

By Bill Potts

GUILTY PLEAS

– the art and the science

Advice for young practitioners

Guilty pleas are integral cogs that keep our criminal justice system moving. This is supported by the fact that ‘most criminal defendants plead guilty and do not contest the charges at trial’.¹ Defendants plead guilty for a variety of reasons – to get the best discount, because they are remorseful, because of a strong case against them, a simple desire to get the case ‘over and done with’, to save time and costs or to protect the real offender.² While this decision is ultimately the client’s, they are ‘heavily influenced and guided by the advice they receive and shaped by the expectations and agenda set which are mediated by their advisers’.³

Given the high prevalence of guilty pleas, it is important to know how to present them well. >>



'Man the living creature, the creating individual, is always more important than any established style or system'⁴

You may have secured a fantastic result for a client last week, but when your new client walks in with a new case, don't assume you have mastered the process. It is important to get to know your client. Your aim is to make them, as an individual, stand out to the court. Do not let them blend in with the 30 other guilty pleas that morning! In your interview, you have to dig into their personal life and find the compelling feature of their circumstances – there is always something. Start with the basics – their education, work history and family circumstances. Discussions about these can often reveal otherwise hidden details that may make a big difference to your guilty plea.

'If you do not know how to ask the right question, you discover nothing'⁵

As lawyers, we are required to step back from the issues and look at the bigger picture. We need to be acutely aware of the smallest details. We often greet our clients and ask how they are, but do we always listen carefully to their response? Court is part of a daily routine for many of us and it is easy to forget just how intimidating the whole process is for the client and their family. The final court date is one of the biggest days of your client's life. Often it has been all they could think about for the last few months. So it is important that you give your clients every opportunity to tell you how they *really* feel. Have they been sleeping properly? Is the case causing difficulties at home? In appropriate cases, invite them to access a counsellor, someone outside their support network who can listen objectively. Make them feel comfortable with the idea.

One of the key tools in getting your client to open up about problems they are facing is to build a rapport with them. Sometimes there is an underlying mental illness that contributed to the offending behaviour. The client themselves may not be aware of this, so ask the right questions and involve a psychologist or psychiatrist if you think it is necessary.

Pre-sentence reports are often extremely valuable (particularly in more serious matters). These reports can provide the judge with significant assistance and 'pacify the lingering unease felt by legal professionals that the everyday summary court processes may be too abrupt, abstract and impersonal'.⁶ They can provide strong mitigation in circumstances where they identify a mental health issue associated with the offending behaviour. Keep in mind they can be costly and take time to prepare, but they may offer mitigation.

'You don't get what you deserve, you get what you negotiate'⁷

There is no formal plea bargaining procedure in Australia⁸ but negotiations often occur. 'The most frequent type of plea bargaining in Australia is discussion between defence and prosecution resulting in a charge reduction.'⁹

According to research conducted by Roach Anleu and Mack, 'Australian lawyers emphasise that plea negotiations are appropriate and legitimate aspects of legal work, not unethical, coercive and unjust'.¹⁰ Indeed, there are quite legitimate reasons for negotiating with the prosecution. Our court system in Queensland now invites negotiations through the case conferencing process. These discussions are useful in circumstances where 'there is insufficient evidence to proceed on a certain charge'¹¹ or where there is perhaps a less serious charge open to the prosecutor. There is also room for a more informal approach to address less significant issues. Sometimes there may be a slight error in the police facts or one particular objectionable sentence that would see the magistrate impose a harsher penalty – this can be avoided on some occasions by simply explaining the situation to the prosecutor and asking them to read over those parts. The results can serve your client well, decreasing the likelihood of more serious penalties.

Guilty plea instructions

Never overlook the importance of guilty plea instructions and ensuring that a client understands the effects of their decision. Wherever possible, write detailed guilty plea instructions for your client and send them to the client in advance. Allow the client plenty of time to read and consider their contents, before signing anything. In circumstances where that is not possible, ask the client to bring a friend or support person with them. Give your client the opportunity to ask any questions they may have. Discuss the contents of the instructions, to ensure that they understand.

