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BEING THE BEST LAWYER

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INTRODUCTION

Criminal defense lawyers are usually so caught up in the hurly burly of practicing law (especially now that Covid restrictions have been loosened) that they seldom take the time to stop and think about what it means to be a good one, let alone the best advocate they can possibly be.

The fact that the profession is described as the "practice" of law suggests that perfect performance may never be realized, but that shouldn't stop any lawyer from trying to achieve the best possible outcome in every case, whether it's a homicide or a vehicle and traffic violation.

What constitutes the best result undoubtedly depends on the circumstances of each case including the nature of the charge, the quality of the People's proof, the susceptibility of evidence to suppression, the client's criminal history, the victim's attitude toward prosecution, the prosecution's willingness to be reasonable and the court's commitment to ensuring a fair disposition.

What should be CONSTANT in every case is counsel's DEDICATION to championing the client's cause in such a way (i.e., zealously, and ethically) that maximizes the possibility for a favorable resolution (considering both direct and collateral consequences) and invites the respect of the bench and bar and creates confidence in the criminal justice system.

START WITH THE RIGHT ATTITUDE

One of the keys to becoming the best lawyer is to regard the practice of law as an honorable and valuable calling rather than just a job that one must perform to make a living. Taking the latter mindset can cause counsel to cut corners, do the bare minimum, and settle for what is offered rather than fight for what is right. And while current Assigned Counsel hourly rates can hardly be said to pave the way to a life of wealth and riches, they should be no excuse for anything less than maximum effort for every client in every case.

YOUR REPUTATION WILL PRECEDE (AND FOLLOW) YOU

As with judges (e.g., fair-minded, hard-nosed), and prosecutors (e.g., true-believer, straight shooter) and police officers (e.g., authoritarian, reasonable), it doesn't take long for defense counsel to develop his/her reputation as either a hard-working, professional, and effective advocate who is a force to be reckoned with or a lazy, half-hearted clod who is easily dismissed and not taken seriously. Worse yet, one who is dishonest with the court and opposing counsel in even small matters will be operating under a cloud of disbelief that may never disappear.

Undoubtedly, most lawyers prefer to be seen as honest and dedicated advocates, and the best way to earn the admiration of everyone involved in the criminal justice system is to conduct oneself always with honesty, dedication and fierce advocacy tempered with civility, courtesy, and respect for everyone whom counsel encounters.

SOME SUGGESTIONS FOR SUCCESS

"TO THINE OWN SELF BE TRUE" -Polonius (Shakespeare, William. Hamlet. Edited by G.R. Hibbard, Oxford UP, 2008, 1.3.84-86).

Though it has been said a million times in many different contexts, it is important for a lawyer to figure out sooner than later who he/she is and be that person. Of course, if counsel has the self-awareness to realize that he/she is an ass, he/she would be well advised to try and become a better version of him/herself by minimizing negative behaviors and accentuating his/her positive traits.

In any event, above all, counsel must be true to him/herself if for no other reason than the fact that other people (in particular, jurors) can spot a phony when they see one. Consequently, they will be less likely to credit his/her arguments regardless of what the evidence in the case may or may not suggest.

So, if a lawyer is not flamboyant by nature, he/she should not prance like a peacock lest he/she be exposed as a dull bird in disguise. That is not to suggest that the dullard shouldn't try and up his/her game by displaying at least some measure of interest in the proceedings and enthusiasm for the client's cause. If the lawyer comes off as phlegmatic and uncommitted, the jury will pick up on it and may well respond with similar indifference to the defendant's predicament.

PUNCTUALITY

Though judges, unlike defense attorneys, have only one place to be every day, some jurists can be persnickety about punctuality and get their robes in a twist when lawyers arrive later than the anointed hour. In such cases, counsel should obviate the judge's ire by showing up on time, if not a little early. Some judges will not hesitate to deride counsel in front of a full courtroom for his/her tardiness and others may adjourn the proceedings altogether, thus inconveniencing everyone.

Even with more patient judges, it is good practice to be on time every time. But, on the off chance that counsel is held up (whether in traffic or in another court), a phone call to the court clerk ahead of time can often work wonders to smooth things over.

BE NICE

Legendary criminal defense attorney, Bob Murphy often said that it is nice to be important but more important to be nice. Judges and prosecutors respected him for his ability, but everyone (in particular, court clerks and officers) universally liked him because he was kind to everyone (except opposing witnesses on the stand). It was no accident that his cases routinely got called ahead of the rest because people wanted to accommodate him.

It costs nothing to be polite and decent with everyone including an obstreperous client, a snotty clerk, a pugnacious prosecutor, or a pompous judge. Rather than respond in kind, counsel should elevate the proceedings by conducting him/herself with dignified restraint and good humor.

