The criminal lawyer, particularly one operating in the pit, comes off to many a client as his prosecutor — if not, indeed, his persecutor. Depending on his style or approach, he may literally say, or at least, communicate (in tone), the following to the defendant who absolutely should plead guilty. And assume it is all true, (because accuracy is key to a client’s claim of “coercion”):

You’re dead. We’re — no, you’re — gonna get killed at trial with no defense. They’ve got A, B, C, D and E going for them. You’ve got zip. You’re guilty; forget all the B.S. you’re telling me for months. Pleading guilty to see your way out of jail ‘before it falls off’ is your only option, especially if you want your wife to stick with you. The prosecutor is giving you a one-shot, five year, ‘take-it-or-leave-it’ plea. She secretly hopes you refuse. That way [pretty boy] you’re in a jailhouse full of hard-bitten criminals for 25 years. Do I have to explain that? And if you persist in refusing to plead guilty, I may just ask the judge to let me out. You want to be a moron! I don’t have to be one.

Has counsel crossed the line? However well-intentioned, has he “coerced” a guilty plea and rendered “ineffective assistance of counsel” — committing, too, the ethical wrong of overbearing his client’s will. Has he broken, thus, the cardinal rule of himself constructively making that critical decision to plead guilty that, all authorities agree, must be left to the client?

And, alternatively, if counsel, facing such a strong case, fails to bluntly and firmly communicate these facts of life in a way calculated to get his client’s attention — afraid of later appearing to have “coerced” a guilty plea — does he err in the opposite direction?

And it is rare that an attorney... will acknowledge having cajoled his client to plead guilty, after his advice turns out to have been unsuccessful.

Neutral Course

The truly “effective” and “ethical” lawyer who zealously wants to impart the needed advice may, accordingly, be “damned if he does, damned if he doesn’t” when the client’s moment of truth is at hand. Resultantly, the lawyer may imprudently concentrate on steering a neutral course.

He rightly wants his client to make an independent decision — after all, the client alone will have to live with it. Still, counsel may behave like a baseball pitcher who starts aiming rather than throwing, and thereby fails to give the unvarnished, unambiguous counsel that the client needs, simply because counsel is “thinking” too much. A stance that fails to read the client “the riot act” when the “act” may be precisely what the client needs, may, thus, be equally flawed — or even more so. In other words, counsel may be faulted for not adequately counseling his client on the possible wisdom of pleading guilty. Some authorities directly say that!

Precisely what occurs — or should occur — in the highly-charged environment when an attorney and client, who must, often quickly because of same-day ultimata, decide between two horrible alternatives, interact, is not susceptible of easy analysis in court opinions, ethics rules and standards or disciplinary and advisory opinions. Frankly, they do not counsel the attorney in “real world” settings how to effectively persuade his client to “yield” to what the attorney firmly proposes — and what the client should objectively do.

Psychological Pressures

And it is rare that an attorney, as in Williams v. Crans — a Seventh Circuit affirmation of an Illinois State guilty plea to murder which resulted in a death sentence — will acknowledge having cajoled his client to plead guilty, after his advice turns out to have been unsuccessful.

There, at a post-verdict hearing Williams, with new counsel, claimed coercion. His prior attorney testified that he and the Williams death penalty team, indeed, used “psychological pressure” and “sophisticated tactics” — using all

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of the “psychiatric and psychological information” gathered and developed by the doctors (actually engaged to assist in jury selection and an insanity defense) to compel Williams “to accept our point of view.” The “coercion” included telling Williams that he would be “hurting his family.” — that the only way to spare them was to plead, and that “I would die if I did not plead.” Williams’ former lawyer swore:

We took advantage of our client, maximizing the use of the information we had gathered for a purpose other than which it was intended. Our strategy was developed to accommodate us and not our client. There is no question that during this period (which lasted over a year) we did not act in accordance with our client’s wishes.

Talk about an attorney — especially a fired attorney — going the whole nine yards for his client!

Arguably, since the Court likely concluded, without directly saying so, that counsel, guilied by the death penalty, was trying to undo the result, the Seventh Circuit denied relief. It found no “coercion” amounting to ineffective assistance. Still, the Court did not condone counsel’s methods “which may very well have exceeded the bounds of ethical norms,” and encouraged a disciplinary inquiry. Nonetheless, putting aside counsel’s surprising, somewhat hyperbolic, statement that his strategy was designed to “accommodate us, not our client” — one wonders how encouraging a guilty plea accommodates counsel — is this conduct deserving of discipline?

Ethics Guidance

To understand the quagmire for lawyers who deal with this issue, one must look to the literature addressing such client interactions. Without saying so in their typically wishy-washy manner, ethics standards and rules often seem more directed to advising lawyers how to protect themselves from a client’s taping of an attorney/client encounter, someday reviewable, in haec verba, by appellate judges unsympathetic to a lawyer’s aggressiveness. Such rules and commentaries, almost implicitly, recognize that such encounters will invariably be challenged by fickle clients, sitting in jail having pleaded guilty, who rethink, now, in every waking minute, the choices made in the guiding hands of their previous — in hindsight, unsuccessful —lawyers.

It is largely unproductive, for example, for a diligent attorney to read the ABA’s amorphous offering that: “[a]lthough it is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client’s decision through misrepresentation or undue influence, counsel is free to engage in fair persuasion and to urge the client to follow the proffered advice….” Is this meaningful guidance?

Nor is the ball significantly advanced by Ethical Consideration 7-7 of the ABA’s Model Code of Professional Responsibility that “[a] defense lawyer has the duty to advise his client fully on whether a particular plea to a charge appears desirable.” “Desirable?” Does a lawyer fulfill his responsibility by merely telling his client that “I think a guilty plea is desirable”?

