

Spectacular Sentencings SPD Fall Conference 2011

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Dealing With The Idealized Conception of the Trial Lawyer: Trials are Rarer Than Sentencings:

Let's face it: many of our clients are guilty. Maybe not guilty of everything, but of something, and these cases settle through plea agreement. Just as much as the falsely accused, these clients need our help. Even for the most aggressive trial lawyers, much of what we really do is resolve cases without a trial. Does the time we spend training and perfecting our advocacy at sentencing hearings reflect this? It should.

Sentencing should not be an afterthought. It should be an integrated part of our efforts in any case with potential to resolve: think theory of defense. Think goal-accomplishment. Don't think plea for mercy at the end, or salvaging a loss. If reducing the damage and accomplishing something for the client – less jail, avoid prison, avoid supervision, buy time, rehabilitation, save dignity – is the goal, set it early, and work on achieving it from the beginning. That is the theory of defense, and like the theory of defense at trial, it must be developed and worked up long before the day of sentencing. Sentencing arguments should not be canned, prepared at the last minute, or mailed in. This is the advocacy you bring for your client in these cases, as much as your preparation and trial skills in a contested case. Your client's fate depends on this.

The challenges at sentencing hearing are difficult, and varied. How do we transform the client from a snapshot on the worst day of his life and round out the picture? How do we do this in a public forum, under pressure, with finite time and a skeptical audience? How does our client apologize? How do we temper revenge? How will society be safe? How do we inspire confidence? How do we – the advocate – look smart, like the one with the best plan, even judicial? How do we get to our goal, and achieve a positive outcome to a difficult situation for our client? In cases likely to result in a plea, think through to sentencing from the start.

I. The Case - Have a Plan

- This is not something to think about at the end of a case, or waiting for the hearing.
- What needs to be done to right the wrong, to make your client, victim and society more whole? To punish? To deter and prevent future conduct like this?
- What are you proposing, and why?
- Client input & counsel recommendations – this is usually a process, not a moment.
- Is this plan realistic?
- Is this plan consistent with an appropriate sentencing goal? Why?
- What can you have your client do to get a head start on that plan?

II. The Plea – Propose Your Plan

- Have you worked up the plan during the pre-trial period?
- Has your client responded?
- What have you and your client learned during that process?
- Are there any other allies to contact (victim/victim's lawyer, DOC agent, influential community member, pastor, boss)?
- Have you proposed and worked your plan with your prosecutor?

- Be aware of all disposition options
 - The Standard Options – incarceration, supervision, fine, or a combination
 - The Alternative Options / Effective Justice Strategies / Alternative Dispute Resolution – DPA, diversion, first-time programs, specialty courts – create your own: court-suspended sentence for conditions met, community probation, etc.
- How has the prosecutor responded?
- What can you conclude from the prosecutor’s response?
 - If the answer is ‘no’ how can you discredit that no?
 - If the answer is yes, how can you accredit that yes?
- Work the proposed disposition at any pre-trial hearings: preliminary hearing, or other motion hearings. Do not pass up an opportunity to solicit mitigating or otherwise favorable information from witnesses for later use at the sentencing, e.g. at preliminary hearing: He cooperated and was polite to you officer? He said he was sorry? He had no problem giving you a statement admitting his conduct? No one was hurt? You were not hurt?
- Float sentencing balloons at scheduling conferences and the plea hearing. Let the judge know where the parties are headed, particularly on a joint recommendation, and gauge the reaction. Adjust if necessary.
- Work the PSI writer
 - After the agreement is reached and a plea is taken, if the court orders a PSI, contact the agent assigned. You are the only one who will do this, the prosecutor will not. Getting a favorable result here will greatly enhance the possibility of achieving your goal at sentencing.
 - Contact the PSI writer directly – with a proposal, to advise of plea agreement (especially if favorable), to discredit the prosecutor’s recommendation (if unfavorable) to submit defense DOC TIS II guideline calculations, to submit written submissions (treatment information, family letters, employment verification, etc.). Documents submitted to agent will be included in the report.
 - For DOC TIS II sentencing guideline calculation instructions, see: Michael Lew & Eric Kim, *DOC Changes its Pre-Sentence Investigation Process by Developing Truth-in-Sentencing Recommendation Grids*, The Wisconsin Defender, Spring 2004, at 15.
 - Prepare your client for the PSI interview, and for the tough questions: What do you think of what you did? What sentence would you give yourself?

III. The Sentencing Hearing – Pitch the Plan

- Be aware of the Dynamic
 - Is your hearing contested?
 - If no – how do we tell the judge that we’ve thought and worked together on the resolution? How do we provide cover – and extend our cover to the judge? How do we avoid a set-up, or the judge jumping the plea? Be aware of sandbagging, substitute, or ineffective prosecutors.
 - If yes – how do we look smarter? How do we win?
- Get Ahead of the Sentencing Hearing – Get the First Word
 - Present your plan in writing – in your own pre-sentence report, or in one prepared for you.
 - Use pre-trial agency submissions, but supplement them if possible.
 - Present documents to consider in writing, and file them with the court prior to the hearing. No case is too small for a short submission.
 - Reports, evaluations & assessments, treatment summaries, letters, employment information, AA/NA meeting attendance forms, etc.

