

Arraignments

by
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This article deals with the anatomy of a criminal court arraignment. It is divided into several subtopics as follows: Surrendering the client to the police; visitation at the holding facility; the arraignment itself; the bail application; representing co-defendants; and how to deal with notorious cases. I have basically omitted statutory citations. Before you have a right to practice criminal law you must read, cover to cover, the Criminal Procedure Law, the Penal Law (both with annotations) and at least the First Department's treatise on *Criminal Trial Advocacy*. You also *must* know it.

Surrendering the Client

After you have been retained or assigned, if the client has not yet been arrested, you must arrange for his or her surrender¹. I find it helpful to explain the procedure fully to

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¹ Since most defendants are males, I will refer to the defendant as him, notwithstanding the fact that the defendant may be a her!

my client and his family. I advise them that justice moves slowly and that they can expect at least a 24-hour wait and possibly as much as 72 hours. I also tell them to eat a lot of bland food before they are arrested to avoid hunger and unnecessary stomach upset. Having obtained his family background and his version of the facts, I hopefully start to develop a trusting relationship between myself, the defendant and his family. Making them feel at ease helps to obtain the closest thing to a truthful version of what actually happened. I tell the client and his family several times that he must not talk to the police about the case but that he must provide them with pedigree information such as names, addresses, employment, medical history, etc. Failing to do either of these things can (and probably will) result in disaster—the client will invariably either make incriminating remarks or he will not provide the necessary information to expeditiously process his arrest.

When I call the arresting officer I inquire as to the possibility of a Desk Appearance Ticket (D.A.T.) which is authorized by C.P.L. 150.10 for offenses that are not felonies. If you are lucky enough to get a D.A.T., you may ignore the rest of this article. If not, please read on.

Since it generally takes 24-48 hours to process an arrest, I tell the officer that I will surrender the client on a day when I hope to be available for the arraignment. Most policemen are cooperative in this respect.

During the phone call, I try to establish a rapport with the officer and get as much information as possible from the officer about the case. I also advise the him (or her) not

to question the defendant about the case. If you are fortunate enough to be retained before the defendant has told everything to the police you will have earned your entire fee and prevented horrible headaches in future proceedings.

I always go to the precinct with my client. It shows I care about him and the case and it gives me another opportunity to ask the cop for information and to repeat that he is not to question my client. I take notes of the exact time of the surrender and who was present as well as my advising the arresting officer about not questioning my client. I *never* take notes about our discussions of the case in front of the officer, since that tends to impede a free flow of information. Instead I listen intently, massage his ego and get as much information as I can, which I write down later.

Initial Visitation

Four to six hours after the arrest, I make a telephone call to Central Booking to inquire about the client's fingerprints to see if they have been taken and, hopefully, if they have returned from Albany. It is essential to verify that fingerprints have been taken to make sure that the client's paperwork does not get lost in the shuffle of the one hundred plus cases that routinely are being handled at Queens Central Booking. If there are any problems or if prints have not been taken, ask when you should call back. This shows your interest and generally has a positive effect on the police in terms of helping to expedite the paperwork associated with the case.

Occasionally (but generally too frequently) there are computer breakdowns. If that occurs, go to the judge sitting in arraignments and try to get your client arraigned without fingerprints. This generally does not pose a problem if the charges are

misdemeanors, but if the charges are felonies most judges prefer to wait for the prints to be returned. In extreme cases you may seek habeas corpus relief. Unfortunately that is usually mooted, since by the time you get your hearing the defendant will have been arraigned.

Once the fingerprints have been taken and returned, it is a good idea to file a Notice of Appearance with the clerk in the arraignment part. Ask the clerk what the backlog is so that you will know approximately when your client will be arraigned. After doing so, go downstairs and see your client who will be languishing in C.B.Q. Advise him of the status of the case and tell him that you hope to have him arraigned within three or four hours after the time the clerk tells you. If it looks like the defendant will have to wait another day, tell him to expect the worst, so that you won't appear like you don't know what you're talking about. Image is important, even when it has no nexus to reality.

The Arraignment

We are now set for the arraignment itself. After more than fifteen thousand of them, I still find arraignments exciting. By this time you will have gathered *all* of the facts of the case and the necessary background for your bail application.

Call the client's family and tell them to come to court with as many people as possible. Evaluate what you think the bail will be in terms of the crime, the defendant's background and, most importantly, the judge. If you have total command of the facts it will help too. While generally it is true that cases are not won at arraignments, you can lose the case by not doing a great job or by not getting a reasonable bail, i.e., R.O.R. (Release on Recognizance) or a bail the defendant can make. Pray that you will not be unfor-

tunate enough to have seven defendants before your client RORed and have ten thousand dollars bail set on your client.

