

GETTING THE PLEA DOWN

- WORKING WITH YOUR CLIENT TO AVOID DEATH AND OTHER UNPLEASANTRIES

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BAY ST. LOUIS 2018



What Your Client Thinks When He First Meets You

- Lawyers are all right, I guess – but it doesn't appeal to me. I mean they're all right if they go around saving innocent guys' lives all the time, and like that, but you don't *do* that kind of stuff if you're a lawyer.

Holden Caulfield
Catcher In The Rye

CLIENT EXPERIENCE IS THAT LIFE HAPPENS *TO* THEM, NOT *WITH* THEM

- “Whatever is going to happen is going to happen”
- “It’s not my case, it’s their case”
- “Everybody (the judge, the DA, you) works for the same company”
- “If you really want to hear about it, the first thing you'll probably want to know is where I was born and what my lousy childhood was like, and how my parents were occupied and all before they had me, and all that David Copperfield kind of crap, but I don't feel like going into it, if you want to know the truth.”

Holden Caulfield

TWO TYPES OF PARENTS

- “I LOVE MY SON UNCONDITIONALLY. WHATEVER HE DECIDES, I’M GOING TO SUPPORT HIM 100%.”
- “I LOVE MY SON UNCONDITIONALLY. I’M GOING TO GIVE HIM GUIDANCE, AND URGE HIM TO DO WHAT I THINK IS RIGHT FOR HIM. I WILL ASSURE HIM THAT I WILL LOVE HIM REGARDLESS OF HIS DECISION, BUT I WANT TO EMPHASIZE THAT I LOVE HIM NO MATTER WHAT HE DID.”

**Duty to negotiate a plea
Guideline 10.9.1**

“Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.”

Duty to establish relationship of trust: Guideline 10.5

- Interview of client should occur w/in 24 hours of trial counsel’s appointment
- Promptly advise client and Government regarding protection of client’s 5th A & 6th A rights and attorney-client privileges
- Advise as necessary
- Engage in continuing dialogue regarding legal & factual issues, theories of case, client’s relationship w/correctional agents & potential pleas

HOFFMAN V. ARAVE

- Risk of death penalty significant factor in decision to reject plea agreement
- Possibility of winning also significant factor
- “(C)ounsel advised Hoffman to give up the certainty of avoiding the death penalty so that he could go to trial, a risky proposition with a substantial downside.” Hoffman v. Arave, 455 F.3d 926 (9th Cir. 2006)

WHAT STOPS CLIENTS?

- FEAR
 - OF FUTURE
 - OF ABANDONMENT BY FAMILY
 - OF STATE PRISON
- SELF IMAGE
 - “MY SON WOULD NEVER DO THIS”
 - “WHAT SORT OF PERSON DO YOU THINK I AM?”
- MENTAL ILLNESS
- LACK OF TRUST OF LAWYERS

Understanding Trauma

- Don't paint client into a corner
 - Don't let family do it either
 - Don't replicate abusers (threats, intimidation)
- Make acceptance of responsibility palatable
- Consider all alternatives that avoid retraumatization
 - No contest pleas
 - Alford pleas



NO CLIENT EVER TAKES A DEAL
BECAUSE HIS LAWYER TELLS HIM
TO!!!

- CLIENTS TAKE DEALS
BECAUSE PEOPLE THEY
TRUST TELL THEM TO

CAN LAWYER BECOME
“TRUSTED?”

- Visit client early and often
- Do the investigation, no matter how silly or fruitless it might be
- Listen more than you talk
- Share discovery with the client
- Litigate motions – let the client know you’re working for him
- Visit client early and often – yes, it’s that important

SALT LAKE CITY - 2017

- “(County Commissioner) Harvey said he felt (defense attorney) Newton was spending too much time trying to create relationships with his clients in prison, when “all the state wants to know is if the appropriate decision has been made” in a conviction.”

WHO DECIDES?

