

**CRIMINAL LAW WORKSHOP FOR
CIVIL LAW PRACTITIONERS**

NEW ORLEANS BAR ASSOCIATION

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JONES WALKER at NEW ORLEANS, LA

PLEA NEGOTIATIONS WITH HONOR

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INTRODUCTION - A PHILOSOPHY FOR THE DEFENSE

Theory of defense lawyer - is your client better off than before you took the case? Plea Bargaining is secretly preparing for trial. Success is not judged by just winning. Definition of a successful lawyer is more than not guilty verdicts.

We protect against abuse by the government and by the majority.

Not all cases are whodunit.

Some are what could happen to the person whodunit.

Good people do bad things.

You can be as proud of good pleas and good sentences as you are of not guilty verdicts.

Good lawyers engage in plea bargaining and do it with the same inventiveness and zeal and enthusiasm as they do with a case that cannot be resolved by a dismissal and must go to trial.

What kind of lawyer are you? A "plea" lawyer or a "trial" lawyer. How many clients do you have in prison?

What can you get now? See if you can do better.

It is the client - stupid.

PLEAS ARE A FACT OF LIFE

Eighty to ninety percent of all criminal cases result in a plea bargain. For good lawyers and bad.

Of the ten or fifteen percent of cases that are not resolved by pleas, a large percentage of those that are tried, are lost. AI try all my cases@ is the name of a wing in the prison.

Rights mean nothing if we do not exercise them - we tell that to jurors.

We plead because either the defendant was guilty or there was enough evidence that the defendant was guilty. In either case, smart defendants should at least contemplate the prospects of a plea.

GOOD PLEA BARGAINING TAKES TIME

The lawyer who gets the best results at trial, gets the best plea bargain. **Hit first - talk second.** To extend the athletics analogy - most ADA=s are not good at long fights. Trained for quick knock-out - quick draw specialist - If you survive their first blow, and are still in the fight - you have a chance. You don=t have to be quick or strong. But you must take a lot of punishment, and still stand. Be a long distance warrior.

Diplomacy is the art of **prolonging crisis** - so is negotiation.

Avoid Ano@.

If Israel and the PLO can make a deal, if the Vietnamese and the United States can make a deal, why can't the District Attorney and the defense attorney.

Vietnam peace talks - rent condo/buy home - plea bargaining is not quick.

If you decide to plead before you have spent time investigating the case, quit reading and find a new job. You are a putz - a prosecutor wanna be. You are not a lawyer. Go home. You don't need to be at this seminar.

THE BIG TRAP

Negotiating causes a bad state of mind. Once you decide on a plea, you become submissive, resigned to fate - martyr-like. It's too late to change the plan. The die is cast.

Plea discussions are part of the case. Do not decide to plead when you accept the case. Do not plead out of despair. Things always look bad at the beginning. Don't decide, in the beginning, that you must plead.

DEVELOP ISSUES FIRST

Facts win/lose cases.

If you don't know the facts, you can't analyze your case.

Facts sway juries and facts sway prosecutors and facts sway judges. Period.

The prosecutor tries to simplify things. Details sometimes favor the defense.

Tony=s flower. Mean girl ripping up flower.

Many attorneys try to forget, hide or ignore the facts because we think they are bad and won't help us. We do not want to deal with the "process of making a decision" but we leap to the decision, instead of exploring what it should be.

However, good trials and good pleas do not occur unless you face up to the facts.

Investigation is not reading the DA=s file.

LEARN FACTS BEYOND DISPUTE

You cannot face up to the facts until you discover them. Don't quit before you have lost. Don't quit if you still have bullets. You get a better deal if your approach is to investigate first and negotiate second.

Take advantage of every opportunity to be in court and have a hearing.

Show the strength of your case and weakness to the state and the defendant. Call cops at preliminary hearings. Take testimony.

