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Compassion and the Criminal Defense Attorney

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By Steven R. Morrison

Introduction

In the comfort of my firm’s conference room, I am listening to my client tell the story of his crime. Federal agents seized his computer, and when they analyze its contents they will find hundreds of images and videos of children of all ages engaging in sex acts with other children and adults. In addition to the images, my client would chat with others online, pretending to be a mother who liked to have sex with her two daughters.

My client will most likely be going to prison, where he will be considered among the inmates as the lowest of the low. Society will have condemned him as so inhuman as to warrant his literal and figurative expulsion from the community. When my client is released from prison, he will be forced to register as a sex offender. He will be branded with a 21st-century scarlet letter and as a result refused reentry into the society that ostracized him. Many criminal defense attorneys would have refused to take his case. Where once he was a complex human being, he has been reduced to the worst sort of criminal.

My client is telling me the facts: how many images and videos there are, what is depicted, when he started collecting them, and how. I transcribe these facts and listen for more. Through subtle cues such as avoidance of eye contact and nervous pauses in speech, I realize that he doesn’t yet trust me. He desperately wants help. He is filled with remorse over his actions and utter disgust at himself. He is surprised at his ability to

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1 Steven R. Morrison is a criminal defense attorney with the Boston law firm of Carney & Bassil.
come so low. In the comfort of my firm’s conference room, I hear his fear that such comfort in his own life will soon end, if it hasn’t begun to already. And he knows it’s all his fault.

Before our meeting, I was concerned that I would despise my client as he despises himself. At best, my work for him would be an act of will; at worst, I would fail in my duty to adequately and zealously represent him. To my surprise, during our meeting I came to like my client and to see him as a good person. Simply, he had made a mistake, admitted it, and now wants to make things right. Most importantly, he takes responsibility for his actions and is humbled in the face of an impending punishment he believes he deserves. As he was leaving, I shook his hand and, with complete honesty, told him, “I’m glad to have gotten to know you better. I look forward to seeing you again soon.” What happened? In a word: Compassion.

I want you to consider that as a criminal defense attorney, compassion toward your client is the most important aspect of representation. What is compassion? How is it viewed in the law? What can it do for you and your client? Answering these questions, you may realize that compassion is the aspect of your relationship with your client that is primarily responsible for every good disposition. Compassion is also the skill you possess that inspires your researching and writing of memoranda, crafting direct and cross examinations, negotiating with the prosecutor, and arguing to the judge and jury. It is the state of mind that inspires you be a zealous advocate for your client in every task you perform.

**What is Compassion?**
Compassion is defined as “a feeling of deep sympathy and sorrow for another who is stricken by misfortune, accompanied by a strong desire to alleviate the suffering.” For the criminal defense attorney to have compassion, then, (1) she must emotionally connect with her client’s condition, (2) that condition must be one of suffering, and (3) she must have a desire to lessen that suffering. The assumption that underlies all three of these elements is that the client is suffering. Is this always the case? I believe so. Emmanuel Kant wrote that “[p]unishment in general is the physical evil visited upon a person for moral evil.” An accused but innocent person suffers at all stages of the criminal justice process, but so, too, does a guilty person. Whatever suffering he may have inflicted on the victims of his crime, and however much he may deserve the suffering of arrest, trial, guilty verdict, and subsequent sentence, he still undergoes the Kantian evil of punishment. Even the most unrepentant offenders desire to be free and suffer at freedom’s restriction. People may not wish to relieve this person of his suffering, but we should not deny that he suffers.

Non-lawyers are not bound by codes of professional responsibility to zealously advocate for defendants. Criminal defense attorneys, however, must be their clients’ champions and thereby seek to relieve them of their suffering. This is as true for the indigent client wrongfully accused as it is for the paying client who admits his guilt with neither shame nor remorse. If an attorney is not in a position to pick and choose her clients, it must often be her goal to lessen the suffering of an unsavory client. There is no code of professional responsibility that allows the attorney to seek anything but this goal. When defense attorneys take on such emotionally and ethically challenging clients, they

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2 RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 416 (2d ed. 2001).
often focus on the intellectual aspects of the law: winning a key motion to suppress, successfully impeaching an important witness, or holding the government to its burden to prove each element of the crime beyond a reasonable doubt. Their repulsion against their client prevents them from finding inspiration in working to ease their client’s suffering. They focus instead on the intellectual details of their craft. If they win the motion, impeach the witness, or get an acquittal, they consider their representation effective.

