

THE INITIAL INTERVIEW

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I. INTRODUCTION

No other criminal case is like a drug case. The garden variety drug case possesses many of the features that make criminal practice fun; sleazy cooperating co-defendants with deals and long records, roguish vice cops who operate in gray areas, search and seizure issues and perhaps, most importantly, no victim or victims family sharing their anguish with the jury. In short, there is always “something to talk about”.

Fun and easy are not the same thing however. No other type of criminal case demands so much so early. The choices made immediately after arrest are often the difference between conviction, acquittal or probation. Attorney and client must often make decisions at the early stages of the case which are irrevocable and to some degree risky.

II. A TYPICAL CASE

All of the above assume that the charges are of the most serious type i.e. trafficking. The “one rock traffic stop” that involves a use amount of drugs and intermediate punishment at worst is glaringly different. Time is not of the essence in these cases. These clients typically make bond and you don’t usually get the midnight phone call from his family informing you of the arrest and asking you how quick you can get to the jail.

Trafficking charges are clearly more demanding. One typical scenario involves the execution of a search warrant at a house of ill repute. The client and two other persons are arrested and charged with conspiracy and Level 3 trafficking relating to the kilogram of cocaine found in the refrigerator. The client is taken to jail and placed under an insurmountable bond. The ultimate question which must be answered very quickly is:

III. SHOULD THE CLIENT COOPERATE OR NOT?

There is no time for the defendant to develop epiphanies about the circumstances after discovery is provided. Opportunities at rendering substantial assistance are never better than the first few hours after arrest. This is because:

1. Co-defendants roll first and your client is not only not needed but his carcass will be feasted on by co-conspirators.
2. Partners in crime will discover that the defendant is under arrest and the chances of engaging in incriminating phone conversations or arranging deals between other drug dealers and undercover officers is lost.
3. Information becomes stale and is not usable for the purposes of establishing probable cause for the issuance of a search warrant.

As a result my first trip, after stopping by and shaking the clients hand, is usually to the Clerk's office and the second is to the police station.

IV. THE CLERK'S OFFICE

At the Clerk's office you will find one important document, the arrest warrant, and confirm the existence or non-existence of another, the search warrant. The arrest warrant will provide you with the name of the arresting officer, your next phone call or stop. The search warrant, affidavit, and inventory will give you some concise insight into the evidence against the client. More importantly the search warrant, if there is one, will allow you to start the analysis of whether there are viable suppression issues that constitute a defense. There are probably more cases without warrants than with but the process is worth a small investment of time.

V. THE POLICE STATION

Since most vice cops operate under the domino theory they are more likely to give you the scoop than other officers. Obviously because the arresting officer is both evaluating his own work and trying to recruit your client there will be some tendency to inflate his case. When you talk to the officer you will want to find out the following:

1. WHAT ARE THE BASIC FACTS?

In deciding whether to cooperate or not you will want to find out from the officer whether the cocaine was in the defendant's lap, did he have large sums of money about his person, was the car registered in his name, etc.

2. GROUNDS FOR ARREST OR SEARCH IF NOT A WARRANT?

This information can begin the analysis of whether there is a viable suppression motion for lack of reasonable suspicion or probable cause or other Fourth Amendment violations.

3. DID THE CLIENT MAKE A STATEMENT?

The significance of this piece of information is abundantly clear. If the client has confessed or begun the process of cooperation the decision about how to approach the case is much easier.

4. ARE THE CO-DEFENDANTS COOPERATING?

Following the theory that the early bird gets the worm you will want to see where your client lies in the pecking order. The first cooperating witness is almost always the most useful. Obviously you do not want to be in the position of being the last person in the car or house cooperating.

5. ARE THE FEDS LOOKING AT THE CASE?

Any practitioner who handles serious drug cases in state court should have at least a working knowledge of the Federal Modus Operandi or access to an attorney who does. While the client may be looking at a Level I trafficking charge in state court that same amount of crack cocaine could invoke a sentence of 10 to life in federal court. Furthermore, federal rules regarding substantial assistance are much more strict. In state court the defendant can make a motion to have his sentence reduced for substantial assistance. In Federal court motion can be made only by the United States Attorney's Office. Obviously the potential of federal intervention makes the case much more serious and changes the rules of the game.

6. IF COCAINE WAS INVOLVED WAS IT CRACK OR POWDER?

See #5. Crack cocaine will make a federal sentence go through the roof. Several kilos of powder cocaine, however, which could invoke a mandatory minimum sentence of 175 months in state court would probably result in a significantly lesser sentence in federal court. Thus the type of drug may be a good indicator of future federal intervention.

7. WERE THERE ANY FIELD TESTS ON THE DRUGS?

Occasionally, especially with regard to the use of synthetic drugs such as MDMA and Ketamine, counterfeiting comes into play. If the police officers field tests are negative then there is a good chance that the SBI lab test will be also. Initial test results are something you will obviously want to know when you trying to decide how deep the water is.

8. ARE GUNS INVOLVED?

This question again raises the issue of whether the Feds are coming. Carrying a gun during a drug crime carries a mandatory consecutive sentence of five years in federal court. There are also enhancements available as a matter of state law. Again, the presence or absence of guns gives you some means of determining what the client is up against and deciding what your next step will be.

9. IS THERE ROOM FOR COOPERATION?

Sometimes there will be occasions when the client has spit in the officers face and they would not talk to him if he could bring down a Columbian drug cartel. Furthermore, as stated above, your client may be too late and may not be needed. If his cooperation is not needed or will not be accepted this information may militate in favor of attacking the search warrant instead of pursuing the substantial assistance. You certainly don't want to attempt to cooperate only to make the case worse by providing a confession.

The synergy of these answers will dictate the reasonable decision as to what the next step will be. All of the above assumes your client will accept his

attorney's advice and harbors at least some minimal desire to be honest with counsel.

VI. THE CLIENT

Having armed yourself with answers to the above questions it is time to have a heart to heart with the client. First you must ask the same basic questions of the client that were posed to the police officer. If they have different versions of the events then counsel will have to reconcile them considering the source. The client is the best person to speak as to how bad things can get. For instance, the client will know if a cooperating co-defendant can take a trafficking by possession charge and turn it into additional counts of trafficking by transportation, manufacturing or delivering. The client must also be specific with counsel about his prior record. This topic resurrects the issue of whether or not there will likely be federal intervention. Two prior convictions of either serious drug crime or a crime of violence will elevate a drug defendant to career offender status in federal court which can significantly enhance his federal sentence. The presence of guns or significant criminal record of this type may be the very thing that causes the Feds to bring a Class H drug offense to federal court.

VII. CONCLUSION

When getting involved in a new "big" drug case you must hit the ground running. If your case is not going to a trial you will probably do as much work in the first 48 hours as you will for the remainder of the case. While every case is a little different the features discussed above are fairly constant. Early advocacy and investigation will pay big dividends on the day your case is heard.