Remember, it is only a good guilty plea if it was in the best interests of the client to make a guilty plea. It is important to recognise the various pressures defendants face to enter guilty pleas at the earliest possible opportunity.¹² Sometimes you will know that a guilty plea is the best move for your client. You can provide your 'strong advice', but it must be clear 'that the client has complete freedom of choice and that the responsibility for the plea is the client's'.¹³

'Confidence is contagious. So is lack of confidence.'¹⁴

Be confident – if you aren't, the impact of what you have to say will be diminished and the client will not have faith in you. But don't be too confident – this can alienate the bench. 'Confidence should always be accompanied by courtesy and unpretentiousness. Confidence should not easily be abandoned.'¹⁵ It is important to be assertive with your argument, and push for what you want, but also to realise when you need to give up on that point and move along. As J L Glissan QC said, 'The courage to persist in a difficult case is important' but 'endless repetition brings no reward but loss of interest and then loss of temper in the hearer'.¹⁶

'By failing to prepare, you are preparing to fail'¹⁷

Know your judge. This knowledge comes from experience and listening to other matters while you are waiting in court. Know the law. You need to understand the factors that

the court can take into account in making its decision and address them. These can be found in the legislation and case law.

Know your case. You must appreciate where it fits on the scale of offending behaviour so you don't ask the court for an outrageous result. If the judge is losing his or her patience and you know your case, you can shorten your submission and address the key points quickly.

Know your client. It often helps to know the little details, like where they work. The judge can often test you. It is also important to know what they are willing to do if, for example, community service is offered.

Know what the prosecution wants. It can be very helpful to speak to the prosecutor and ask what penalty they are seeking. Are there any surprises? Being polite and having a chat can make a big difference when you are ultimately on your feet. It may also help to give them a warning if you are asking for something out of the ordinary.

'...advocacy is the 'art of persuasion', which in turn depends on the communication skills of the advocate...'¹⁸

Here are some quick advocacy tips taken from James Glissan QC's 'Advocacy in Practice':

- 'One rule that should never be violated is that under all circumstances the advocate should keep cool, and not lose his or her temper on any account.'¹⁹
- 'A clear, distinct and interesting voice is more than an asset to an advocate: it is essential.'²⁰
- Use simple, clear and direct language.²¹
- 'Be attentive to the audience to ensure that you are going slowly enough to drive your point home and yet not so slowly as to be tedious.'²²
- 'Good diction and a carrying (though not necessarily loud) voice is of the essence, as is variation of pitch and tone effective to highlight certain aspects.'²³
- Most importantly, recognise the 'great dangers presented by detailed notes and scripts ... they distract from the vital tasks of communication and observation' – if you are looking at your papers, you will miss key reactions from the judge.²⁴

'Sentencing is an attempt to juggle objects of various sizes while walking a tightrope which is being shaken at both ends'²⁵

Sentencing is essentially the responsibility of balancing the interests of the community, the accused, the victim and their families within the framework of the law.²⁶ As one Queensland judge quite succinctly stated, 'the balance is easier said than done'.²⁷ It is important to be aware of the factors and guidelines that judges are required to take into account; these are set out in the legislation.

'Sentencing guidelines seek to strike a balance between discretionary considerations ... and the need for reasonable consistency in the administration of criminal justice.'²⁸ Judges are individuals and place different weight on the relevant factors. Your job is to present the best possible submission and persuade them to side with you.