In cases in which one’s client is especially remorseless and his crime particularly heinous, the attorney’s focus on the intellectual details of representation is understandable and probably the best that any attorney could do. This narrow approach to representation should, however, be a last resort. All clients, innocent or guilty, have a story to tell. If the attorney listens, the guilty ones will tell her why they did the crime they did. Perhaps they were in the throes of their addiction to drugs; perhaps they have a problem with anger that they’ve never been able to control. William Blake wrote that “[t]ruth can never be told so as to be understood, and not believ’d.”\(^4\) If the attorney listens, she will understand the truth of her client’s crime, she will believe it, and she will begin to believe in her client. She will, as Atticus Finch would say, consider things from the client’s point of view by climbing into his skin and walking around in it.\(^5\) In so doing, she will feel her client’s suffering, and as an attorney, will desire to relieve that suffering. She will feel compassion for her client, and that compassion will drive her work.

Defense attorneys may require compassion for their clients more than other attorneys. This is so because the prosecutor’s job is to convince the judge and jury that the defendant is nothing more than his crime. James M. Doyle asks, “How can we know

the murderer from the murder?” The prosecutor’s answer is, “You cannot, and you should not try.” To counter this dehumanizing focus on one brief incident, the defense attorney must review the defendant’s entire life and offer some positive representation of the defendant. By climbing into our client’s skin, we can discover his life and re-humanize him by offering a positive representation.

To have compassion, must we as attorneys believe in our client’s innocence, regardless of the evidence or the client’s admissions? Must we ignore the truth? Must we adopt as our own our client’s morals? The ABA Model Rules of Professional Conduct and a number of states provide that “[a] lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” Neither, however, does compassion constitute such an endorsement. Consider this hypothetical situation: the principal of your child’s elementary school calls you. She tells you that your child faces detention because he hit another child during recess. You have told your child numerous times that it is not right to hit a classmate. That evening, you have a talk with your child and ask him to explain his behavior. He tells you that just before hitting his classmate, that classmate was teasing another particularly vulnerable child who was also at recess. On top of that, the classmate had taken this other child’s favorite toy, and your child was trying to get the toy back to the rightful owner. Your child told the classmate that if he did not return the toy, he would hit him. Sure enough, the classmate did not return the toy, and your child made good on his promise. Although you tell your child that hitting

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7 Id. at 425.
8 MODEL RULES OF PROF’L CONDUCT R. 1.2(b) (1983).
is wrong, even in this situation, your child continues to believe that hitting the classmate was the right thing to do. The next day, you and your child go to see the principal. She recommends five days of after-school detention.

Like any good parent, you are touched by your child’s misguided attempt to defend the defenseless, and you naturally have compassion for him. You also know that your child should not have hit his classmate; instead, he should have told the recess teacher about the teasing and the toy. At your meeting with the principal, your compassion does not require you to profess your child’s innocence or ignore the fact that your child could and should have solved the problem much more easily and without resorting to violence. You do not have to adopt your child’s opinion that hitting the classmate was the right thing to do in this situation. Your compassion does, however, allow you to tell the principal about what led up to your child’s actions and argue that under the circumstances, five days’ detention may be a bit much. You have listened to your child tell the truth of his act, you have understood this truth, and now believe it. With the compassion that comes from emotionally connecting with your child’s condition, you are able to zealously advocate for your child in the principal’s office.

Now consider one of your current or past clients. Perhaps he has assaulted his girlfriend because she was speaking with another man at a bar. The police arrest him, and he calls you. You agree to represent him, and as he gets to know and trust you, he tells you that he’s “the jealous type.” When you press him to expand on that, his trust in you allows him to admit that he didn’t always consider himself a jealous person. He is, in fact, surprised and shocked at his actions. He feels terrible about what he did. You

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9 This does not, of course, imply that without understanding, there can be no compassion. One can be compassionate toward another without understanding the other.
ask him when his feelings of jealousy began. About a year ago, he tells you, just after he returned home from a tour of duty in Iraq. As he continues to describe his time in Iraq and his emotional state before, during, and after his tour of duty, you begin to realize that he may be suffering from Post-Traumatic Stress Disorder. By this time, you are walking in his shoes, and he is grateful for your understanding. He is a proud, ex-soldier who wants to do his duty and not complain about it, but, because he recognizes your genuine compassion for him, he agrees to seek counseling when you recommend it. By the time you’re ready to discuss his case with the prosecutor, your client has made real progress in counseling. You use this progress and your client’s willingness to engage in counseling to convince the prosecutor to continue the case without a finding. This disposition could not have been possible if you had not listened to your client tell his story.

