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The Defender

Newsletter for CJA Panel Attorneys

Independence Day Issue*

Client Control

All defense lawyers know the agony of dealing with a client who refuses to take advice. Panel attorneys and defenders get more than their share of such clients. This is because defendants equate free advice with defective advice. ("If I only had a free-world lawyer, I could get probation").

However, lawyers often aggravate this schism by sending the wrong signals back to the client. Lawyers have some duty to "win the client over," even when it does not mean signing up a fee. The following are some comments about dealing with several critical stages of client contact.

Introduction

Often, we meet our clients in a busy courtroom. This occurs in the presence of a judge, one or more prosecutors, law enforcement agents, marshals, Pretrial Services officers, and other assorted bodies. For a defendant without significant experience in the criminal justice system, this is frightening. For the more savvy defendants, this is at least unsettling.

How you react to your new client, and the others in the courtroom, is important. In a small district like this one, everyone knows everyone. There is a tendency to continue conversations about other cases, to tell jokes, and to make "small talk."

A client, meeting his lawyer for the first time, may mistake this casual banter as sign that his appointed lawyer will be neither objective, nor independent. That is a bad start toward an attorney-client relationship.

Only the defense lawyer can set the tone in this situation. The others, especially the prosecutors, are oblivious to the ramifications of making an attorney look bad in front of the client. Prosecutors do not understand that a poor attorney-client relationship will make *their* job harder in every stage of the case. Some will even try to discuss plea offers before you have had a meaningful discussion with your client in private.

Go directly to the client, explain what is going on, and let them know that very soon there will be an opportunity to discuss the case in private. Tell the client not to discuss their case with anyone when you are not present. Show concern for their predicament, and do not undermine your words by careless actions.

Meetings

When meeting with the client, be careful about the signals you are emitting. Most people will trust you more if you can look them straight in the eye without wavering. If it makes the client uncomfortable, then they can choose to look away.

Eye contact is extremely important to persons who have been in prison. In that noisy and congested environment, any meaningful conversation will occur close up. Looking away may be viewed as deception.

Be calm and speak slowly. What you will tell them about federal court is scary enough. Speaking loudly, in staccato bursts, will only make the client tense and defensive.

What the lawyer says is as important as how it is conveyed. It does not matter if it's a bank robbery with ten eyewitnesses, videotape, fingerprints, and a defendant caught covered in dye - the first item of conversation should not be about a "deal."

First, it sends a bad vibration to the client. Second, no matter how hopeless the facts the lawyer may still end up trying that case.

Attorneys are scared that if they start talking to the client about a trial, then the client will expect a trial, even though the best resolution may require a guilty plea. This is exactly backwards. The more information the client receives about what a trial is, and how the evidence in his case will be presented, the more likely that a client will trust the lawyer about potential plea offers.

Treat every case as if it will

*Independence from British tyranny, not space aliens.

CONTENTS

require a trial and meet with the defendant accordingly. It fosters trust.

Consistency

The most important attribute a lawyer can show to his client (other than an excellent working knowledge of federal criminal law), is consistency. This means never promising too much, or doing too little. Do not give clients a big show about how much you care about them the first day, and then never accept their calls.

Never promise results that are only possible and not certain. You are unlikely to be forgiven when you say something is going to happen and it does not. You will never be blamed when there is an unanticipated good result.

If you are busy (and we all are), give the client some expectation about when they will hear from you and what the progress of their case is likely to be. Do not tell them how busy you are. Clients simply hear, "Your case is unimportant."

Some clients never call and some call every day. Make ground rules and stick by them. Refusing your client's daily collect call about suing the Supreme Court is not going to get you in trouble. Refusing to talk to clients about their Presentence Investigation Reports is malpractice.

Write letters to clients. It is a cheap and efficient way of conveying information. It indicates you care, and it stays in the file.

Client Concerns.

Some defendants understand the issues in their case and the relative importance of each. Many clients have little or no perspective. Their concerns tend to be immediate and impulsive.

Simply telling a defendant that their issues are unimportant or misguided will only create friction. Patience is necessary. Just listening attentively can solve a lot of problems.

It is perfectly fine to tell a defendant that you do not know the answer to his question, as long as you promise to put some effort to finding out the answer. Too many lawyers would rather guess wrong than admit they are ignorant.

Materials

It is always a good idea to give the client motions and memoranda you have filed on their behalf. Discovery materials should not be distributed so freely. Prosecutors generally do not appreciate FBI 302s or DEA 6s to be given to clients. However, clients are unlikely to consider this a good reason not to receive them.

A more acceptable reason is that such materials could be seen by others (especially cellmates), who will then go and report the client's jailhouse "confession" (containing explicit detail).

Conclusion

It is easier to deal with a client that trusts you. Trust must be earned. Earning that trust takes less energy than fighting with the client.

Reversible Errors.

Supreme Court.

Nothing good.

Eleventh Circuit.

