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TRIAL TACTICS:

Lessons from the Criminal Defense Bar

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By Doug Jones

I. What's the Big Deal? A Trial's a Trial

To make it through law school and pass the bar, every lawyer must learn a minimum amount of criminal law. But very few have to learn any criminal procedure. The difference is significant because in today's media driven world most civil lawyers learn about criminal cases through television shows like the "Good Wife" and "Law & Order."

NEWSFLASH: That ain't the real world folks!

So to really put the lessons to be learned in proper context, let's take a quick look at some of the major differences in the procedures of civil trials and criminal trials. In doing so, the focus will be on federal court cases. There are simply too many nuances among the various states in both civil and criminal procedure to adequately address any particular state court.

A. Pre-Trial

1. The Civil Demand Letter—Even though in many instances your client might have an inkling about a potential action, often they will get a stern but somewhat friendly demand letter from a plaintiff lawyer. The client might then

engage an attorney, begin a preliminary investigative process and engage in at least some negotiations with plaintiff's counsel. Usually this is not a very long process. Significantly, unless the parties agree otherwise, no documents are exchanged and no depositions are taken.

2. **The Criminal Grand Jury**—Pre-trial in a criminal case is vastly different and usually lasts significantly longer. It is also totally one-sided. While lawyers for subjects or targets are scrambling to learn what is going on, the prosecutor has a vast arsenal of investigative weapons—an army of investigators interviewing witnesses and examining records, the power to subpoena any record they desire, and the power to subpoena witnesses to give testimony before the Grand Jury, kind of like a deposition with only one party attending. So imagine being asked to defend a client pre-trial knowing that the other side has total access to every document and witness with the exception of your client. Not only does the other side not have to tell you anything, in some cases grand jury secrecy rules prohibit them from saying anything. *See* Rule 6, Fed. R. of Cr. Procedure.

B. Initiating the Case

1. **Summons and Complaint**—Rule 2 of the Fed. R. of Civ. Procedure simply states "A civil action is commenced by filing a complaint with the court." The complaint is then served in various ways by service of a summons per Rule 3.

The complaint, of course, has the style of the case "John Doe" versus your client, "Jane Doe" versus your client, somebody's "Next Friend" versus your client.

2. An Indictment and Arrest—The grand jury returns an indictment in secret and the next think you know your client is being visited by law enforcement agents who promptly "serve" him with an arrest warrant, cuff him and take him into custody. In a high profile case the client might have to endure a "perp walk" past a line of cameras and reporters. The client appears before a U.S. Magistrate where he may or may not be released on bond depending on the crime charged and whether or not he is a flight risk or danger to the community. *See* 18 U.S.C. § 3141, et seq. Subsequently, in an arraignment proceeding the client is formally "served" with a copy of the indictment and "answers" by simply pleading "not guilty." From that point on the client has no further obligations to do anything except show up for court.

C. Discovery

1. Documents, Depos and Interrogatories—It is all at the civil lawyer's fingertips. Rule 26 of the Fed. R. of Civ. Procedure is incredibly broad. Not only do you produce everything you have that is not privileged, you have to produce the names of folk who might have information about the case.

Rule 30 governs the use of depositions and Rule 33 interrogatories.

The entire process is designed to be as transparent to the other side as possible.

Based solely on a literal reading of the Rules of Criminal Procedure, discovery is incredibly narrow and given a prosecutor considerable discretion in deciding what is required to be produced and what is not. For instance:

Documents and Tangible Objects—In addition to any statements of the defendant, a defendant's criminal record and expert reports, Rule 16 (E) of the Fed. R. Cr. Procedure requires that the prosecutor produce only the following "Documents and Objects:"

> Books, papers, documents, data, photographs, intangible objects, buildings or places, … if the item is within the government's possession, custody, or control and:
>
> (i) The item is material to preparing the defense;
>
> (ii) The government intends to use the item in its case-in-chief at trial, or
>
> (iii) The item was obtained from or belongs to the defendant.

Unfortunately in recent years we have seen all too many prosecutors get into hot water for interpreting their discovery obligations to narrowly.

Note what is NOT included in this rule: any witness statements or grand jury testimony. Under what is known as the Jenks Act, 18 U.S.C. 3500, witness statements or testimony has to be produced only if the witness testifies at trial and the statement is signed, or acknowledged by the witness or is the witness' testimony. Even then, production does not have to be made until after a witness testifies or direct examination!