These hypothetical situations are relatively simple in that they do not require much emotional digging. The suffering of the child and the ex-soldier and the mitigating circumstances involved are not difficult to find. More complex cases, however, demand a greater commitment to walk in your client’s shoes. Your client may be a murderer, child molester, or worse. He is also a human being who has been led to his crime by a past that probably caused him great suffering. Perhaps he suffers from a psychological disorder that influenced his actions. He has a story that you must hear, but it is not always easy to find or listen to. To understand your client and thus his case, you must be part psychologist, gaining your client’s trust, teasing his story from him, and once it is out, greeting it with compassion, if not agreement. But isn’t this a routine exercise for defense attorneys? After all, understanding your client’s case is fundamental, and your
practice relies in large part on finding facts that mitigate or excuse otherwise criminal behavior.

This exercise may not be routine. In addition to representing her client as his lawyer, the defense attorney also represents the client to the judge and jury by constructing an image of the defendant, just as a historian represents the time about which she is writing. The representation is never quite the same as the person whom it represents. In the face of this, James M. Doyle accepts that “representations remain inescapably fictions or imaginations.” This may be philosophically so, and I suspect that many attorneys have come to accept it. In doing so, however, they may have come to believe that the facts of the defendant’s life should serve the most effective representation possible. A more difficult, but better, approach is to dig deep into the defendant’s life to find compelling facts that will in turn drive the representation of the defendant. The result will be a representation shaped by the facts and will therefore be more honest, credible, and compelling.

How Compassion is Viewed in the Criminal Law

The legal community is ambivalent about compassion. On one hand, people such as Chicago Bar Association President E. Kenneth Wright, Jr., former President of the Rhode Island Bar Association Philip M. Weinstein, and a former dean of Seton Hall Law School, Ronald Riccio, extol the virtue of compassion. The Principles of

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10 Doyle, supra note 6, at 420 (“A copy can resemble an original more and more, but it can never achieve identity with it.”).
11 Id. at 448 (quoting STEVEN MARCUS, REPRESENTATIONS: ESSAYS IN LITERATURE AND SOCIETY ix (1975)).
12 Judge Michael B. Hyman, Meet CBA President E. Kenneth Wright, Jr.: A Passion and Compassion for People, 22-JUL CBA REC. 40, 41 (2008).
Professionalism for Delaware Lawyers even require attorneys to treat all persons with compassion.\textsuperscript{15} When considering an attorney’s post-discipline reinstatement application, courts often praise the applicant for her compassion toward her clients.\textsuperscript{16}

On the other hand, it is no secret that among the general populace, lawyers are often viewed with skepticism if not open disdain. We are viewed this way not because we are perceived to lack practical legal skills, but because we are believed to be mercenaries who believe only in our bottom line, and in our clients only by chance. Kristin B. Gerdy reported on a 1999 Illinois Bar Journal article, writing that “the most important thing clients wanted from their lawyers was neither superior legal skills, reasonable legal fees, nor a proven track record; what the clients wanted was to know that their lawyer cared.”\textsuperscript{17} Unfortunately, an ABA survey in 1993 found that people’s complaints about lawyers focused significantly on a “perception that lawyers lack caring and compassion.”\textsuperscript{18} Less than 20\% of respondents agreed that “caring and compassionate” accurately described lawyers.\textsuperscript{19} One court, considering an attorney’s disqualification from a proceeding, commented that “[t]here is nothing in the disciplinary rules that says that an attorney has to show compassion or sympathy.”\textsuperscript{20} With the exception of the Delaware Principles, no state code of professional conduct that mentions compassion appears to exist. The ABA Model Rules of Professional Conduct also lack