That does not mean being a pipsqueak or a pushover. Counsel can be polite and still be an effective advocate who can kill his adversary with kindness and a persuasive legal argument.

BE CURIOUS AND CREATIVE

There is nothing more boring or ineffectual than a lawyer who predictably follows the lead of other lawyers like a lemming and makes the same moves and advances the same arguments that he/she has heard others make a thousand times without thoughtfully and creatively applying the law to the unique facts of his/her client's case.

While criminal cases lend themselves to common issues and arguments (e.g., legal sufficiency of evidence, unlawful searches and seizures, identification, self-defense), each case requires counsel to take a close look at the facts (and the law) and identify the areas of potential weaknesses in the People's case which will determine the avenues of attack before and during trial.

Counsel should therefore try to get to the bottom of things by reviewing every piece of discovery (no matter how voluminous or time consuming) more than once, interviewing witnesses and taking nothing at face value (including the client's version of events) until it has been cross checked against all other information that has been obtained.

If counsel relies solely on DISCOVERY provided by the prosecution, and does not go to the scene, enlist an investigator to explore relevant matters, consult with an expert where one is needed, or speak to witnesses (whether or not they've already spoken to the police or prosecutor), there is a good chance that counsel will lose at trial.

Counsel should also take advantage of the recent defense-friendly discovery laws to challenge the People's certificates of compliance and declarations of readiness. Instead of accepting representations that may not comply with the letter or spirit of CPL Article 245, lawyers should take a pro-active approach and put the People on their heels. Knowing that their case is hanging in the balance may cause the prosecutor to re-think his/her "no-plea" position and start to see reason. Better yet, the case may be dismissed.

BE A STUDENT OF THE LAW

It is not entirely uncommon for prosecutors and defense lawyers to reveal a superficial familiarity with the substantive and procedural rules that govern their case. Defense counsel can distinguish him/herself (and represent his/her client more effectively) by READING and UNDERSTANDING the statutes under which the defendant has been charged and the procedural rules that can affect whether he/she should be released, or the case dismissed altogether. It is also a good idea to read the cases interpreting those statutes.

This is also true of the RULES OF EVIDENCE which govern what information a jury may consider in deciding a client's fate at trial. No one would expect a coach or an athlete to go into a game not knowing the rules inside and out. The same is true for lawyers who should, for example, not only recognize hearsay when they hear (or read) it but have prepared the arguments for and against admissibility long before the witnesses have taken the oath.

In addition to knowing the rules (e.g., relevance, authentication, leading questions, scope of cross examination, probative value versus unfair prejudice), counsel should know enough about the elements to be proven and the issues in the case to have made the strategic decision whether to object to a particular item of evidence or testimony. Generally, evidence that does not harm the client's case (assuming it has some relevance) may not be worth objecting to lest defense counsel appear to be obstructionist in the eyes of the jury. On the other hand, if the People's witness is galloping along, an objection may serve as a well-placed obstacle to knock him/her off stride.

MAKE MEANINGFUL MOTIONS

Prosecutors will sometimes tell defense counsel, "the plea offer, for now, is X but if you make motions and make us run a suppression hearing (e.g., *Huntley*, *Wade*, *Dunaway*, *Mapp*), there will be no reduced plea offer."

While prosecutors have the authority to attach strings to plea offers (even it involves rescinding an offer when the defense puts them through their paces), unless the defendant is bent on pleading guilty (and the court has hopefully made a favorable sentence commitment), counsel should not jump at the first offer like a hungry hound or hesitate to challenge the constitutionality of the police procedures by which evidence (e.g., a weapon, an admission, or an identification) was obtained.

This requires a thorough analysis of the facts and the relevant case law. If the People appear to be on solid footing and the plea offer (and sentence commitment) appear(s) reasonable, counsel may forego fighting a losing battle only to have the defendant either plead guilty to the charge or face the full force of the People's proof at trial.

If counsel does take the suppression route, he/she should make sure to bring legally sufficient motions setting forth the grounds for the relief sought and (except for challenging the voluntariness of statements or the suggestiveness of identification procedures) alleging sufficient facts to provide the basis for a hearing.

Counsel should carefully prepare for the hearing, using the issues and relevant case law to help frame the questions for cross examination of police witnesses. Prior testimony from a felony hearing and/or the grand jury should be used as impeachment ammunition should the officers' hearing testimony veer off in new and different directions from answers previously given.