As a practical matter more and more US Attorney offices are taking a much broader view of discovery and producing all documents obtained during the course of the investigation, witness interviews, and at some point prior to trial, grand jury testimony. The prosecutor also has a separate constitutional obligation to disclose exculpatory and impeaching information.

Depositions: While Rule 15 allows for the taking of depositions, they are allowed only in exceptional circumstances and only with the Court's permission. In other words, depositions simply do not happen in criminal law!

Interrogatories: Criminal defense lawyers have no clue what these are. None are available.

Request for Admissions: Ditto

D. The War

A trial is like most wars—a series of battles culminating in a confrontation where the decisive blow is usually delivered. In that sense, civil and criminal trials have a number of similarities—motion practice, order of proof at trial, etc. But the war is much more compressed in criminal cases. Criminal cases get to trial much quicker since there is virtually no discovery except for the production of documents and the occasional expert, not to mention that both the Constitution and the Speedy Trial Act, 18 USC 3161, et seq. require that criminal cases progress to trial at the earliest opportunity. In addition, because of the significant differences in civil and criminal procedure, and the incredible hurdles for criminal defendants, the strategic battle plan for a criminal defense lawyer is significantly different, and in many ways more intense, than their civil counterpart.

II. Preparing the Battle Plan

A. Don't Panic- But Don't Delay

Perhaps the single most important lesson from a criminal trial is to act with a sense of urgency. Despite your best efforts during the investigative phase of a criminal case, the Government is always ahead of you—sometimes by months, sometimes by years Even so, criminal defense lawyers begin to mount their defenses the moment they are engaged regardless of where the case is postured.

Civil cases tend to lumber along with endless discovery. But reacting with a sense of urgency to a complaint the way a criminal defense lawyer reacts to an indictment can put you ahead of the game. For instance, immediately set out to create a "theory of defense" document. Long used in criminal cases, a theory of defense document traditionally seeks to reduce the indictment's allegations to their core, and then memorialize the various types of evidence which refute or at least undercut those allegations. Used properly, a theory of defense in the criminal context is a "living" document which evolves throughout the course of the case, and incorporates information obtained from various sources. A suitably comprehensive and refined document serves as the starting point for virtually every aspect of the case: discovery requests, motions, opening statement, arguments to the court on evidentiary and proof issues, direct and cross examination, and closing argument. The process works equally well in the civil context, but for whatever reason is used far less frequently. If anything, lawyers on the civil side are positioned to make far more effective use of this tool, since the more liberal discovery rules provide access to a far greater scope of information. Incorporating this criminal defense lawyer tactic in the civil arena allows for a more focused and efficient process of evaluating, preparing and trying cases.

Although there are inevitable ebbs and flows to the demands of a civil case, attorneys representing civil defendants would do well by not letting the sense of urgency slip away.

B. Characteristics of the Battle Plan

1. Take the Fight to Your Adversary

Criminal defense lawyers know that if you simply wait your turn you lose the jury. They know that the "presumption of innocence" is really more of a legal fiction than reality. It is the old "if they weren't guilty they wouldn't be charged" mentality. People still believe –and want to believe—prosecutors and FBI agents. To make matters worse there simply might not be any affirmative defense in a criminal case and/or your client might not be able to testify. So don't hunker down in discovery waiting for your turn at trial to present a polished defense.

Pre-Trial: Quickly figure out the sensitive evidence for both parties. Don't wait on discovery. Use investigators, paralegals, junior lawyers, social media and databases. Criminal defense lawyers have to be creative in gathering the information necessary to make informed decisions and prepare for cross-examination. All too often civil lawyers approach cross examination armed only with information produced by the other side and whose goal is to simply impeach the witness. For criminal defense lawyers, necessity is the mother of invention

when it comes to gathering information to defend their clients. A lawyer whose only source of cross examination points is the information provided by the other side will be predictable and ineffective.

Trial: Put on your case in your opponent's case. All too often, civil lawyers representing defendants in a civil case use cross examination to simply impeach the credibility of a witness. But cross examination is perhaps the greatest weapon in a trial lawyer's arsenal and can be used for so much more.