\textsuperscript{15} PRINCIPLES OF PROFESSIONALISM FOR DELAWARE LAWYERS (2003).
\textsuperscript{16} See, for example, In re Brenda M. Brown, 674 So.2d 243, 248 (1996); In the Matter of the Application for Reinstatement of Michael C. Blasnig, 181 Ariz. 356, 358 (1995).
\textsuperscript{17} Kristin B. Gerdy, Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering, 87 Neb. L. Rev. 1, 7 (2008).
\textsuperscript{18} Id. at 8.
\textsuperscript{19} Id.
\textsuperscript{20} In the Interest of A.M., 974 S.W.2d 857, 864 (1998).
such a provision.\textsuperscript{21} Today’s typical law school curriculum may also give inadequate attention to compassion.\textsuperscript{22}

In the criminal law, compassion seems to abound. Compassion by the criminal justice system toward the victim of a crime,\textsuperscript{23} by the jury toward the defendant by jury nullification,\textsuperscript{24} and by prosecutors toward defendants\textsuperscript{25} are three common instances of compassion. Indeed, the criminal defendant is often the subject of compassion. Compassion may come from the criminal justice system itself through the availability of defenses\textsuperscript{26} or excuses,\textsuperscript{27} from the judge through a well-crafted sentence,\textsuperscript{28} from an executive through clemency or pardon,\textsuperscript{29} or from the judiciary through the institution of drug courts.\textsuperscript{30} Certain defendants seem to be particularly deserving of compassion. Indigent defendants are common subjects of compassion,\textsuperscript{31} as are those who suffer from psychological infirmities\textsuperscript{32} or have traumatic pasts.\textsuperscript{33}

Viewed in light of this apparent abundance of compassion in the criminal justice system, it is surprising that very little discussion is given to the compassion needed by

\textsuperscript{21} See throughout MODEL RULES OF PROF’L CONDUCT (1983).
\textsuperscript{22} Gerdy, supra note 17, at 4.
\textsuperscript{30} Anthony V. Alfieri, A Colloquium on Community Policing, 90 CAL. L. REV. 1465, 1495 (2002).
criminal defense attorneys toward their clients. This inattention may stem from the presumption that we already have this compassion. After all, only a select few criminal defense attorneys earn big salaries or high profiles, and we all have to struggle to find and secure our livelihoods. With the stress and relatively low salaries, we must be the “true believers” who run on pure compassion.

A study conducted by Mercer University School of Law in the 1980s suggests that this may be the case. 34 Fifty criminal defense attorneys were asked to rate the importance of twenty pretrial criminal representation abilities and traits that were related to interviewing, counseling, and negotiating. 35 Compassion came in as the seventh most important ability or trait, and the ability to establish a rapport with clients, certainly a function of compassion, was third. 36 The study therefore concluded that criminal defense attorneys were “very concerned about their clients.” 37

While heartening, this study calls for greater discussion of the role of compassion toward one’s criminal client. First, compassion was only the seventh most important trait; I suggest that it is the primary trait that every defense attorney needs to cultivate. It is the trait that inspires the development and action of all other attorney abilities. Second, although attorneys may name compassion as an important element to representation, in the daily grind of phone calls, motions filing, and demanding and/or unsympathetic clients we may forget the purpose of our calling: to understand the suffering of our client and dedicate ourselves to relieving that suffering. It all comes back to compassion.

35 Id. at 1021-22; See also Marcus T. Boccaccini, et al., Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients, 26 Law & Psychol. Rev. 97, 106 (2002).
36 Doyel, supra note 34, at 1022.
37 Id. at 1031.
What Compassion Can Do for You and Your Client

Judges are supposed to be objective arbiters of law and fact. Where the answers are not clear, the judge often has discretion, and an attorney’s compassion for her client can sway the judge’s decision. In one case, an attorney, Ronald Bankston, testified regarding a former client’s settlement agreement. The court wrote:

Mr. Bankston testified despite the fact that [his former client] had filed a grievance against him with the State Bar of Texas due to Mr. Bankston’s unwillingness to assist with the Annuity Contract. Mr. Bankston declined to assist [his client] because Mr. Bankston firmly believed that the Annuity Contract was not in [his client’s] best interest. Mr. Bankston’s demeanor evidenced a clear concern for [his client’s] welfare. Indeed, he exhibited the best qualities of any advocate, legal or otherwise: honesty, humility, and compassion. Accordingly, the Court finds his testimony to be credible.38

