

The Forgotten Trial

More often than not, the punishment phase of a trial is treated like the “stepchild”. It is something that takes a back seat to the “guilt/innocence” phase of the trial. However, with the attitude of today’s appellate courts, specifically the make-up of the Court of Criminal Appeals, and the public’s call for law and order that we face daily, the punishment phase of a trial can be more important than the “guilt/innocence” phase.

How often have you had a case, where the facts were such that you had little, if no defense to the charge at all? Or, how often has your client, by the time you are appointed or hired, done everything in his power to assist the government in proving its case? Often, we as defense attorneys are asked to do the impossible. Many times all we can do is damage control in attempting to keep the punishment to a term that our client can accept or to minimize the number of years that he can be assessed.

Unfortunately, in recent years, I have found that we often measure success by beating the number of years that are actually assessed as opposed to what the prosecution has offered in the form of a plea bargain. But, if you are willing to put forth the effort, the punishment phase of the trial can actually be more important and more beneficial than the case in chief.

A very large number of attorneys spend all their time and effort on the guilt/innocence portion of the trial, and do not devote adequate time to the punishment phase. In many cases this may be an absolute mistake. In this regard, I have found that you

can often lose the battle, but win the war during this second portion of the trial.

CONSIDERATIONS

1. WHAT COURSE OF ACTION IS AVAILABLE TO YOU?

- Plea of not guilty to the jury, with the jury to set punishment.
- Plea of guilty to the jury, with the jury to set punishment.
- Plea of not guilty to the judge, with the judge to set punishment.
- Plea of guilty to the judge, with judge to set punishment.
- Plea bargain agreed to by the parties.

B. FACTORS TO CONSIDER IN EACH CASE!

- Deferred Adjudication**
- Probation**
- Jail Time**
- Penitentiary Time**
- Community Service**
- Restitution**
- Good of the Community**
- Level of sophistication of the community where the trial is being held**
- Judicial attitude toward your client or the offense**

- Your client's criminal history**
- Your client's attitude**
- Your client's demeanor**
- Your client's personal history**
- Your client's family**
- Friends of your client**
- Relatives of your client**
- Availability of witnesses**

3. HOW DO I DECIDE WHICH PROCEDURE IS BEST?

You have to make the determination on a case by case basis. I recommend that if the facts are such that the government has a "lay-down" case, that you consider selecting the punishment phase as the place to make your stand.

There are basically two ways to approach this tactic. One is that you can let the court and the government know what you are going to do. The other is not to reveal your course of action, and let the government think you are going to fight them on the guilt/innocence portion of the trial; then at the time of trial, you enter your guilty plea and you are ready to proceed with the trial you have prepared for. This method circumvents the prosecution from preparing for the punishment phase of the trial. The prosecution will still be required to prove up its case, but the majority of the time, their proof is minimal and often some of the more damning details are skimmed over. And, the amount of "smoke" you have thrown up prior to trial may lead the prosecutor to spend all his or her time attempting to offset the defenses you have been touting. Most prosecutors will not devote the

time to the punishment phase of the trial and rely on police, law enforcement, probation, and/or parole officers to testify as to the bad reputation of your client. Many times the prosecution has no evidence to put on against your client in punishment. You on the other hand, will have witnesses that you have prepared ready, willing and able to take the stand and tell the court or the jury what a great person your client is and why he should not be incarcerated. Bottom-line is that not revealing your strategy, will oftentimes give you an advantage over the government. But, you need to make an assessment of your particular case and use the tactic that will be to your best advantage.

When trying to decide whether to go before judge or jury, you absolutely have to know your judge, your community and your client's background. For instance, I know a judge that is fairly light on drug users, but will absolutely "hammer" a child molester. Or another judge I know is often swayed by crying children begging not to send their daddy to jail. There is a publication that I have found useful as well. It is called Texas Judge Reviews, by Jane M. Corley. The book is published by James Publishing. This book lists each year every District Judge in the State of Texas. It gives each judge's biographical information, attorneys' impressions of the judge, discusses each judge's temperament, demeanor, legal acumen, preparedness, trial style, attitudes on continuances and gives you suggestions concerning his "leanings" in criminal and civil cases. I have found the book very helpful, but not the final word. Therefore, I would suggest that you talk with attorneys that practice before the judge on a regular basis to make sure as to your assessment of the judge.