Comparative sentences can provide guidance and make both the legal representative's and the judge's jobs a lot easier. They have been identified as 'the chief mechanism of maximising consistency'.²⁹ It is often useful to compile a table of comparative sentences that can be handed to the court and the prosecution. When interviewing 31 judges of the Queensland Supreme and District Courts, Geraldine Mackenzie found that 'generally speaking, the judges tended to rely on counsel's submissions to establish the appropriate range of sentences, and saw counsel's submissions as fairly crucial'.³⁰ As highlighted by Eric Colvin, comparative sentences can be used to support similar sentences or to justify higher or lower sentences.³¹

'Right actions in the future are the best apologies for bad actions in the past'³²

One of the best ways to achieve a great outcome is to place your client before the court with evidence of remorse. As Mack and Roach Anleu highlighted, 'the guilty plea has long been recognised as a factor that can mitigate a sentence when it indicates remorse or a genuine desire to avoid further harm to a victim caused by a contested trial'.³³ It is important to note 'that some Australian legislatures have chosen to separate remorse

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from the mere fact of a plea of guilty, and have afforded them separate status in the list of factors which a sentencing judge is required to consider'.³⁴

A simple 'sorry' won't cut it. If your client is genuinely remorseful and does not intend to come back before the court, these points need to be firmly established. You can inform the court of the price the client has already paid – have they lost their job because of this charge, had to pay compensation for the damage or had to pay a driver to get them to work each day? Consider the embarrassment they have faced telling their friends or loved ones and asking for character references. You can also go one step further by ensuring that they complete relevant rehabilitative courses. Does the offence involve anger management issues, alcohol or drug abuse? Encourage your client to complete suitable courses, asking them to take notes of what they have learnt and ensure you obtain a letter or certificate confirming their attendance. Speak to your client about their impression of the program and what they learnt. This often reveals powerful material for your submissions.

Timing is everything

The fact a guilty plea has been entered must be taken into account and the court may reduce the sentence it would otherwise have imposed. Lawyers face the task of balancing the earliest possible guilty plea and placing the client in the best possible position. Both 'legislation and case law indicate that a prompt plea will attract a more substantial discount than a late plea'.³⁵ While timing will affect the discount, in circumstances where the plea was delayed because of a 'genuine dispute as to certain charges' the discount is not lost.³⁶

'Good is not good, where better is expected'³⁷

If you follow all the advice above, you are likely to end up with a great guilty plea outcome. However, unless your client *understands* it is a great outcome, they will leave unimpressed and unaware of your achievements. So make sure you set your client's expectations and discuss all possible outcomes. Explain the full penalty range, give them your view as to where they sit, but explain that higher penalties are still possible. The last thing you want is your client coming to court expecting to receive a fine and leaving in handcuffs. Let them know that judges may place more weight on the negative aspects of their case. Ensure that they are aware that the courses mitigate the penalty but do not remove it altogether. After court, it is critical that you take the client and any support person aside to explain how court went – what battles you faced, what victories were secured and the overall result.

All of this advice should not overshadow the most important feature of a guilty plea – you are dealing with *people*. Whether it be your client, the prosecutor, the judge and in some cases the complainant, your knowledge of their needs and interests must inform every step you take. The law may seem mechanical at times, but one should never lose sight of its human components. ■