THEN DEVELOP A THEME OF THE DEFENSE

If you do not try to develop a defense you cannot win. If you have no defense you better start developing one. The "boot strap theory" is that if you file a motion to suppress a search knowing that you will lose, you might unearth a confession subject to suppression because the cops are not really ready on all issues

- "just the ones at this hearing."

In law school you ask why. When you become a lawyer you sometimes simply ask what. Since the answer to Awhat@ is usually bad - you should go back to asking why. Your intellect is your weapon. The lesson of the sixties and seventies is that good lawyering makes a difference. Pleas are like motions - you start with nothing and develop something.

- ! Find dirt on prosecution witness.
- ! Find inconsistencies among government witnesses e.g.:
- ! One eyewitness is a drug addict, the other eyewitness is in trouble, the two eyewitnesses contradict each other and contradict the confession.
- ! Examine the scientific evidence. An examination of the bullets and ballistics may cause some problems to the prosecutors case.
- ! Turn mitigation into defense. Is the anabolic steroid for body builders or a cure of sexual impotence.
- ! Develop discovery issue. File a motion with the court to require them to file an answer. Request stipulations of fact. Make them talk. This leads to a motion to file surplusage. For example, bribery allegations and the Authority issue@.

- ! A motion to suppress based on voluntariness gets the agent on the stand and may develop evidence to be used for other motions.
- ! White collar - admit facts, but here is why we did it.
- ! Challenge jurisdiction of drug court.
- ! Develop Brady/self defense issue - give theory
- ! Litigate 404B
- ! Jury selection issues.

DEVELOP MONEY ISSUES

Tell your client and the court, the truth. Not enough time, not enough money. ACCD opinion.

You cannot do that in my district, with my judge, with my prosecutor.

ABA 10 principles.

Public defenders - case loads, experts.

Peart and Jim May in Alabama.

Private lawyers - money - hourly rate - overhead - Newchurch case.

ALL PROSECUTIONS HAVE A WEAKNESS

- IF YOU FIND IT - YOU CAN EXPLOIT IT

The prosecutor's fear that he might lose the case, on a totally novel point that you might raise, will not exist unless you raise the issue. The longer the plea and

the process, the better the result, so raise issues that the prosecutor feels you might win. Get discovery; a.k.a. Asecretly preparing for trial@. Even if you are in active negotiations.

Your enemy is your fear that you might lose a motion and thus credibility for being "wrong". Don't raise motions that aren't well supported by the facts and the law but never ever say that there are no issues in your case, because if you say that, you are just lazy. There are always issues in every case.

It is never too late to start good habits. The same old thing means the same old result. If you have developed bad habits, you can change. If its been a while since you proved you can try a case, try one.

Standard DWI, Highway Stop, Burglary, drug case are only standard if you are lazy.

Batson, Miranda, Ring and Atkins are all cases people said - Ayou=ll never win that issue@. Remind prosecutor=s of that. Capitalize on their fear of Aliberal judges@.

Which is best to argue - how many times Feltus shot Keith or whether the state has the right to be present at a hearing regarding my request for money to hire an investigator?

DEATH PENALTY CASES HAVE TAUGHT ME THAT GUILT AND INNOCENCE IS ONE PHASE AND PENALTY IS ANOTHER

You argue for days and present evidence for days on whether life or death should be imposed. That is because there are guidelines that discuss mitigation and aggravation. Reason is put into the process.

People don't hire a lawyer just to "get them out of trouble". People hire a lawyer to make their situation better. If the poor devil will undoubtedly be convicted, then what's a reasonably achievable goal for the sentence? Remember, you can't possibly deal with the notion of a plea until you have explored every reasonable defense.

PROSECUTORIAL BULLIES

Dealing with the **K-Mart flashing blue light** special. Tell the truth to get past the "this is the last time I'm gonna offer this" - - agree to the deal if they will agree to stipulate that you do not know all the facts, have not completed discovery, do not know if your client is guilty and basically agree to the deal while the getting is good and that's what you'll say in open court and put it in writing. I guarantee that is the last you will hear of that special.