As for your community, you have to know what the level of sophistication may be. For instance, in a rural county, where the people think that marijuana is next to the "ultimate sin", or that lawyers from Dallas are "flatland foreigners", you may not want to use a jury. How do you find out? You talk to lawyers where the case is pending. You find out what the judge's position might be in a particular case. If you are a "foreigner," consider associating a local "well thought of" attorney to assist you in at least picking the jury. If he does nothing but take notes for you during

voir dire, have him at the counsel table to show that a “native” is on your client’s side. You talk to people from the area and try to get an idea of the sophistication and level of acceptance in a particular area. I have found that if I can find a TCDLA member who is familiar with the community, I can generally get a valid read on jury philosophy in a community. For instance, there is a county in West Texas that has not had an acquittal by a jury since 1968. Most lawyers who are not from that general area, would not be aware of that fact. You may or may not be aware of that fact, without talking to local lawyers.

4. HOW DO I DETERMINE WHETHER TO USE THE PUNISHMENT DEFENSE?

Below I have listed the things that I look at to see whether this is a viable way to approach the case. I am quite sure there are more, but these are factors that have worked for me. They are not in any particular order of importance, but each must be looked at by you as the attorney, as a way of possibly assisting your client.

- Evidence by the State
- Past criminal history
- Reputation of client in community where case is pending
- Reputation of client in his home community
- Family of client
- Work history of client
- Religion of client
- Type of offense
- Civic involvement
- Psychiatric of client
- Children
- Availability of witnesses
- Victim of crime
- Length of incarceration
- Intelligence level of client
- Judge
- Extraneous offenses
- Health of client
- Level of sophistication of community where case is pending

Depending on the case, I try to start work on the punishment phase of the trial from the date I am hired or appointed. In other words, I start trying to build the character for my client immediately. And what is even better, you can actually control, if your client will follow your advice, what your evidence is going to be at the punishment phase.

I divide the clients into two types:

FOR THE CLIENT THAT IS OUT ON BOND:

1. Tell him to get a job, or keep his, and to get as close to his boss or supervisor as he can. This way his boss can testify as to what a great employee your client has made.
2. Tell him to get involved in church. Not just go, but be active. Usher, attend during each service, teach Sunday School, serve at Wednesday night suppers, etc. All the while he should be developing people that are in the church as possible character witnesses.
3. If young and living with parents, develop a course of living to bring the parents into play as witnesses who have noticed a change in their child.
4. If living with wife or girlfriend, what better witness to a change in lifestyle by your client.
5. Get your client involved in volunteer work, YMCA, boy scouts, “meals on wheels”

anything dealing with helping out in the community and develop fellow workers, supervisors, coordinators as possible character witnesses.

6. If drugs or alcohol played any part in the alleged crime, get your client into rehab and/or counseling. Counselors make great witnesses.
7. Try to get your client into counseling. Counselors make great witnesses and are on your side, trying to make your client a contributor to society.
8. Education is something that is oftentimes overlooked. Get your client into GED program, adult education, junior college courses, etc.
9. New job training is another area that can be used to show that all important change in your client, preparing for the future.

FOR THE CLIENT NOT OUT ON BOND:

1. Get client involved in religious services at jail. More than just attending. The jail church people are always sincere and convincing witnesses.
2. Education, most jails have in facility education or correspondence courses that can be signed up for.
3. Letters to relatives setting out remorse for the alleged crime (without confessing) and

statements about setting his life straight and making a better citizen. DO NOT HAVE YOUR CLIENT WRITE LETTERS TO THE VICTIM OR THE VICTIM'S FAMILY.