Notes: **1** Roach Anleu, S and Mack, K, 'Intersections Between In-Court Procedures and the Production of Guilty Pleas' (2009) 42(1) *The Australian and New Zealand Journal of Criminology* 1. **2** Roach Anleu, S and Mack, K, above n 1 at 1; Mack, K and Roach Anleu, S, 'Sentence discount for a guilty plea: Time for a new look', (1997) 1 *Flinders Journal of Law Reform* 123 at 139. **3** Roach Anleu, S and Mack, K, above n 1 at 7. **4** Bruce Lee, available at < <http://www.brainyquote.com/quotes/quotes/b/brucelee165586.html> > **5** William Edwards Deming (American business philosopher and consultant), available at < http://www.brainyquote.com/quotes/authors/w/w_edwards_deming.html > **6** Tata, C, 'A sense of justice: the role of pre-sentence reports in the production (and disruption) of guilt and guilty pleas' (2010) 12(3) *Punishment & Society* 239 at 239. **7** Dr Chester Karrass, available at < http://www.finestquotes.com/select_quote-category-Negotiation-page-0.htm > **8** Biles, D, (2000), 'Australia' in *World Factbook of Criminal Justice Systems*, Washington DC, Bureau of Statistics, available at < www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjaus.txt > cited in Cole, G F, 'Pleading guilty and professional relations in Australia: comment' (2001) 22(2) *Justice System Journal* 185 at 185; Mackenzie, G, *How Judges Sentence*, The Federation Press, Sydney, 2005 at 24. **9** Roach Anleu, S and Mack, K, above n 1 at 1. **10** Roach Anleu and Mack cited in Cole, G F, 'Pleading guilty and professional relations in Australia: comment' (2001) 22(2) *The Justice System Journal* 185 at 186. **11** Mackenzie, G, *How Judges Sentence* The Federation Press, Sydney, 2005 at 24. **12** Bridges, L, 'The Ethics of Representation on Guilty Pleas', (2006) 9 *Legal Ethics* 80 at 82. **13** General Council of the Bar, 'Code of Conduct', section 3, *Written Standards for the Conduct of Professional Work*, 11.3 cited in Bridges, L, 'The Ethics of Representation on Guilty Pleas', (2006) 9 *Legal Ethics* 80 at 86. **14** Vince Lombardi, available at < <http://www.brainyquote.com/quotes/quotes/v/vincelomba127567.html> > **15** Munkman, J, *Techniques of Advocacy*, Stevens & Sons Ltd, London, 1951 cited in JL Glissan QC, *Advocacy in Practice: being the fourth edition of Cross Examination: Practice and Procedure*, LexisNexis Butterworths, Sydney, 2005 at 9. **16** JL Glissan QC, *Advocacy in Practice: being the fourth edition of Cross Examination: Practice and Procedure*, LexisNexis Butterworths, Sydney, 2005 at 9. **17** Benjamin Franklin, available at < <http://quotationsbook.com/quote/30474/> > **18** Glissan QC, above n 16 at 7. **19** *Ibid* **20** *Ibid* at 9. **21** *Ibid* at 8. **22** *Ibid*. **23** *Ibid* at 9. **24** *Ibid* at 7. **25** Anonymous judge cited in Mackenzie, G, *How Judges Sentence*, The Federation Press, Sydney, 2005 at 14. **26** *Ibid* at 13. **27** *Ibid*. **28** Colvin, E, 'Sentencing Principles in the High Court and the PSA', (2003) 3(1) *Queensland University of Technology Law and Justice Journal* 86. **29** *Ibid*. **30** Mackenzie, G, above n 11 at 22. **31** Colvin, E, above n 28. **32** Tryon Edwards (American Theologian, 1809 – 1894), available at < <http://quotationsbook.com/quote/15504/> >. **33** Mack, K and Roach Anleu, S, 'Sentence Discounts for a Guilty Plea: Time for a new look', (1997) 1 *Flinders Journal of Law Reform* 123 at 123. **34** Field, D, 'Plead guilty early and convincingly to avoid disappointment', (2002) 14(2) *Bond Law Review* 251 at 265. See *Penalties and Sentences Act* 1992 (Qld), ss9(4)(i) and 13; *Crimes Act* 1900 (ACT) s429A(i)(u) and (v); *Crimes (Sentencing Procedure) Act* 1999 (NSW), ss21(A) and 22; *Sentencing Act* 1991 (VIC), ss5(2)(e) and 5(2C); *Crimes Act* 1914 (Cth), s16(A)(2)(f),(g). **35** Mack, K and Roach Anleu, S, above n 33 at 127. **36** *Nicholls v R* (1991) 53 A Crim R 455 at 459 cited in Mack, K and Roach Anleu, S, 'Sentence discount for a guilty plea: time for a new look' (1997) 1 *Flinders Journal of Law Reform* 123 at 128. **37** Thomas Fuller, available at < <http://quotationsbook.com/quote/13258/> >.

Bill Potts has a legal career spanning nearly three decades. He is the founding director of Potts Lawyers, one of Australia's largest private client criminal law firms. **PHONE** (07) 3221 4999
EMAIL bpotts@pottslawyers.com.au