Capitalize on lazy arrogance. We have a slam dunk/air tight/best case/ world of hurt/no defense case. AExplain to me so I can tell my client.@

No case is hopeless - you need an issue. Sometimes you can develop it by paying attention to detail - chemists, document examiners, the need for money and

so forth.

CLIENT RELATIONS

Talk to your client about what is going on. You made a speech about how good you were when you were hired - now prove it. It is important to develop your client's confidence to prepare him for making the big decision. Take the time to explain why you are doing whatever you are doing. If you cannot tell him what you are doing, get busy. Tell her the evidence you have uncovered.

I=m the lawyer - do what I say - is bullshit for AI do not have a reason, I only have an ego.@

Talk to your client. Certainly your client has an explanation for what he or she did. If not, it is important for them to realize there is no defense.

It takes time to peel an onion.

Give state=s opening statement. Ask client to give his opening.

WAIVER OF INEFFECTIVENESS

Ethics opinion of NACDL.

METHODS OF NEGOTIATING

Providing reasons for a decision gives you something to discuss.

AMy Judges do not want to hear that:@

- A) Demand that they listen.
- B) Litigate if they do not listen.
- C) You have a right to negotiate pleas fairly - file a motion on disparity and plea negotiations.
- D) Challenge the Awe=ve always done it this way@. Lessons from teaching law students.

Talk don't yell.

Gripe about substance not personality. Discuss facts with the prosecutor.

Try to bring your arguments to a high moral ground. Challenge the prosecutor every time on every case on every issue to a duel (but be civil about it).

"Gee Judge, I've never done this before so I guess I had better file this motion to cover my ass."

What does a "recommendation" mean? Is it binding? Are you afraid to ask?

Clarify and reduce to writing your deal.

Talk to co-defendants lawyers.

Talk to the judge with the prosecutor present. What criteria do you use in sentencing? Guidelines bargaining - what will you give my client as a sentence. 1 - 5 years. Depending upon what? Depending upon the PSI. What about the PSI? What is significant? The facts of the crime - (relevant conduct in Federal Court).

The more you talk, the more issues you identify, and the more issues that can be resolved favorably in advance rather than waiting until the end, where if it is not resolved in your favor by then, forget it.

Get the prosecutor to join with you. Co-opt them to help you with probation officer.

Cross-training. In jury selection, when testifying defendant has prior record, you say Awhen we have children who do wrong, we punish. But we don=t punish them over and over again.@

The Mexican Barter Theory - you agree on the price of a serape and then you throw in a hand blown glass unicorn. A simple way to start generating paper, once you agree in principle, is to write the principle that you have agreed to. If the prosecutor agrees with the principle, then you start shaving points. For example - once the agreement has a five year cap then you start establishing where you fall within the sentencing guidelines. Does the other side oppose parole? What about the designation of an institution? What about a Crosby plea? Hold a motion to reduce Aopen@.

Arguments are caused by misunderstanding as well as backstabbing. The prosecutor thinks "I'll help your client" means recommending ten years rather than fifty. If they are afraid of writing - ask why? To "hide the deal" from other lawyers? ATell me your 5K1 policy.@

THE GOOD OLD BOY BUDDY SYSTEM

If your relationship with the judge or prosecutor is social and that is it, its worthless. Getting stuff because the judge or the prosecutor is your friend is cheating and makes you lazy. Being screwed by a friend is as bad as by an enemy. And, it=s hard to punch your friend in the face.

You cannot practice for future chips with the judge and the DA. They are never going to like you or your clients. Even when they have all the cards they still cheat.

If you swap one client's future for another's, you should commit suicide because you are a putz.

FINANCIAL CONSIDERATIONS IN PLEA BARGAINING

The amount of the fee should not determine the amount of the effort.