In determining the amount of loss caused by a defendant's fraud, for sentencing purposes, the district court could not rely solely on the amount stipulated in parties' plea agreement. United States v. Strevel, 85 F.3d 501 (11th Cir. 1996).

It was insufficient to charge a jury to determine whether the defendant "willfully" acted as an unlicensed firearms dealer - knowledge was required. United States v. Sanchez-Corcino, 85 F.3d 549 (11th Cir. 1996).

Counting seedlings as marijuana plants to calculate the base offense level was plain error. United States v. Antonietti, 86 F.3d 206 (11th Cir.1996).

Evidence that the defendant drove a vehicle containing cocaine and was to be paid to "unload" the vehicle, did not support findings that he knowingly possessed cocaine, or that he knew of the conspiracy. United States v. Mejia, 1996 WL 341188 (11th Cir. 7/9/96).

Other Circuits.

(1) Jury instructions that did not distinguish the meanings of "use" and "carry" were defective in a trial on 18 U.S.C. §924 (c). (2) When a law is clarified between trial and appeal, an objection will be preserved as "plain error." United States v. Webster, 84 F.3d 1056 (8th Cir.1996).

The "good faith exception" to the warrant requirement does not affect motions to return property under F.R.Cr.P. 41 (e). J.B. Manning Corp. V. United States, 1996 WL 333690 (9th Cir. 6/19/96).

A loaded handgun in the defendant's waistband was not "used" in relation to a drug offense. ("Carry"

was not charged). United States v. Garcia, 1996 WL 316490 (5th Cir. 6/12/96).

Officers did not have the right to break down an apartment door without first knocking and announcing their presence. United States v. Bates, 84 F.3d 790 (6th Cir. 1996).

There was insufficient evidence that a rape involved "serious bodily injury" in a carjacking case for sentencing. United States v. Rivera, 83 F.3d 542 (1st Cir. 1996).

(1) Government's failure to object to the presentence report waived its complaint. (2) Insufficient factual findings for a managerial role. United States v. Ivy, 83 F.3d 1266 (10th Cir. 1996).

(1) Court failed to make individualized findings of drug quantity. (2) Extreme vulnerability to abuse in prison may justify a downward departure. (3) Adoption of the PSI was not the same as "express findings." United States v. Graham, 83 F.3d 1466 (D.C. Cir. 1996).

Drugs seized after the defendant was in custody could not be counted toward the sentence. United States v. Byrne, 83 F.3d 984 (8th Cir. 1996).

Prohibiting a defendant from active cooperation with police was an abuse of discretion. United States v. Goossens, 84 F.3d 697 (4th Cir. 1996).

Restitution order failed to indicate all the statutory factors were considered. United States v. Giwah, 84 F.3d 109 (2d. Cir. 1996).

Amendment to commentary of guidelines which required a sentence base on a lower, negotiated quantity of drugs, was retroactive. United States v. Felix, 1996 WL 351188 (9th Cir. 6/27/96).

Robberies and burglaries were not relevant conduct in a money laundering case. United States v. Gabel, 85 F.3d 1217 (7th Cir. 1996).

Eligibility for "safety valve" (§5C1.2), does not depend on acceptance of responsibility. United States v. Shrestha, 1996 WL 343638 (9th Cir. 6/24/96).

(1) A judge could not determine the price of methamphetamine based on the judge's experience, the price, or where drugs came from. (2) Counsel's bad sentencing advice required remand. United States v. McMullen, 86 F.3d 135 (8th Cir.1996).

Drug quantity finding was insufficient. United States v. Acosta, 85 F.3d 275 (7th Cir. 1996).

(1) Credit card loss was the outstanding balance and not the total amount charged. (2) Remand was proper even though the district court could still impose same sentence. United States v. Allison, 1996 WL 343645 (9th Cir. 6/24/96).

A criminal contempt offense does not allow both incarceration and a fine. United States v. Versaglio, 85 F.3d 943 (2d Cir.943).

The fair market value, rather than the smuggler's price, should have been used to calculate value of illegally smuggled wildlife. United States v. Eyoum, 84 F.3d 1004 (7th Cir. 1996).

There was no basis to deny credit for acceptance of responsibility when the defendant did not falsely deny relevant conduct. United States v. Patino-Cardenas, 85 F.3d 1133 (5th Cir. 1996).

An attempted "home invasion" was not a violent felony under the Armed Career Criminal Act. United States v. Sparks, 1996 WL 346686 (9th Cir. 6/21/96).

No reason was given for an upward departure on a fine. United States v. Sharma, 85 F.3d 363 (8th Cir. 1996).

A defendant was given inadequate notice of the court's intention to depart upwards for perjury. United States v. Marmolejo, 1996 WL 327636 (5th Cir. 6/13/96).

Court failed to make findings on the defendant's objections to the presentence report. United States v. Del Muro, 1996 WL 360595 (9th Cir. 7/1/96).

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