Another court considered the civil rights claim of a transsexual person who was incarcerated and was refused female hormone treatment by the state that would have cost the state $10 per month.39 This treatment would have been proper medical treatment for the plaintiff’s sexual dysphoria.40 The failure to provide the hormones arguably led the plaintiff to attempt to commit suicide six times, five of those times by attempting to remove his genitals.41 The court wrote:

To this day I remain convinced that the plaintiff’s life was in jeopardy. The record is replete with circumstances I will not mention here which show that the probability of her life being terminated was indeed high. [The lawyer’s] handling of this unusual case was skillful, doggedly persistent, and brave. There are very few, if any, other attorneys in this community who would have undertaken this unusual representation with such skill and compassion.42

40 Id. at 1533.
41 Id.
42 Id. at 1535.
Because the attorney’s compassion was mentioned just subsequent to the court’s expression of belief in the plaintiff’s argument, it is likely that the court was moved to that belief by the attorney’s very compassion. It is also likely that this compassion influenced the court’s calculation of attorney fees to be paid. The attorney requested $100 per hour, and the court granted him just that. This was in 1984. In today’s dollars, the attorney would have received over $200 per hour for court-appointed work.

In another court, a defendant filed a motion to modify a sentence, alleging in part ineffective assistance of counsel. In denying the defendant’s motion, the court wrote:

After hearing the testimony from both the defendant and his attorney, this court is called upon to make a credibility determination. While the court did not find defendant’s testimony to be entirely unworthy of belief, it finds the testimony of counsel to be more believable. Clearly, there was a strong attorney-client relationship, and counsel personally felt compassion for the defendant.

Courts clearly recognize the existence and importance of an attorney’s compassion toward her client. Judges respond to this compassion by giving credibility to the attorney’s statements and, to the attorney, the benefit of the doubt. Attorneys will be protected from disciplinary proceedings by their compassion and, where they do get disciplined, compassion toward their clients can serve them well in reinstatement hearings. Compassion may also help attorneys avoid malpractice suits.

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44 Id. at 7.
45 Kiefel v. Las Vegas Hacienda, 404 F.2d 1163, 1165 (7th Cir. 1968) (“Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion . . . .”); Miller v. Mooney, 431 Mass. 57, 63-64 (2000) (“Considerable patience and compassion can be required of attorneys drafting wills, especially where the client seeks guidance through very private and sensitive matters.”).
46 In re Brenda Brown, 674 So.2d 243, 248 (La. 1996) (in which a U.S. District Court judge testified for an attorney, and “was impressed with respondent as an attorney, particularly, respondent’s compassion for her clients.”); In the Matter of the Application for Reinstatement of Blasnig, 181 Ariz. 356, 358 (1995) (an attorney testified for Blasnig, and he “characterizes Blasnig’s recovery as remarkable, and believes his intellect and compassion will make him a gifted lawyer.”).
47 Gerdy, supra note 17, at 12-13.
If compassion can enhance an attorney’s credibility with the court, it makes sense that it can also do so with prosecutors. The Mercer study, cited above, provides a good platform for discussing the importance of compassion toward one’s client in dealing with prosecutors and clients. The study noted that defense attorneys had been accused of being too cooperative with their adversaries and sought to determine the truth of this accusation. It concluded that “defense lawyers may not be overly cooperative with prosecutors. By contrast, they are very concerned about their clients. For as yet undefined reasons, however, defense counsel may not be adequately preparing themselves for plea negotiations.” This contradiction is highlighted in two passages. First, “while lawyers are compassionate toward their clients and believe that attorney-client rapport is very important, they are far more concerned about dealing with each client’s immediate legal problem than with the problem’s fallout in other areas of the client’s life.” Second,

\[\text{[i]n actual practice, it seems that many defense lawyers conduct little or no prenegotiation fact investigation. [Another study] found that in 47.3\% of felonies and 69.2\% of misdemeanors, defense counsel did not interview any prosecution witnesses before entering plea negotiations. In 30.3\% of the cases, no defense witnesses were interviewed.}\]

