almost certainly be waived for appellate purposes. Worse yet, if you don't object in the right way, you almost certainly will have insulated the error from federal review.

This is especially true in a capital case because there is no way to anticipate what motion or objection, thus far deemed a "loser" by the courts, may ultimately become a winner. For example, for many years, lawyers representing capital defendants filed motions asking for the right to "reverse *Witherspoon*" capital juries. These lawyers figured that, if under *Witherspoon v. United States*, 391 U.S. 510 (1968), the prosecution had the right to identify and strike for cause all potential jurors who would be unable to impose the death penalty under any circumstances, lawyers for the defense should be able to identify and strike those who would never consider anything else. Courts denied these motions time and again in Illinois, and the denials routinely were affirmed by the Illinois Supreme Court. Then, the U.S. Supreme Court decided *Morgan v. Illinois*, 504 U.S. 719 (1992), and agreed with the "reverse *Witherspoon*" advocates. If the trial lawyers representing Derrick Morgan had not made their record—had not been willing to hear the word "denied" one more time—this right would not exist.

Pay attention to making the record as you are trying the case. You need to make your objections, of course, but you also need to be careful not to "unmake" them by appearing to

accede to the judge's ruling. For example, if you object to a photograph's introduction into evidence and the objection is overruled, don't say, "Okay, Your Honor." Instead, try to say something innocuous such as, "I understand your ruling"—but be careful. Increasingly, state courts are following the federal lead and avoiding issues by finding waivers whenever they can. Also, you must make those objections with appropriate reference to the federal Constitution.

Why is this federalizing important? After all, you are the trial lawyer, and the writ of habeas corpus seems to most trial attorneys some arcane thing that "federal" attorneys do to fix what went wrong in state court that resulted in imprisonment or a death sentence for their client. It seems far removed and relatively unimportant in the preparation of a case for trial. Trial lawyers, particularly defense attorneys, certainly understand how important it is to preserve the record, to object, and to state both the state and federal grounds for the objection. But what is not immediately apparent is how, working backward, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) has altered and intensified not only the need to preserve the record but also the *manner* in which it must be done. In fact, the AEDPA can be seen as providing the support and justification for expanded motions practice, evidentiary hearings, and discovery.

Before the AEDPA, it certainly could be argued that a conscientious defense attorney should file and litigate only those motions that she had, at the least, more than a suspicion or a hunch were necessary. For instance, she would not file a motion to dismiss the charges based on allegations of prosecutorial misconduct unless she had very solid evidence of that misconduct and the conduct was sufficiently egregious to warrant such a motion. Indeed, even if it *were* that egregious, she might decide not to file it, because of trial strategy or because she thought the motion unlikely to succeed. She could do so, secure in the knowledge that should more evidence come to light later on, and she could not reasonably have located it through the exercise of due diligence, she could mount a challenge in a federal habeas corpus proceeding. That simply is no longer the case, unless the prosecutorial misconduct is of such a nature that the lawyer could show not only prejudice to the court (a difficult enough endeavor) but innocence of the crime itself.

If the defense attorney has any reason at all to file such a motion, she must do so. The price of silence is that the issue almost never can be brought to the attention of the federal court unless it is accompanied by proof of actual innocence. This certainly increases the burden on the defense. To fail to object, file a motion, or elicit a fact from a witness may indeed later prove literally fatal to your client's ability to even talk about the issue to a federal court. It is a daunting and frightening prospect.

Also on your to-do list in a capital case is to decide whether your client needs to go to trial at all. The importance of negotiation cannot be stressed enough. If it is possible to settle your case with a plea for life or a term of years, you should work to do that. Many factors play into the ability to negotiate: strength of the prosecution's murder case, strength of the aggravation case, whether it is an election year (is the judge going to worry about how he looks to the electorate?), whether you are an opponent the prosecution respects, and a host of other issues. But as Guideline 10.91 states, it is your duty to seek an "agreed upon disposition" of the case.

Failing successful plea negotiations, you must be fully prepared for trial. The major difference between trial preparation in capital and noncapital settings is that your theory of the case in a capital case must work with your theory of mitigation.

Some theories of the case flow obviously into the life phase of the trial. For example, if your defense is insanity, the mitigation presentation will likely be an extension of the defense at trial. If your client is convicted of felony murder—say, in the course of an armed robbery where the victim went for the gun—part of your mitigation likely will focus on the unintentional nature of the crime, i.e., it is felony murder even if the deceased died of a heart attack during an armed robbery, but it is not the cold-blooded "worst of the worst" case we think of as deserving of the death penalty. If you are presenting a vigorous "wrong guy" defense, you must face up to the fact that the jury disagreed with you, then present your mitigation out of respect for the awesome challenge facing the jury—choosing punishment. If there is a conflict in your theories, you have to acknowledge it and be honest with the jury. You cannot say that this is the wrong guy and now he is sorry, but you *can* say that he is the wrong guy in our estimation, but you disagreed with us, members of the jury, and we will now tell you his story to help you with this next decision.

The Supreme Court quoted my previous article when it denied relief to the capital defendant whose lawyer conceded his guilt at trial. The excerpt the Court selected:

Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course.

I also wrote that "[i]t is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney." See Lyon, "Defending the Death Penalty Case: What Makes Death Different?," 42 *Mercer L. Rev.* 695, 708 (1991), quoted in *Florida v. Nixon*, 543 U.S. 175 (2004). I want to be clear that what I mean by that statement is not that you should concede guilt but rather that you must honestly confront the fact the jury rejected the defense at trial and then present mitigation that tells the jury who your client is and why his life is valuable.