The same can be said of certain ivory tower philosopher/commentators whose law review articles supposedly guide attorneys, but who, one suspects, were never confronted by having to give advice to a real-life client. One such article by a Pepperdine scholar, astonishingly, in an article highlighting Dostoyevsky, advocates a “model” — the word alone is a tip-off — that the lawyer should actually encourage the guilty client to plead guilty precisely because it is the “moral thing” to do. Indeed, he argues that it provides “an opportunity for moral growth for both lawyer and client and is therefore likely to lead to the best decision.” To that author, it is as if Kantian moral imperatives should compel the lawyer when advising his client at crunch time, in assessing his alternatives, and whether to plead guilty to limit punishment.

He also does not “get it” why the Utah Supreme Court (while “cast[ing] no aspersions on the proposition that confession is good for the soul from a religious and moral perspective”), would exorciate a lawyer whose stated goal, as he actually told the jury in a death penalty phase of a murder case, is to persuade his client to confess and, basically, “live with” the appropriate punishment. Using that “model” to describe the role of defense counsel perhaps the only friend the client has in all the world at that critical moment, the client might be better off with a lawyer wearing a clerical collar or prayer shawl.

Nonetheless, these sources that discuss the proper stance for a lawyer, typically, fail to factor in the personal dynamics implicated with such high stakes. They frequently overemphasize “neutrality” when the lawyer’s role is anything but neutral, especially if the decision the client must make is so clear-cut to an experienced lawyer who has navigated those tricky shoals before.

Some Guideposts

Some court decisions do provide valuable guideposts along the continuum — although, we would all probably reach the right conclusions without them. For example, in Frazer v. United States, an attorney allegedly called his client a “stupid nigger son of a bitch and said he hopes I get life. And if I continue to insist on going to trial I will find him very ineffective.” The Ninth Circuit held that while the racial slur would not constitute per se prejudice, once Frazer’s counsel threatened ineffectiveness through substandard performance, the attorney ceased to function as defense counsel, and vacated his guilty plea: “[A]n attorney who adopts and acts upon a belief that his client should be convicted ‘fail[s] to function in any meaningful sense as the government’s adversary.’”

Failure to Give Plea Advice

At the opposite end of the spectrum, the Second Circuit’s seriatem decisions in Boria v. Kema were also predictable. There, a defendant had already served 6 years of his life sentence for drug trafficking. It held, where even though the lawyer believed that rejecting a guilty plea was “suicidal” (given the likely sentence after trial conviction), the absence of “any” advice by the lawyer concerning the advisability of accepting the offer warranted relief.

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Still, Boria does not describe the result if the attorney, before his client demanded a trial, had simply, plaintively, told Mr. Boria: “I think the plea offer is something you might consider, because beating a ‘buy-and bust’ case on a Class A-II drug felony in Orange County is very hard” — when, in truth, it would have been virtually impossible. Would telling the client “you should consider it”, or even “you should strongly consider it,” or even “I certainly would, if it were me,” suffice? One suspects last Boria that a lawyer is off the ethical and “ineffectiveness” hooks by just giving “some” advice.

Bear in mind, however, in the third (final) version of Boria, the Second Circuit continued to approvingly cite Professor Amsterdam’s Trial Manual that counsel “must give the client the benefit of counsel’s professional advice” whether to plead. Nonetheless, it omitted the second opinion’s further quote that “often counsel can protect the client from disaster only by using a considerable amount of persuasion” to convince him “that a plea which the client instinctively disfavors is, in fact, in his best interest.” The language that encourages “considerable persuasion” is no longer part of Boria.

Too Aggressive

What if counsel tells his client indicted for first-degree murder, that his only realistic strategy is to plead guilty to “accessory after” murder? Probably okay! What if, too, he says: “[Y]ou’re not tough enough for prison … a prison sentence is most probably for you a death sentence or worse. Because things would happen to you in prison that would cause you to wish you were dead or would want to kill yourself.” Suppose, too, counsel states that awaiting an appellate reversal “won’t do you any good because you’ll be dead or your [anus] will be the size of a dinner plate.”

Add that the death-in-jail predictions were repeated.

The court, in People v. Adams, was disturbed by counsel’s profane comments (although it acknowledged defendant’s use of similar language). Still, a divided Colorado Appeals Court upheld the guilty plea: “defense counsel is not restricted to discussing the probable outcome of a case in discussing the propriety of a guilty plea.” The majority was persuaded by (1) Adams’ (taped) acknowledgement that he was not “tough enough” for prison, and that (2) Adams actually experienced some unspecified problems after being incarcerated. In other words, counsel did not mislead Adams, and fairly stated his predictions of prison life.

The minority, urging vacatur, found the plea involuntary: While counsel “may make his position known to defendant in forceful, clear and certain terms,” and that “accurately informing the defendant of the certain terms,” and that “accurately informing the defendant of the potential hazards of incarceration is a legitimate and responsible act of counsel,” here he “crossed the line” and coerced a guilty plea by “browbeating” Adams by predictions of sodomy and murder.

To summarize, however, as a law student of mine would say: “Adams’ lawyer may, indeed, have been ‘ineffective’, but, he gave the kind of advice and warnings Adams needed to hear. Isn’t that “zealous” representation?”

Conclusion

All said and done, reading rules and cases alone is not a criminal lawyer’s life. Alone they do not always instruct how to properly clients — occasionally, they only tell lawyers how to protect themselves.

“Zealous advocacy” frequently means zealously telling one’s client what he needs to know, sometimes by coldly reporting “the facts.”