4. Communication with friends by letter, telephone or jail visit.
5. If drugs are involved, get counseling for your client. Petition the court for help in drug rehabilitation.
6. Have your client prepare a "plan" once he is released. Include in the plan living conditions, job, church, community involvement, etc.
7. Have client's family arrange employment if he is released.
8. Take advantage of any medical condition your client may have.
9. Have client volunteer for any program in the jail, work crew, trustee, etc. Once again to show the change in your client

The main concept is to develop a "plan of action" as to all phases of your client's life if he is released and to have all the bases covered to give the court or the jury something to get the judge or the jury to sink their teeth into. CAVEAT: IT HAS TO BE VIABLE AND SELLABLE.

For instance, your plan should contain a job for your client upon release, a place to live, people to assist him, remorse for the offense, involvement in the community, involvement in a

church, involvement with his family, counseling, etc. All of these items and any more that you can come up with to show the jury that your client will be a useful, contributing member of his community.

E. WITNESSES

In the punishment phase of the trial, you have a unique position, as you can actually select whatever witnesses you want to prove whatever you want. In no other type of proceeding before a court do I know of an opportunity that you have like this. I divide the witnesses into two categories:

Witnesses for the Defense and Witnesses for the State.

I have used almost any type of person you can possibly imagine as a punishment phase witness. Here are some of the types of witnesses I have used:

WITNESSES FOR THE DEFENSE

- Expert witnesses
- Employer
- Fellow employee
- Relative
- Children
- Family
- Church people
- Concerned citizens
- Volunteer coordinators
- Counselors
- Civic leaders
- Jail employees
- Deputies
- the Defendant
- Fellow volunteers
- Friends

Each one of these witnesses are important, and the more that you can weave into your case to prove up your plan, the better off you will be. Remember, you can get these witnesses with little or no trouble, and they will almost always be friendly, supportive, and against sending your client to jail. Any evidence you can bring forward concerning the history of your client as compared with your plan will help show a change for the better.

If you have evidence of your client as a child, the hardships he endured, the level of training or education by parents or lack thereof, the educational level of your client, his peers, etc. These are all matters which if handled properly can contribute to your plan and either reduce the possibility of a lengthy sentence or even grant probation.

STATE'S WITNESSES

Most of the time, the State's punishment phase witnesses are divided into two categories:

- Law enforcement officers
- Victims or families of victims

Law enforcement officers are the easiest to attack. They generally will not know where the client lives, his or her spouse's name, what church he or she attends, where he or she works, how many children he or she has, whether or not he or she is involved in any volunteer work. Their testimony generally goes like this:

PROSECUTOR: "Officer Jones, are you acquainted with _____?"

OFFICER: "Yes sir."

PROSECUTOR: "Officer Jones, are you acquainted with the reputation of _____,
for being a peaceable and law abiding citizen in the community in which he lives?"

OFFICER: "Yes, sir."

PROSECUTOR: "How would you classify that reputation, good or bad?"

OFFICER: "Bad"

PROSECUTOR: "Pass the witness"

It is at this juncture where you can really go on the attack. Start off low key and get more and more surprised, disgusted, frustrated as you cross-examine the officer. You can question the officer as follows:

LAWYER: "Officer Jones, do you know where _____ lives?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know where _____ works?"

OFFICER: "No sir."

LAWYER: "Officer Jones, what is _____'s spouse's name?"

OFFICER: "I don't know."

LAWYER: "Officer Jones, what is the name of _____'s oldest child?"

OFFICER: "I don't know."

LAWYER: "Officer Jones, what is the name of _____'s youngest child?"

OFFICER: "I don't know."

LAWYER: "Officer Jones, do you know the name of the church that _____ attends?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know what volunteer programs _____ participates in?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you the name of _____'s best friend?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know whether or not _____, has completed high school?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know the names of the parents of _____?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know the occupation of _____'s father?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know the occupation of _____'s spouse?"