There are three major purposes of an arraignment: (1) to acquire jurisdiction over the case and the defendant; (2) to formally apprise the defendant of the charges against him; and (3) to set bail. Notwithstanding what I perceive as a prejudice shared by the courts, prosecutors and the Legal Aid Society, the principal purpose of arraignments is not to dispose of cases. If a truly appropriate opportunity arises at arraignment to dispose of the case with what you know is the best offer that you will ever get or if neither you nor your client has any impulse control, then by all means dispose of the case at the arraignment.

The Bail Application

The first two above-mentioned purposes are easy and take care of themselves. The third factor is crucial and must be done very carefully to insure the best results possible.

Experience will be your ultimate weapon towards an effective bail application. The best bail applications are made by judges when Assistant District Attorneys either inaccurately or inadequately state their case. After the District Attorney has made his pitch, the first words you speak should be to correct falsehoods, inaccuracies or misstatements of facts.

I would add that the next thing you should bring to the court's attention are the family and friends present in court who have been patiently waiting for your client's case to be called.

Barring such fortuitous circumstances, C.P.L. 510.30-2(a) lists the factors which the court must "consider and take into account" when setting bail:

- (i) The principal's character.

reputation, habits and mental condition;

- (ii) His employment and financial resources;

- (iii) His family ties and the length of his residence, if any, in the community;

- (iv) His criminal record, if any;

- (v) His record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 of the Family Court Act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any;

- (vi) His previous record, if any, in responding to court appearances when required or with respect to flight to avoid criminal prosecution;

- (vii) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and,

- (viii) If he is a defendant, the sentence which may be or has been imposed upon conviction.

Regarding factors (ii), (iii) and (iv), I correct any inaccuracies in the CJA sheet and the NYSID sheet. I always emphasize either overcharging as a function of the facts alleged in the complaint or falsehoods, misstatements or errors made by overzealous, inexperienced or untruthful Assistant District Attorneys in violation of the Code of Ethics.

Remember that the ultimate issue with regard to bail is "Will this defendant return to court?" Contrary to a view held by many prosecutors I have met, preventative detention is *not* the law of this state.

If you are certain that the bail set is too high, you may appeal forthwith to Part AA1. If that doesn't

work you may go to the Appellate Division. My experience is that 98+% of the appeals do not work. I am therefore careful in making them. Bail appeals frequently do work if you can show changed circumstances. If so, appeal!

Note that there are eight forms of bail as mentioned in C.P.L. 520.10. Also note that the laws of 1970 and 1984 have provided us with C.P.L. 520.30 which allows a bail sufficiency hearing. Examine carefully the six items listed in subdivision one and be certain your sureties are posting legitimate money. Otherwise, they lose the money, the client remains in jail, you go to the doghouse and, even worse, you will lose the client. Preparation is very important!

If, by the way, your client does not get out of jail at the arraignment, adjourn the case for C.P.L. 170.70 for misdemeanors (5 days not including Sunday) or C.P.L. 180.80 for felonies (120 hours, but 144 hours if there are included any Saturdays or Sundays).

Representing Multiple Co-Defendants

There is a legendary apocryphal judge in Queens named Learned Foot who will undoubtedly try to put his foot in your mouth, especially when you represent co-defendants.

When representing multiple co-defendants it is therefore essential that you first determine that there are not conflicts. If there are any conflicts, you should consider not representing both defendants.

You must explain the problems of representing co-defendants to your clients so that the judge does not make you look like a fool when he or she diatribes you for representing multiple defendants. If you either fail to honestly ascertain that

there is no conflict or if you do not go over the issues of multiple representation with your clients you will have set yourself up for problems.

For a comprehensive discussion of multiple clients, please read Ethical Considerations 5-14 through 5-20 of the Code of Ethics. If you have any doubts either ask someone more experienced than you or err on the side of caution.

The Notorious Case

This is probably the most interesting but least important topic. By the time we generally get our first notorious case we have been around long enough to have learned what to do.

While television and newspaper publicity *may* be good for business it is necessary to remember several things: (1) you don't want to give up your case to the press, because then you'll have no surprises left for the Assistant District Attorney in court; (2) Disciplinary Rule 7-107 limits the attorney as to what may ethically be said about the case; and (3) publicity generally does not help the defendant.

Although many of our colleagues on both sides of the fence ignore these rules, my feeling is that we do not dignify ourselves by hawking our clients to the press and television, and most of the time we do our clients no good in the process.

If a client will benefit from public exposure, which I generally cannot see happening in a criminal case, then use the press and the media. Do not let them use you! If your client will not benefit from such exposure, as is usually the case, then we should remember that we must represent the client zealously and competently. It is his rights and freedom we are protecting!