Practice to represent this client, not tomorrow's client. Good work brings good business. Hard work brings the respect of the DA and the judge and improvements in your clients position.

Do not compete with the bottom of the pile, compete with the top of the heap.

The pay is better and the satisfaction is better.

If you didn't get paid enough to do everything, that is a good first issue - file a motion for expenses and investigator. Investigate what? - Think about it and decide. e.g.: Newchurch arson of an abortion clinic.

"I'd rather be free than cheap" - Ginger Berrigan, July, 1990.

MULTIPLE DEFENDANTS

Strength in numbers. Is it the defendant against the state, three defendants against the state, or fifty defendants with common issues against the state.

Multiple defendants - all or none. Two sided sword.

Who do we bring to the table.

Ceiling and floor.

SPECIAL PROBLEMS IN FEDERAL PLEA BARGAINING

Theory of Federal prosecution - hit the weakest the hardest.

Benefits to state court practice.

Rules codify issues.

Acceptance of responsibility - death penalty defense mitigation.

Distinguish 5K1 cooperation from acceptance of responsibility.

The main problems in federal court:

- 1) Fear of the unknown.
- 2) No sense of humor.
- 3) Different forms. Bureaucrats won't accept your papers.
- 4) Different procedures.

Grazing. Read the guidelines - (state & federal). There's good shit in there.

The Feds think of cases as processing paper. They want to get it right. You can negotiate them down as much as possible and then reserve your right to argue with the judge.

Guilty pleas are done without rules of evidence. But the Feds have put together rules governing begging, whining and moaning. Government recommendations go a long way.

Plea negotiations in federal court, for example about the "Arole in the offense", is secretly conducting discovery for trial.

The feds are very rule oriented. Use the rules to force disclosure.

Establish relevant conduct early. Section 1B1.3. This allows you to negotiate a statement of facts (secretly preparing for trial).

Status conference - misbranding case issue of intent. Any possibility of a plea the judge says? The government will not stipulate for sentencing purposes certain facts regarding relevant conduct and intent. Sometimes you can get the

judge to participate in plea bargaining Awithout participating@.

Adjustments - upward and downward.

- A) Role in offense.
- B) Obstruction of justice.
- C) Multiple counts.
- D) Acceptance of responsibility.

The grab bag approach - ' 5K2.

THE ETHICS OF SNITCHING - THE GOLDEN RULE

Cooperation, section 5K1 and Rule 35.

Discretion of the U. S. Attorney/District Attorney. "Trust me."

THE "FIRST PIG TO THE TROUGH THEORY":

The best time to approach a prosecutor is early on in an investigation, when information is scarce. If you or your company is not a major target, the prosecutor may agree to grant immunity in return for cooperation. Several attorneys involved in the "alliance" fraud case in California obtained quite lenient treatment by winning the race to the courthouse before others even knew there was a race.

If you are a target, the prosecutor's reluctance to grant immunity early on does not foreclose such discussions later when the investigation bogs down or requires information that only you can provide. Even if immunity is not a possibility, pre-indictment plea bargaining is to your benefit. (Former AUSA's speech about plea bargaining - August, 1994.)

So where does the Golden Rule apply? "Do unto others, as you would have them do unto you." When you cross-examine a snitch, you expect him to be

coached - but by the prosecutor, not by the defense bar.

The Arlo Guthrie method of ending the Vietnam War.

Have you ever heard of - "what's sauce for the goose is sauce for the gander?" That's reverse Nix v. Whiteside - think about it.

The person who says AI never represent snitches@, never had a crack case in federal court where the defendant had a gun and a prior criminal record, confessed, and sold dope to an undercover agent on video tape. It=s a great concept, but hard in practice. Private lawyers can decline representation of informants. Assigned counsel cannot.

CONCLUSION

We have a hard job.

If it is not hard - you are not doing it right.

Always remember that we have a honorable job and do not let the bastards get you down.