There is a disconnect between the compassion that defense attorneys feel toward their clients and their performance. It seems a truism that if one is compassionate toward one’s client, one would tend to work harder and better for that client. This, however, may not be the case. The reason for this may be found in the first passage cited above: defense attorneys tend to separate their emotional bonds to their clients, of which

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48 Doyel, supra note 34, at 1020, 1024.
49 Id. at 1031.
50 Id. at 1025.
51 Id. at 1026.
compassion is a large part, from their intellectual duty to perform the technocratic elements of their legal practice with skill. Attorneys seem to be saying, “yes, yes, compassion toward my client is all fine and good, but what I really care about is negotiation with the prosecutor, writing an effective motion, and doing good legal research.” As one commentator writes, “[m]ost lawyers view the practice of law as a set of legal problems that must be solved like a puzzle, rather than as a vocation which assists people who have problems involving both factual and emotional dimensions.”52 This is not necessarily the attorney’s fault because “modern legal education focuses . . . on the isolation of logic and ‘critical thinking’ to the exclusion of the emotional and ‘human’ aspects of legal analysis, often giving ‘the covert message that dealing with human emotions and personality is inconsistent with legal thinking.’”53

As attorneys, we need to reconnect our emotions to the technocratic aspects of our practice. We need to recognize that “caring actually makes analysis stronger.”54 This can be shown in any field of endeavor, that those who invest their emotions in their work are the leaders and innovators. Bill Gates has a personal passion for technology and the way it can help people. Nelson Mandela’s drive for political and social equality came from within. Michael Jordan did not become the best the game has even seen just for the paycheck or to win titles. Each of these people cared deeply about succeeding in their chosen fields, and this care inspired their innovation, intelligence, and perseverance. As lawyers, our primary goal is to understand our clients’ suffering and work to relieve it. Judge Wright describes how caring inspires him:

52 Gerdy, supra note 17, at 17.
53 Id. at 30.
54 Id. at 15.
[t]he law allows me to pursue my passion and compassion for people. I don’t like to see people in pain—there’s a lot of pain and misery in the world which can be alleviated. When you understand and believe in the law, what you can do for people knows no limits.\(^{55}\)

The Mercer study cited six abilities or traits that defense attorneys rated as more important than compassion. Three of these abilities or traits are clearly influenced by compassion: the ability to establish rapport with the client, the ability to counsel the client, and the ability to interview.\(^{56}\) A fourth one, the ability to negotiate with the prosecutor, also depends on an attorney’s compassion toward her client because if the attorney does not have compassion for her client, it will be nearly impossible for her to instill such compassion in the prosecutor. Effective operation of the remaining two abilities or traits, knowledge of available sentencing alternatives and knowledge of statutory minimum and maximum punishments, require compassion for the same reason. If the attorney does not believe in her client, how can she expect the prosecutor or judge to believe in him and thereby recommend or impose a favorable sentence? In the words of Karl Llewellyn: “Compassion without technique is a mess; and technique without compassion is a menace.”\(^{57}\)

Kristin B. Gerdy provides an excellent account of why compassion toward one’s client is, as she puts it, at the “heart” of lawyering.\(^{58}\) In addition to compassion, she cites the necessity of empathy, or understanding, toward the client.\(^{59}\) The acts of compassion and empathy are not separate, but rather are two ways of expressing the same relationship toward someone. If everyone, even in the midst of committing a crime, does the best

\(^{55}\) Hyman, supra note 12, at 41.
\(^{56}\) Doyel, supra note 34, at 1022.
\(^{57}\) Quoted in Roger C. Crampton, Beyond the Ordinary Religion, 37 J. LEGAL EDUC. 509, 510 (1987).
\(^{58}\) Gerdy, supra note 17, at 3.
\(^{59}\) Id.
they can (an optimist’s view, admittedly, and therefore subject to debate), and if William Blake is correct that truth understood is truth believed, then understanding a client and his situation means understanding the fundamental goodness of that person, despite any criminal acts he may have performed. Thus understood, the client becomes a recipient of empathy. Although wordsmiths will rightly disagree, empathy and sympathy, which is required for compassion, are functionally the same. With empathy, therefore, comes compassion.