Non-destructive cross through a series of "agree" questions can often establish the elements of your case and to strip away an element from your opponent: Carefully worded, leading questions actually tell the story of your case. The lawyer gets to testify without being placed under oath? Just remember the words of that great philosopher Kenny Rogers: "You got to know when to hold 'em. Know when to fold 'em. Know when to walk away. Know when to run." Kenny Rogers, "The Gambler"

2. Make the trial about them—not your client

Criminal defense lawyers often have nothing affirmative to say—no witnesses, no documents—so the goal is to refocus the attention to your opponent even when you are hoping to point liability in the direction of someone who is not a party. No doubt that the "empty chair" defense can be effective. But in the end you are still re-focusing the jury's attention on your opponent for bringing the case

against your client, whether you say it in those explicit terms or not. In every criminal case that goes to trial, the first line of defense has to be to make every effort to re-focus the jury's attention away from their client and onto the opposition—be it the prosecutor, the agents or the witnesses. Lawyers in civil cases can do the same thing, but rarely do.

In a civil case, defense lawyers should not become so enamored with their own witnesses and shining exhibits and experts that they fail to draw the jury's attention elsewhere during their opponent's case in chief. Shaping the narrative early on, and consistently, not only helps give jurors what they need to find in favor of your client, it can also influence a judge. You might get more favorable rulings and certainly the judge's demeanor toward the parties could influence a jury. Take advantage of every edge that you can get!

3. Attack Your Enemy From the Rear

Since Hannibal destroyed the Roman forces at Cannae, over two thousand years ago—a standard western military tactic has been to attack your enemy's rear. Without an affirmative defense, criminal defense lawyers have perfected this technique in the courtroom. They have learned to spot weaknesses in a Government case that appears impenetrable from the front—that is the indictment and media hype. And every case—every case—has weaknesses in the flanks and/or the rear. For example:

- sloppy investigation, cutting corners
- sloppy pleading, such as overcharging
- poor handling of SI
- not fully understanding the real world meanings behind documents or statements
- a failure to make required disclosures

There are flaws in every case and they are ripe for exploitation.

III. Executing the Criminal Defense Battle Plan in Your Civil Cases

A. Investigate Now, Not Later

Do not wait for discovery, which is notoriously slow in civil cases. Everyone in a civil case slow rolls discovery. Get ahead of the game with the creative use of paralegals and investigators.

B. Analyze Now, Not Later

Because the Government is always way ahead, criminal defense lawyers are always playing catch up. Get the legal analysis, document review, and witness interviews done as soon as possible. Do not put off as complete a factual and legal analysis as you can make until you get a glimpse of your opponent's case. The "theory of the defense" document should not be set in stone, but a working

document that can adapt to a changing landscape and guide the defense from start to finish.

C. Be Aggressive and Creative in Motions

The limited criminal discovery rules in criminal cases mean that the defense often has limited information about how the government will try its case. While some judges will require the government to file a witness list, exhibit list and trial memo, that is typically the exception rather than the rule. Even in a best case scenario, criminal trial lawyers receive that information so close to trial that it hinders significantly their ability to prepare adequately. For criminal trial lawyers, the challenge of trying to prepare a defense which has multiple contingencies regarding which evidence will be introduced necessitates the filing of multiple motions, particularly motions in limine, to force the government to identify (or at least provide some additional information regarding) the manner in which the case will be tried. Even when those motions are unsuccessful, or the court defers ruling on them, they have value because they require the government to respond and confirm or deny that it intends to offer certain evidence and to articulate the reasons why that evidence is admissible, thus greater insight into the government's theories even if the motion is denied. Because the civil discovery rules require parties to articulate the theory of the case during the discovery process, it is usually not necessary to file motions in limine in order to learn how the other side plans to

proceed. Motions in limine still have great value in the civil context, however, because they provide an early opportunity to educate the court on the defense theory. Even if the court defers ruling or, in worst case scenario, denies the motion, the lawyer is no worse than he or she was before filing.

D. Tell your Story Before you Ever have to Call a Witness

Let's face it—jury selection is a crapshoot. You can spend a boatload of your client's money on focus groups and mock trials and jury consultants, but at the end of the day you really don't know the men and women who will render a verdict in your case. Everyone comes into a courtroom with different life experiences, bias and prejudice—some of which the potential juror doesn't realize is even there. Criminal defense lawyers begin every trial assuming that the jury believes their client is guilty, or at least did something wrong, before any lawyer says a word. Thus, from opening statement until it is time for the defense case in chief, be aggressive in telling your story and putting your opponent on the defensive.

As much as possible, tell your story through your opponent's witnesses. This will obviously require some careful planning of your cross-examination. Some witnesses will simply need to have their credibility crushed without any cross of the substantive facts. Remember though, witness credibility is a part of your story

and helps re-direct the jury's focus. Others will be more pliable giving you the opportunity to tell your story through leading questions that focuses the jury's attention on you and the narrative you are telling, rather than whatever answers the witness gives. Knowing which is which goes back to your early investigations and analysis.

