

Practice Tips, Part 3

Often tell clients who want a “guaranteed” result that if they ever run into a criminal defense lawyer who guarantees a certain outcome, the lawyer is either a liar, a thief, ignorant—or a combination of the three. In such an event, clients should clutch their wallets and run the other way—fast. Nonetheless, I consider the following two practice tips “slam dunks” and, therefore, if you want to take these “guarantees” it’s up to you. The third is just a good tip.

If the law is against you, argue the facts; if the facts are against you, argue the law; if both the facts and the law are against you, take the prosecutor and probation officer out to lunch. On the date of sentencing, you want in your “fondest dreams” to stand up, have an alternative to imprisonment, and hear the prosecutor and probation officer tell the judge that they agree with your proposal because it is fair, reasonable, and an equitable administration of justice.

The way to achieve this is early preparation. If your client has a mental and/or substance abuse problem that contributed to the commission of the offense and from which he or she either (1) still suffers or (2) has experienced a miraculous recovery and you can document this with highly credible experts (such as the shrink the government typically uses), you are well on your way to getting both probation and the government to concur in what you have to say, which is that your client should not be punished as severely as someone of sound mind who committed a crime out of greed and avarice.

On the other hand, if your client is not so fortunate as to have a significant mental disorder that contributed to the commission of the offense, a series of letters attesting to what a “wonderful” individual he or she is from which you can quote some of the more excellent ones at length in your sentencing memo and even possibly call them as witnesses is often equally as effective as a good mental health report for a crazy client. I have a character instruc-

tional letter that I give to my clients that gives the character letter writer tips on how to write a character letter. I get the letters in advance, throw out the bad ones, quote liberally from a few of the real good ones, and also go so far as to call the writer to expand on why he or she thinks my client is so terrific. I share this with probation, the prosecutor, and at the end of the road, the judge.

Hire the government’s shrink. When you think your clients may suffer from a mental disorder that contributed to the commission of the offense, you should have them evaluated by a mental health professional. The first person I go to is the prosecutor. I ask who he or she likes to use and then I use that person. First of all, it conflicts the government out of using the expert; second, I get a bulletproof report; third and most important, it is often a very good, credible report and you get an expert in court at sentencing who is well and favorably known to the government and often probation and the court. These people are often quite competent and eager to add to their résumé that they’ve testified for criminal defense lawyers. Rarely have I used a government shrink from whom I have not gotten a fabulous report. Often I have the expert speak directly on the telephone with the probation officer and even the prosecutor who provided the referral in the first place.

Don’t forget the unspoken two-level downward departure for good lawyering. Be creative. If you are able to make your case both compelling and entertaining, your client may be rewarded. For example, you might want to integrate some marketing language into documents such as a sentencing memorandum. Remember that in many documents, particularly the sentencing memorandum, you are being a salesperson. You are selling your client to the judge. If you can tell a compassionate story that explains why the defendant did what he or she did, a judge may be persuaded to be less severe in sentencing. I have often found it useful to have my sentencing memoranda edited by people who are not lawyers but rather storytellers—marketing and advertising professionals, for instance. I sometimes use the services of screenwriters, who are masters of storytelling. We often get bogged down in legalese and fail to take advantage of language that persuades. So when preparing your next sentencing memorandum, consider having someone who is not a lawyer—he or she doesn’t have to be a Hollywood screenwriter—help you out. ■



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