While counsel may make oral argument at the conclusion of the hearing, unless the outcome is a forgone conclusion, the opportunity to provide a post-hearing, written memorandum of law should NOT be passed over. If counsel chooses the former approach, an argument like "Judge, what we have here is a stop with some fruit," as advanced by one lawyer, will probably not carry the day.

LOOK AND LISTEN CAREFULLY WHEN PICKING A JURY

While most lawyers dread this most important phase of a trial (assuming the prospect of a bench trial was dismissed as a bad idea), counsel should embrace it as an opportunity to select the most hospitable audience possible to decide his/her client's fate.

Defense counsel's biggest advantage in going last to question prospective jurors (after the court and the prosecutor) is the opportunity to observe the jurors and listen to their answers while the judge and prosecutor are doing their part. At this stage, counsel's life experience, familiarity with human nature and street smarts are every bit as important as legal acumen.

While counsel should consult with the client and consider his/her input on a juror's suitability, in the end, the decision whether to strike or keep a particular person belongs to counsel not the defendant.

It is important to not let the prosecutor argue his/her case in voir dire or ask hackneyed hypothetical questions that, for example, try to condition the jurors to take certain weaknesses in their case (e.g., inconsistencies in witness statements or bargained for testimony) less seriously than the circumstances require. If that happens, an objection should be made because questioning should focus on juror's qualifications, fairness, and impartiality, rather than on what they would do in a particular situation.

When it is counsel's turn to inquire, he/she should break the ice and get to the point with meaningful and mostly open-ended questions that invite answers that enable an intelligent decision whether the juror is acceptable to be seated and sworn. Counsel may also attempt to plant a few seeds of reasonable doubt, especially where the prosecutor has touched on certain expected weak points in the People's case. It is worth keeping in mind that most judges will keep a tight rein on the questioning, so counsel's approach should be economical and efficient.

As a practical matter, once counsel has eliminated the gargoyles, whether for cause or by peremptory strike, the process becomes an educated crapshoot in which the defense's perceived allies will be in the prosecution's cross hairs and vice versa.

SET THE TONE AND CONTROL THE FLOW OF THE TRIAL

While judges like to think they control the process (in large measure, they do) and prosecutors go first with the opening statement and presentation of evidence (because they're the ones with the burden of proof), defense counsel should set the tone of the case from the start in the opening statement (which should NEVER be waived).

So, if the theme is simply one of reasonable doubt, the People's inability to meet their burden of proof, or one that focuses on incredible witnesses, a weak identification, a sloppy and incomplete police investigation that leaves unanswered questions, self-defense (whatever it may be), counsel should set the stage early and use the theme to inform and guide every step of the process from cross examination of the first witness through the closing argument.

BE WARY OF STIPULATIONS

Like most lawyers, prosecutors prefer to take the shortest and easiest route possible from point A to point B. So, if they can persuade opposing counsel to stipulate to admit an exhibit (e.g., a lab report, DWI documents, hospital records) or testimony (e.g., chain of custody) into evidence, that is one less thing for them to obsess about.

When that occurs, counsel should ask him/herself, "WHY WOULD I AGREE TO ADMIT EVIDENCE THAT I KNOW THE PROSECUTOR INTENDS TO USE TO CONVICT MY CLIENT?" For example, in a felony DWI

bench trial, what benefit is there in stipulating to the defendant's prior misdemeanor DWI conviction which the People must get into evidence to prove the felony? Unless the court has foreshadowed a favorable income (e.g., DWAI) about which counsel has confidence, the answer is "there is no good reason to stipulate."

At a jury trial, there may well be some benefit in keeping the fact of the prior conviction from the jury by stipulating to it outside its presence, lest the defendant be convicted based on perceived propensity toward drunk driving. On the other hand, in cases where the prior may be difficult to prove (e.g., problems with court records or proof of identity), counsel may choose to take the People to task and make them prove the prior.

Counsel should remember that once the prospect of a guilty plea has been rejected and the case is bound for trial, the gloves are off and the prosecutor's sole objective is to knock the defendant out and put him/her away for as long as the law will allow. Defense counsel's mission is to make the prosecutor's job harder, not easier.

So, unless, there is some comparable quid-pro-pro or strategic benefit to doing so, counsel SHOULD NOT STIPULATE TO ANYTHING.

SAY NO MORE THAN NECESSARY

For trial lawyers, words are weapons (especially on cross examination) but too often, a machine gun is used when a pistol is all that is needed to accomplish counsel's purpose. For example, an otherwise effective cross examination may be overdone (or undone) by too much repetition or by asking a rhetorical question the answer to which is better left for summation.

