ON BEING A CRIMINAL DEFENSE ATTORNEY

Thomas P. Franczyk

Director of CLE Training

Assigned Counsel Program

INTRODUCTION

Criminal defense work has sometimes been described as the art of damage maintenance. Upon meeting a client who is either under investigation for or charged with a criminal offense, counsel is expected to draw upon a multitude of legal, interpersonal and persuasive skills to help the client make the best of what is usually a very bad situation.

Some of these skills include an ability to: listen with an open but skeptical mind, ask the right questions, insist upon candor, communicate in a frank but supportive manner, read people accurately, analyze a criminal fact pattern for areas of prosecutorial strength and avenues of vulnerability, understand the client's objectives, set (and manage) realistic expectations, be practical and flexible, use common sense and street smarts, evaluate an accusatory instrument for legal sufficiency, obtain as much information as possible about the client and the case from discovery and independent investigation before making or counselling the client with respect to important decisions, understand and take advantage of changes in the law such as bail and discovery to ensure release of the client and prompt receipt of important information, identify areas of constitutional challenge to evidence (e.g. stop, search, seizure, warrant, exigency, consent, suggestiveness of identification, voluntariness of statements made to law enforcement or their agents, fruit of the poisonous tree, right to counsel etc.), make appropriate motions and conduct suppression hearings based on a clear understanding of the relevant law and a strategic assessment of the evidence and its likely effect upon the fact finder, read and understand the procedural and substantive rules that govern the process from the investigative stages to disposition (and sometimes beyond in the event of an appeal), accurately assess the prosecution's case as well as the individual prosecutor who is handling it , understand the leanings and limitations of the presiding judge, know when to " hold 'em " and prepare for trial (which you're actually doing from the minute you open a file), and when to "fold 'em" and negotiate a favorable plea disposition (whether from a misdemeanor to a violation or an ACD, a felony to a misdemeanor, a violent felony to a non-violent felony or, if no reduced plea is offered, obtain a favorable sentence commitment (e.g. no jail time, minimum jail time, less than maximum jail time) that represents the best possible outcome under the circumstances.

Taking a case to trial requires its own set of skills not the least of which is the ability to identify and select jurors (unless the defendant opts for a bench trial), who will be receptive to your arguments and willing to embrace important principles such as burden of proof beyond a reasonable doubt and presumption of innocence, recognizing a discriminatory peremptory challenge when you see and hear one and properly taking the prosecutor to task (unless you don't want that juror either), listening to the

prosecutor's voir dire (what are they confident/concerned about?), observing prospective jurors while listening to their answers, introducing the jury to your theory of the case, asking meaningful, open-ended questions that elicit responses that allow you to make an intelligent decision whether to strike or keep a juror, knowing what decisions are counsel's to make and which one's belong to the client, delivering a persuasive opening statement that neutralizes the prosecution's opening and conditions the jury to see the evidence through the prism of reasonable doubt, cross examining prosecution witnesses with crisp, leading questions that poke holes in the prosecution's message or cast doubt on the messenger's credibility, impeaching a witness with prior inconsistent statements, knowing when to refrain from asking any questions, knowing whether to object (a matter of Evidence and strategy) and making objections that count (i.e. keep out damaging evidence or at least preserve the record for appeal in the event of an adverse ruling), knowing what line of questions to pursue and how far to go on cross examination without going too far and undoing points already made, always being mindful of the jury who will decide your client's fate, making a substantive and meaningful motion for trial order of dismissal that pinpoints the prima facie failings in the People's case and preserves the record for appeal, deciding whether to put on a defense case including calling the defendant to testify (always a risky move but sometimes necessary depending on the nature of the allegations and the strength of the People's case), properly preparing your witnesses for direct and cross exam and eliciting relevant information that refutes or cast doubt upon the People's proof, introducing relevant physical, photographic or documentary evidence that supports your case, renewing the motion to dismiss at the close of the defense cases, deciding whether to go for broke or seek a charge-down to a lesser included offense, delivering a coherent and persuasive closing argument that highlights the flaws in the People's case, anticipates their closing and undercuts their likely arguments, reinforcing your theme of the case, listening carefully to the People's summation for misstatements of fact or law, improper appeals to emotion, vouching for witness credibility, demeaning defense arguments or defense counsel or inciting jurors, by their verdict, to protect the community from the likes of the defendant.

In the event of an adverse verdict, counsel should, where appropriate, timely move to set it aside. Counsel must also, whether after a guilty plea or verdict, prepare for sentencing including accompanying the client to the pre-sentence interview, submit a sentence memorandum and advocate zealously for the best possible sentence instead of a long stretch in a state penitentiary (or even a shorter stay in a local correctional facility).

Hopefully, counsel will have created a good record for appellate counsel to identify and (because it was properly preserved), advance the most compelling arguments supporting reversal of the conviction. Ideally, an appeal will be unnecessary because counsel has been able to secure an acquittal.

Thinking, however, that success in criminal defense work is measured only in not guilty verdicts or outright dismissals is to set oneself upon a path of endless disappointment. More often than not, the "best" outcome will likely be one that is "better than it could have been" (and sometimes should have been) because of defense counsel's preparation, persistence and perspicacious advocacy. Understanding that success can only be defined in the context of "this case, this client and these charges," is one of the keys to recognizing and appreciating a good outcome when you achieve one.

If you have read this far and are ready and willing to undertake the many challenges and occasional rewards of being a criminal defense attorney, then welcome to the Assigned Counsel Program.