Gerdy goes on to provide a list of benefits a lawyer and her client can enjoy if the attorney practices compassion toward her client. A study polled prison inmates and found that their satisfaction with their attorneys had less to do with their lawyers’ “conventional advocacy skills [or] the outcome of their case” but was related directly to whether the clients perceived that their lawyers respected, cared for, and were emotionally involved with their client and his case. Lawyers have a general duty to follow their clients’ reasonable demands. Clients, it seems, demand compassion. Lawyers ought to respond to this demand. If they do so, they will not only be performing their duty toward their client, but they will earn the client’s satisfaction. Over the long term, this will improve the lawyer’s reputation, increase the number of referrals she receives, and reduce the likelihood that she will be sued for malpractice or undergo disciplinary proceedings. Compassion is good business.

60 Id. at 11.
61 Id. at 12.
62 We need not have qualms that we can do well by doing good. One group that studied the link between helping others and self-interest concluded that “[t]here are both egoistic and altruistic motivations to help.” DAVID A. SCHROEDER ET AL., THE PSYCHOLOGY OF HELPING AND ALTRUISM: PROBLEMS AND PUZZLES 90 (McGraw-Hill 1995). This is not a problem, they write, because helping another, even if for selfish reasons, is “essentially prosocial. If I am motivated to help you because I am distressed or saddened by your situation, I am still motivated to help you . . . Your benefit is mine; mine is yours.” Id. For attorneys,
In addition to the client being more satisfied, an attorney’s compassion can increase her own satisfaction. Akira Kurosawa’s film *Ikiru* concerned a government manager in post-WWII Japan who was stuck in a Kafka-esque bureaucracy that did not answer to the needs of its citizens. Instead, it had devolved into a maze of forms, stamps, offices, and signatures. Staggering in its complexity, the system failed to feel the pain of its petitioners. The manager, Ikiru, was once idealistic but had succumbed to the bureaucracy. He was figuratively dead until diagnosed with a disease that promised to actually kill him within a short time. Ikiru ventured into the streets and found the suffering of the citizens the government was supposed to help. He was inspired and, despite the bureaucracy, was able to help the people. At the end of the film, Ikiru died happy. Compassion may take more preparation, more work, and more mental energy, but the payoff is the knowledge that you helped someone as much as you could.

As I mention above, Gerdy writes that compassion actually makes analysis stronger.63 In my firm, we work hard with new clients to learn about them. One of the first tasks we have them do is write their autobiography for us. Some are just a few paragraphs, some reach fifty pages and beyond; we let the client decide how much and what to write. We do, however, encourage him to be verbose. We usually learn about his childhood, upbringing, embarrassing and glorious moments, and many other often unexpected things. This helps us get to know the client as a person, rather than as just a client or defendant. When the time comes to negotiate with the prosecutor or seek a favorable sentence from the judge, our knowledge of the client as a person is invaluable. We are often able to discover facts about the client that are helpful in obtaining a great

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63 Id. at 15.
disposition, facts that we would otherwise not think to learn. We want to understand our
client and thereby learn why he deserves a favorable disposition. We are then better able
to confront the prosecutor or judge with a request. Sometimes, knowing the client as we
do, our disposition letters to prosecutors and sentencing memos to judges practically
write themselves.

Conclusion

Criminal defense attorneys help their clients through difficult times, and to do so
effectively, they must understand their clients. By definition, then, to be an effective
defense attorney, one must practice compassion. Compassion does not entail undeserved
mercy but rather a search for and decision-making based on the truth. Gerry Spence
wrote that “[t]he first trick of the winning argument is the trick of abandoning trickery . .
.To win, we must be believed. To be believed, we must be believable. To be believable,
we must tell the truth.”64 What is the truth of your client? Listen to him, understand him,
find his goodness despite the crime. If you do, you will be able to marshal compelling,
fact-based arguments to the prosecutor, judge, and jury. These players will therefore be
more likely to follow your lead because they are natural-born experts in judging
credibility.65 They will know if you don’t believe in your client and the argument you’re
making in his favor. Worse, you will know it yourself.

64 GERRY SPENCE, HOW TO ARGUE AND WIN EVERYTIME 47-48 (1995).
65 See Timothy A. Rowe, How to Litigate Auto Cases with Heart, Soul, and Compassion Without Burning