- Client and client alone decides
 - Important that client knows this early on
- In reality team decides first
 - Everyone on team MUST be in agreement
- Avoid TRIAL LAWYER SYNDROME
 - Yes, you are the best lawyer in the world
 - No, you can't win this case

Stitt v. United States, 369 F.Supp. 2d 679 (E.D. Va. 2005)

- “The fact that there was a disagreement between the two attorneys who Petitioner retained for his defense team does not negate the fact that Petitioner was presented with the opportunity to plead guilty and chose not to do so.”

Learn Court Culture

Trials v. plea outcomes
Client's false realities –
no one gets executed,
death row same as general
population
Death sentences better for appeals

Understanding Past Mitigation

- Intellectual functioning/adaptive behavior
- Culture: prison, family, larger community
- Multigenerational history abuse and trauma
- Multigenerational history mental impairments
- Power base of the client
 - No one stands alone
 - Power base not always family
 - Persuade power base first

Three Factors In Achieving Goal

- Understanding Past Mitigation
- Creating Present Mitigation
- Imagining Future Mitigation

Power Base of Client

- Family
- Friends
- Peers, Co-defendants

Creating Present Mitigation

- Family contact
- Employment
- Therapy/treatment
- Enabling process of remorse/redemption

Imagining Future Mitigation

- Life in prison is really a life
 - Stark differences from death row
 - Employment, betterment, fulfillment
 - Wilbert Rideau: The Life Project
- Family will continue to support client
- Client will continue to be important to family

WHEN DO WE TALK DEAL?

- **WHEN THE MOOD IS RIGHT**
 - Your investigation almost complete
 - Client’s investigation requests have been done
 - Team is in full agreement
- **CONVERSATION IS PLANNED**
 - Who delivers message?
 - Who is present?

When Can Case Be Resolved?

- Before arrest
- During investigation pre-trial
- At waiver/jury decision
- During jury selection
- After jury verdict at guilt stage
- During post-conviction process

Team Strategy Of Persuasion

- Nothing happens by accident
 - Every meeting with client must be coordinated and memorialized
 - No mixed messages
- Every member of team must play a role
 - Investigator, mitigator, mental health expert, lawyers

ACCEPTANCE OF RESPONSIBILITY

- CLIENT CAN'T EXPECT OTHERS TO ACCEPT HIM UNTIL HE ACCEPTS HIMSELF
 - "NO ONE IS DEFINED BY THE WORST THING THEY'VE EVER DONE."
- PROCESS SHOULD BE SLOW BUT START EARLY

BRING IN OUTSIDERS

- “EXPERTS” CAN SAY THINGS THE TEAM MIGHT HAVE TROUBLE SAYING
- OUTSIDERS CAN HELP BALANCE THE TEAM RACE-WISE, GENDER-WISE, AGE-WISE

Ms. Erin,
 Hid how ARE you doing? Tell KAEL AND MARK I SAID Hello AND I'll Never ever Forget you guys For saving my life. AND I ASK GOD For Forgiveness everyday CAUSE I took someones life. I'm doing REAL good I dont stress that much CAUSE I no I done WRONG AND I HAVE to PAY FOR it like A MAN. my FAMILY ARE doing well also they ALL write, visit, AND help me with money. THANKS For the CARDS on my B-DAY AND X-MAS. I hope to hear From you guys in the Future yall ARE some cool white people ©

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 PLEASE
 I know what your trying to do but its not gonna work on me. Now Im about to testify you... Good luck"
 I Don't have any regrets about phoning youly cause I was guilty and in life. You have to pay for your Fuck ups. I regret not leaving that bastard that would put me back in prison. but like I said you have to accept responsibility for what you did and face faith in your head that hell? Forget you and you just try to help the younger kids who are gonna be you if you dont reach out to them. I gave up my life but my life isnt over cause people look up to me and I can influence some of them to think about change. So in retrospect Im turning a negative to a positive. Im happy that Im gonna be positive about my situation. Cause if you not then you've lost the battle.
 AP
 P.S. So yes I did the right thing for myself!!!!