The point is not that you should never put on a defense based on the theory that the police got the wrong guy, but think these things through before you start trial; even if you have an innocent client, the odds are you will be facing a penalty phase. Be prepared to try your case with that in mind.

As you begin trial, keep in mind that jury selection in a capital case is far more complicated and difficult than in an ordinary case. For one thing, it is clear that the "process effect" of asking jurors about the death penalty before they have decided the question of guilt or innocence predisposes jurors to believe that the outcome of the trial is a foregone conclusion.

As I mentioned earlier, under *Witherspoon v. Illinois* the state has the right to ask the trial court to exclude, for cause, anyone who could not consider giving the death penalty. Subsequent U.S. Supreme Court decisions modified *Witherspoon* and held that only those jurors whose views on the death penalty could "prevent or substantially impair" their

ability to perform their duties as jurors could be stricken for cause. Although this somewhat relaxed the rigors of inquiry on one side of the question, in the long run it complicated matters, because “death-qualification” became a three-dimensional phenomenon for the interrogator.

First, jurors who are “substantially impaired” by virtue of anti-capital punishment views must be identified. Second, jurors who are “substantially impaired” by virtue of *pro*-capital punishment views must be identified. Third, venire members must be identified who are “substantially impaired” in considering lawful mitigating evidence. Inquiry into a prospective juror’s thoughts and feelings about the death penalty is a far more complex process than simply finding out whether a juror is “for” or “against” capital punishment. It is imperative to discover whether the juror generally is favorable to or against the concept, whether the juror can listen to both aggravating and mitigating evidence, and whether that potential juror can actually consider each.

Since studies consistently show that you are far more likely to get good information from jurors if you ask yourself whether it is important to request attorney participation in voir dire in every single case. (I recommend that you read Dr. Sunwolf’s excellent book *Practical Jury Dynamics*, published by Lexis/Nexis. It is a highly useful primer on jury selection that weaves the lessons learned from these studies into practical guidance.)

Figure out the areas of potential bias in your case, and make sure that you cover them in voir dire. It is preferable to ask questions yourself, but you also should request a jury questionnaire. Many prospective jurors will give information to you in writing that they would be very hesitant to disclose in open court. The questionnaire also will help you to hone your questions to the areas most relevant to your case. Although many state courts are not accustomed to questionnaires, if you offer to solve the logistical problems for the court (for example, you will mail out the questionnaires and get them copied and distributed or, if the court prefers, have the questionnaires handed to the venire and filled out in court, after which you will copy and distribute them), a court may let you use them, particularly since a good questionnaire can be a real time-saving device. Getting the right people to listen to your case is very important and deserves as much of your attention and preparation as any other part of the case.

The final nuts and bolts in a capital trial comes in the life phase. Mitigation is anything that might persuade a jury to punish with less than the death penalty. In essence, the defense attorney should bring the following three types of evidence to the jury’s attention:

1. showing the jury the good things the client has done throughout his life;
2. explaining how the client became the person he is now, i.e., why he has been violent. This is usually shown through evidence of abuse, psychiatric conditions, addictions, or other family and developmental problems; and
3. convincing the jury that the defendant’s life has value for himself and others.

These are the facts that your investigation of the client’s life helped you to find.

Your mitigation argument should include witnesses and exhibits that tell the story of your client’s life, and should answer the two main questions a death-qualified jury faces: Why did this person turn out this way, and can we feel safe if

he is imprisoned rather than killed? If the focus of the life phase is on asking the jury to balance the crime and the client, you will almost certainly lose. It is very important to change the focus and language of the life phase from a comparison of the victim’s and your client’s suffering to a question of choice of punishment. After all, that is what the jurors are doing—once they found your client guilty, they ensured that he was going to be punished, and punished severely. Your job now is to convince those jurors to give him a punishment other than death. You want to figure out how to tell your client’s story in the most effective way you can.

At every step, always remember that a capital case is all about emotions. People vote first with their hearts, livers, or stomachs (whatever part of the anatomy they identify with), and second with their heads. This does not mean that logic and proof have nothing to do with the case. Rather, it means that as a capital defender, you must understand in a visceral way that part of your job is to recognize and prepare for the emotional reactions of the jury, judge, and prosecutors to the case. You cannot ignore emotions; they will not go away. Part of your time must be spent in developing a relationship with your client, his or her family, and, if possible, with the family of the victim. You will be surprised how receptive a victim’s family members may be if you approach them with respect and some sensibility to their loss, either through an intermediary such as a clergyman or by yourself.

I cannot emphasize enough the importance of your relationship with your client. If he or she does not trust you, you will operate in ignorance of facts (good and bad) that you need in order to do well. Many lawyers feel that this is undue “hand holding” of the client and is “not my job.” This is literally true—you are not your client’s family member, priest, or therapist. But in a very real sense you are some part of all three. You are the person to whom your client looks for meaning and understanding of the “system,” for guidance on his behavior in court, for your expert assessment of the case, and for the strategy you both should take. It is not possible to win if your client doesn’t want to win—your client has to want to live. It is possible to convince a jury of the value of your client’s life only if you both believe it has value. Establishing a relationship with your client is not some unnecessary form of hand holding or pseudo-therapy—it is a necessity. It is not only the moral or right thing to do—it is the practical thing to do.

Finally, trying a capital case requires a real commitment from you. It requires not only a substantial devotion of your time and your talent, which is significant enough, but also your heartfelt belief in the value of your client’s life. A jury knows if you are insincere or if this is just a job to you. In most death penalty cases, it is the defense that means the difference between life and death. If you prepare well, work with a talented and diverse team, and the case matters to you, you *can* save your client’s life. □