OFFICER : "No sir."

LAWYER: "Officer Jones, do you know the occupation of _____, prior to his arrest on this charge?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know whether or not _____ has ever been treated for mental illness or an emotional disorder?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know what religion _____ follows?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know whether or not _____ has special training as a _____?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know the name of _____'s boss?"

OFFICER: "No sir."

LAWYER: "Officer Jones, do you know how long has _____ been held in custody for this case?"

OFFICER: "No sir."

LAWYER: With disgust-----"I have no further questions of this witness!"

In the proper case you can ask other questions, like:

LAWYER: "Officer Jones, do you know whether or not _____ was sexually

abused as a child?”

OFFICER: “No sir.”

LAWYER: “Officer Jones, do you know whether or not _____ was physically abused as a child?”

OFFICER: “No sir.”

LAWYER: “Officer Jones, do you know who is _____’s family doctor?”

OFFICER: “No sir.”

Use anything that can show that the officer really has no knowledge about your client. But make sure that you know that the officer does not know the answers to your questions. You have to make your cross-examination fit your case, and the facts, but you can see how you have set up your final argument. The theme of your argument would be “the only witnesses brought by the government were witnesses that it pays. Weigh the credibility of a witness who doesn’t even know where my client lives, works, worships, etc. It can make a really great argument if you have put on your witnesses to show all of these items which I have listed previously, put on my witnesses to prove up and cross-examined the government’s witnesses. Be creative, be cautious, but try to build your case from a character standpoint that will appeal to the judge or the jury. There is not a real “burden of proof” here, so more is always better. I have literally filed witnesses from all walks of life in and out of the courtroom in a particular case for hours and hours, and all the government had was some policemen, undercover agents, and deputies who had little actual knowledge of any of the facts concerning my client or his reputation.

A MAJOR CAVEAT HERE: NEVER, NEVER, NEVER, NEVER

ASK A LAW ENFORCEMENT OFFICER UPON WHAT HE BASES HIS OPINION.

FURTHERMORE, DO NOT GET EVEN CLOSE TO THAT QUESTION. IF YOU DO, EVERYTHING THAT HAS EVER BEEN SAID ABOUT YOUR CLIENT WILL LIKELY COME OUT AND YOU CANNOT STOP IT.

6. HOW DO I PREPARE WITNESSES FOR THE DEFENSE?

This is the easy part, in that you are not dealing with any facts that are in issue. You literally have the “sky” open to you to discuss about your client.

Make sure that you prepare your witnesses for the following:

1. “Have you heard” questions.
2. Extraneous offense attempts by the Government
3. Badgering by the Government

You can actually prepare your witnesses and with your most trusted ones, set traps for the prosecution to step right in the middle of.

You want to use your witnesses to make the jury or the judge a part of the family. Let them in on what is going to happen. You want tears, crying, weeping, begging for forgiveness, unbridled remorse all coming out. Emotion can be a deadly weapon against the government. The prosecutor is not going to badger or jump all over an emotional witness begging for forgiveness, begging for mercy, pledging his or her loyalty to your client, for fear of alienating the jury. You want to make sure that you have every facet of the life of your client impregnated with assistance from family, clergy , friends, community services, employer, etc.

Finally, the most time in preparation of witnesses should be spent with your client, if you are going to put him or her on. My tips on preparing your client are very simple:

1. Develop our plan, know it backward and forward;
2. An unrelenting pledge to make a positive contribution;

3. Begging for mercy;
2. Begging for a second chance;
3. Unbridled remorse;
4. Emotions running rampant;
5. Fear of confinement;
6. Fear for his or her family;

CONCLUSION

I hope that you can use some of the suggestions I made. My experience has been that you can often turn a “sow’s ear” into a “purse”, it may not be “silk”, but it oftentimes will be acceptable. If you are successful you can cut your client’s exposure and time, and once in a while walk out of the courthouse with him on probation or a deferred.