- Round out the picture – provide something other than that worst day snapshot of your client.
- Be Aware of Your Audience
 - Communicate effectively: Address the concerns of the judge, the prosecutor, the appellate court, your client, and the victim – try to accommodate these perspectives into your pitch
 - Persuade: Use your own language and personality, but incorporate the language and dialogue of others when speaking to their concerns.
 - Translate: Present your client’s experience – use examples, not statistics.
- Do Their Job for Them
 - Take advantage of institutional mill and grind. Give them something that will make their lives easier (e.g. an expert assessment or report that evaluates the case for them, a restitution calculation)
- Give credit where credit is due: to the judge, the prosecutor, the victim, your client.
- Be Aware of the Risks
 - If something is bad, really bad, don’t make excuses for it, or try to mitigate it directly. Acknowledge it, and address what the client did in response, or what to do about it moving forward.
 - Will victims be there? What does that mean? What can you expect? Be aware of the unexpected. Take control as much as possible, or as much as is realistic.
- Allocution
 - Prepare your client for this moment. Your client can really help their cause here and, just as important, your client can really cause damage here. Saying the wrong thing during allocution can make a judge pounce, and the result can be ugly. Public speaking is hard enough for anyone. In this setting – convicted of a crime, unfamiliar and imposing setting, fate on the line - it’s nearly impossible.
 - Review with your client. Do not script, but make suggestions. Think about what the judge would want to hear from the client. Think about what the victim would want to hear from the client. Think about what society would want to hear from the client. Think about what your mom, or the client’s mom, would want to hear from the client.
 - Watch for pitfalls: the client who says I’m sorry poorly, the client who tries to be a lawyer, the unsympathetic client, the client who only asks for forgiveness or focuses solely on self.
 - Help the Client Learn How to Say I’m Sorry – What makes a good apology? In the criminal justice arena, a no-excuses acceptance of responsibility, genuine remorse and appreciation of the consequences of the action, and an expression to do better. Inspiration and guidance can be found reviewing other approaches:
 - The Spiritual Approach -
 Contrition (Catholic):
 My God, I am sorry for my sins with all my heart.
 In choosing to do wrong, and failing to do good, I have sinned against You, whom I should love above all things.
 I firmly intend, with Your help, to do penance, to sin no more,
 and avoid whatever leads me to sin. Amen.
 -*The Act of Contrition*

Repentance (Buddhist):

For all the evil deeds I have done in the past,
Created by my body, speech and mind,
From beginningless greed, hatred and delusion
I now know shame and repent them all.

- *Traditional Repentance Verse from "The Practices & Vows of Samantabhadra Bodhisattva" (Avatamsaka Sutra, Chapter 40)*

Confession / Atonement (Judaism):

'Please God! I have intentionally sinned, I have sinned out of lust and emotion, and I have sinned unintentionally. I have done [such-and-such] and I regret it, and I am ashamed of my deeds, and I shall never return to such a deed.'

- *Translation, Mishneh Torah: Hil. Teshuvah Chapter 1, Law 2*

Repentance (Muslim):

'O Allaah, You are my Lord, no one has the right to be worshipped except You, You created me and I am your servant and I abide to your covenant and promise as best as I can, I take refuge in you from the evil of which I committed. I acknowledge your favour upon me and I acknowledge my sin, so forgive me, for verily no one can forgive sin except you.

- *Istighfar / The Chief Prayer for Repentance (Muslim)*

- The Common Sense Approach -
 - "I'll pay you" / Restitution or Compensation
 - "I'm sorry" / Letter of apology
 - "I'll stay away" / no contact
- The Minimalist Approach
 - Client stands silent
 - Lawyer does the speaking for the client
- Address "the thing":
 - This is what I call "the thing" simply for lack of a better name. It is, in my opinion, crucial to address. It's the "how do I (the judge) know this will never happen again?" thing. "How do I know you won't screw me?" (make me look foolish for taking a chance, put my name in the paper). The judge needs to have "the thing" addressed in order for he or she to take any risk on your client.
 - Does your client "get it"? How does your client communicate this? How do you communicate this? Address this head-on, if possible. Tell the judge: "If I were you, I would have this concern – Here's what we have to say about that."
 - If the client's accomplishments during the pre-trial proceedings have been demonstrative of the capability of following through with the defense sentence recommendation, then use that to address "the thing". To show your client gets it, understands, is willing to take action.
 - Allocution can also be the ideal moment to address "the thing". If the judge thinks your client gets it – that your client understands the wrong and will work to make sure it doesn't happen again – anything is possible.

There is always something to say on behalf of your client, even if only that he's sorry. If you don't, no one will. –C.M.