Sometimes, it can be more effective to use cross examination to elicit favorable facts that counsel can use to the client's advantage in closing argument rather than attempt to "take out" the witness in the witness chair. On the other hand, cross examination can be utilized not just to discredit or impeach an adverse witness but to underscore points made by other witnesses that are consistent with the defense's theory of the case.

In any case, cross examination must be tailored to each witness, considering his/her age, level of intelligence, personality and degree of damage done on direct examination. And, where there has been no damage done on direct, and nothing to be gained from cross, there should not be one.

DON'T LET THE DA GO OVERBOARD

Some prosecutors will try and get away with murder (of your client) if you let them. For example, after defense counsel has scored points on cross examination, the prosecutor will lead the witness by the nose through redirect examination. DON'T LET THEM GET AWAY WITH IT. Counsel must object and remind the court that this is re-DIRECT exam NOT re-CROSS, and it is improper for the prosecutor to testify for the witness with leading questions that feed him/her the answers.

The same is true for summation where some prosecutors run rough-shod over the defendant's constitutional rights with improper and inflammatory comments that: misrepresent the evidence, comment on facts not in evidence, vouch for a victim's credibility, invite sympathy for the victim, paint the defendant as a criminal and defense counsel as a con-artist. They may also implore the jurors to "send a message" and protect the community from the likes of the defendant.

When the prosecutor goes beyond the boundaries of fair comment and proportionate responses to defense arguments, counsel should OBJECT and, where appropriate, MOVE FOR A MISTRIAL. This is no time or place to sit back for fear that the jury might hold it against counsel for doing his/her job or the court might overrule the objection. Not taking a stand when it's called for could amount to INEFFECTIVE ASSISTANCE OF COUNSEL (see *People v Wright*, 25 NY3d 769 [2015]).

DEFENSE SUMMATION

As with every other stage of the trial, counsel should be surgically succinct and analytical in dissecting the prosecution's case. The objective is not to rehash the evidence for the sake of repetition but to point out those facts (or lack thereof) that establish reasonable doubt and which compel a verdict of not guilty.

While the defense theme of the case should be stressed (with reinforcement by some repetition of key facts and arguments), counsel should give the jury some credit for intelligence and capacity for recall and not undermine their position with insufferable redundancy.

It is also worth remembering that the People get the last word, so if counsel dares the prosecutor to address a particular issue in the case, he/she should be sure that there is no good rebuttal to be made. Also, counsel should not fail to address key points the prosecutor is likely to talk about (unless there is nothing good that can be said) lest counsel's silence on the matter be perceived as a concession. Counsel should also avoid making arguments that he/she knows the prosecutor will be able to blow out of the water.

PLAYING THE LONG GAME

While defense counsel should try every case with an eye toward an acquittal (or a conviction to a lesser-included offense, when appropriate), he/she should always be mindful of PRESERVING THE RECORD for appeal. This requires making the right objections, making a motion for trial order of dismissal (TOD) that IDENTIFIES and ARTICULATES specific grounds that can be argued on appeal, if necessary, and by RENEWING the TOD motion at the close of all proof.

If the defendant is found guilty, then counsel must begin the battle anew and help the defendant put on the best case for sentencing. (ACP'S sentence mitigation specialist can be very helpful).

As a practical matter, since the court will have heard the facts of the case in far greater detail than would be the case after a guilty plea, the court will be at greater liberty to impose a sentence that reflects the jury's verdict upon proof establishing the defendant's guilt beyond a reasonable doubt. In short, the sentence is likely to be more severe.

In contrast, if counsel has negotiated a reduced plea and sentence commitment, the result is largely predetermined unless the defendant violates some condition of the commitment, or the court reads something in the pre-sentence report that prevents it from honoring the deal. In such case, the defendant must be afforded an opportunity to withdraw his/her plea.

FINAL THOUGHT

In many respects, criminal defense work can be described as the art of damage maintenance. As noted earlier, it's all about doing everything possible within the bounds of law and ethical considerations to obtain the best possible outcome under the circumstances. Depending on the nature and severity of the charges, the strength of the People's case, the defendant's criminal history and the victim's attitude toward prosecution, the best possible result could be anything from a lesser charge or sentence (felony or misdemeanor depending on the starting point) to a non-criminal offense to an adjournment in contemplation of or an outright dismissal.

While it is improper for a prosecutor to accuse a defense attorney of trying to distract a jury from the truth with "smoke and mirrors" arguments, occasionally counsel will "pull a rabbit out the hat" (i.e., achieve a better-than-expected outcome) by force of superior advocacy and a little good fortune. (Other times, counsel may feel like he/she is wearing a boa constrictor for a scarf).

If counsel prepares each case fully and outworks his/her adversary, overall, there should be more rabbits than snakes.