Telling your story through your opponent's witness also accomplishes a couple of things aside from the obvious. First, it puts your opponent in a position of either accepting those pieces of the defense story or having to impeach their own witnesses. Second, it will allow you to reassess your own affirmative defense. Plaintiff lawyers are pretty good themselves and can be just as effective on cross examination. But it is hard for them to deviate from their case in chief. If you have been effective in telling your story through the Plaintiff's witnesses you might very well decide to limit your defense.

E. Use the Burden of Proof

In criminal cases, most jurors are ready to convict the defendant before they've heard the first piece of evidence. Not coincidentally, as a practical matter, most criminal defendants are guilty, and most lose at trial. Any lawyer doing criminal work must quickly get accustomed to the challenge of having to push a very large rock up a very steep hill, often without success.

In most criminal cases, the first defense is simply the "reasonable doubt defense." That is, that the Government has failed to prove beyond a reasonable doubt that the defendant is guilty. Candidly, this is a tough defense and the statistics regarding convictions at trial bears it out. But it often is all that a criminal defendant has. Thus, criminal defense lawyers harp on the burden of proof from start to finish, emphasizing that the burden is always on the government and it never shifts. Civil defense lawyers just do not harp on the burden of the plaintiff enough.

Even the burden of proof in a civil case is much less than in a criminal case—preponderance of the evidence versus beyond a reasonable doubt—it is still a burden and your opponent's burden and jurors should be reminded of that whenever possible. Use demonstrative evidence when you can to get a picture in the jury's mind of just how heavy a burden your opponent has.

F. One Great Decisive Aim

The Prussian general Carl von Clausewitz is often quoted on military tactics. The one that seems most applicable to the trial lawyer is: "Pursue one great decisive aim with force and determination."

Criminal defense lawyers have "one great decisive aim"—their client's liberty. They use "force and determination" because that is the only thing that can work against the immense power of the government. They thus forget a steely

resolve which makes the lawyer all but immune to setbacks along the way as he keeps pushing toward the goal regardless of the improbability of achieving it. Adopting that approach in the civil context, even if it would seem that the circumstances don't require it, will enhance a lawyer's likelihood of success. There is absolutely no substitute for perseverance, and one who enters the crucible of the courtroom prepared to face the toughest of challenges will be able to summon reserves of energy, confidence and resilience which are essential to success.

IV. Storytelling

Storytelling has to be a section all to itself. Storytelling permeates every aspect of a criminal trial—from opening statement to closing argument. Even a good cross examination is done in a way that tells a story. Criminal defense lawyers are perhaps the greatest storytellers in the country. Criminal cases are intensely personal. It is personal to the victims and their families. It is personal to the client whose liberty is at stake, whose family is also stressed and whose assets are being depleted. Criminal defense lawyers learn to instinctively follow the wisdom of the novelist F. Scott Fitzgerald who said: "Draw your chair up close to the edge of the precipice and I'll tell you a story."

Lots of lawyers can tell a story. The trick is getting the jury, and frankly the judge, to pull their chair up to the edge of the cliff. Criminal defense lawyers rarely

identify with their clients—most of whom are guilty. But they have an intense feeling about what they do—standing between a government and its citizens, being "liberty's last champion," the motto of the National Association of Criminal Defense Lawyers.

It is that intense feeling regarding their role in the criminal justice system that allows criminal defense lawyers to dig deep into their souls to simply tell their client's story. Lawyers representing defendants in civil cases likewise do not have to identify with their clients but they should do more than simply go through the procedural motions. They should believe in the role in the civil justice system with the same level of intensity and urgency in which a good criminal defense lawyer believes.

About the Author

Doug Jones is a founding partner with the Birmingham, AL law firm of Jones & Hawley, P.C., where his practice concentrates on complex civil and criminal litigation including white collar criminal defense, commercial litigation, False Claims Act litigation and class actions. His practices in state and federal courts across the country. He is a graduate of the University of Alabama and Cumberland School of Law at Samford University. Following law school he served as Staff Counsel to U. S. Senator Howell Heflin on the U. S. Senate Judiciary Committee and then as an Assistant United States Attorney in Birmingham. He maintained a

private practice until 1997 when he was appointed United States Attorney for the Northern District of Alabama by President Bill Clinton. Although he has successfully defended numerous high profile cases across the country, Mr. Jones is best known for being the lead prosecutor that convicted two former Ku Klux Klansmen for the 1963 bombing of the 16th Street Baptist Church.

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