GRAYA NEWS

# THE PLEA IN MITIGATION IN THE CROWN COURT
## 10 DO'S AND DONT'S FOR STUDENTS AND PUPILS

DAVID BARNARD (WITH HELP FROM COLLEAGUES AT THE BAR AND ON THE BENCH)

**1 Don't read a prepared speech to the judge**
Doing that reveals that you are a complete beginner. It distracts from what you need to say. You instantly lose credibility. Of course, you will be nervous (like a good actor waiting to go on stage) but writing everything out in advance is not the answer. The answer is that you must learn the art of speaking from notes – drafting the note which you are going to use in court is one of the key skills of the competent advocate. (And, of course, this applies not just to pleas but to every sort of appearance – in both civil and criminal cases.)

There is one exception to the rule that you must not read from a prepared speech. Sometimes, it is worth writing out a couple of opening points which you can read aloud slowly to the judge: 'I am going to ask the court not to pass an immediate custodial sentence, and I would submit that this is an exceptional case where the Court can properly depart from the Sentencing Guidelines because …' – that assists the judge and gives you a few moments to relax.

**2 Do know the facts inside out**
You can only begin to prepare a successful plea if you have complete command of the facts. Unless the plea is following on from a trial, the judge will only have a limited time to familiarise himself with the evidence. The judge will rely on the CPS representative – who may be overworked and underprepared and may get the facts wrong.

You need to have in your notebook: (a) a chronology of the facts, (b) a precise calculation of any loss (cross-referenced to the witness statements), and (c) a record of all the matters in interview where your client's account is at odds with the witnesses and the reasons for this. In real life *Newton* hearings (where the judge decides disputed facts before sentencing) are not very frequent, but that is because competent defence advocates can usually resolve differences with competent prosecution counsel. But you must not embark on a plea without being fully prepared to cover points where the prosecution and defence versions are different (and, indeed, you must draw the judge's attention to important points of difference or else you may lead him into sentencing on a false basis – try explaining that to the CACD!).

**3 Do be ready to answer questions on sentencing powers: the law is more difficult than you might think!**
The starting point must be the *Sentencing Guidelines* – the judge will be well aware if the *Guidelines* cover the offence being considered; and so must you be. If you are going to ask the judge to depart from the *Guidelines* you must say so at the outset. And make sure you know the relevant statutory restrictions on sentencing. What worries judges more than anything is getting the law wrong. And sentencing is a 'minefield' – the law is over-complicated and constantly changing.

The position is made worse because of the different sentencing regimes which depend on the defendant's age. Perhaps as many as one in four defendants at the Crown Court is underage and your plea will be not be regarded as impressive if you are suggesting a course that the judge simply cannot take because of the defendant's age. Do be ready to deal with breach of earlier orders. All this sounds terribly complicated – but help is at hand! Just go to the excellent CPS website referred to below to answer almost any problem you may have.

**4 Do be aware that the Court will expect you to be ready to deal with financial penalties and ancillary orders it might be considering**
These include fines, compensation, costs and straightforward confiscation orders (where the defendant is invited to sign an agreement for the immediate release of funds). Note the importance of having accurate details of the defendant's income and outgoings. Be warned that judges can get very irritated if counsel does not have this information and has to 'take instructions from the dock'.

**5 Do take an up-to-date *Archbold* to court and flag up the references**
Many judges and recorders do not find *Archbold* 'user-friendly'. A Court of Appeal judge once declared that the index had been prepared by fiends! But, although there are excellent alternative books covering sentencing, you should take *Archbold* with you to the Crown Court because that is what the judge will be using. The electronic version can now be viewed in the original printed text format, and, if you have it available, take your laptop or tablet to court and use that as your 'default position'.

**6 Do check the contents of the list of previous convictions with your client**
It may be wrong, and you cannot let the judge sentence on a false basis. If your client says there is something wrong in the list, tell the prosecutor and ask for a check to be made. This should be done before the case is called on. It is something which ought to be resolved if possible before you address the court. The judge will not appreciate your raising this for the first time when you stand up to mitigate!

**7 Do be ready to back up every assertion you make in your submissions with evidence**
Judges are often looking for real points in the defendant's favour. They would welcome evidence that there is a real chance that a young defendant will not be offending again – but promises of reform are not very convincing unless they are supported by evidence. Judges know only too well that defendants are capable of being very manipulative and that includes misleading counsel! So do make sure that, if possible, you have material to support what you are asserting on the client's behalf.

**8 Do try to tell the judge something he doesn't know already**
Many years ago Master Ralph Cusack (an outstanding High Court Judge) gave a lecture in Gray's Inn on how to present a plea in mitigation. One of the points he made was the value of telling the judge something he did not already know. Judges have to listen to pleas in mitigation which provide them with little or no additional information. The advocate who can tell the court something about the facts of the case itself or the defendant's background that does not appear in the papers will have the enormous advantage of getting the attention of the judge. Of course, this is subject to 7 above – make sure what you are saying is correct!

You (or your solicitor) may need to be a bit proactive if you are to follow Master Cusack's advice. For example, consider finding out what the defendant has been doing in the months he has spent on bail. Has he got the prospect of a job or a place on a training course? If so, get written evidence to back that up. Often, but not always, this will be covered in part in the pre-sentence report. If the client is inevitably going into custody, sometimes you may be able to reduce the period significantly by telling the judge what the client realistically hopes will happen after he is released (such as where he is going to live and what support he will have). Again, see if you can back this up with concrete evidence and check whether there is support for this in the pre-sentence report. You must check to see whether a report has been prepared and you must go through it with your client (it might produce some surprises when he says the information in it is wrong!)

**9 Don't skimp preparation**
Forget what we have been saying in *Graya News* about the disgracefully low legal aid fees paid to members of the Bar. You will not be paid any sort of reasonable fee for the work you put in when preparing a good plea. But a plea well done that earns the gratitude of the defendant and his family, an acknowledgement from your solicitor and the respect of the judge brings its own reward. Work on the basis that you will spend hours preparing a plea which will only take a few minutes to deliver. The value of preparation is that it gives you confidence, and that will show through in your advocacy.

**10 Don't be emotional and don't appear to be expressing your own opinions**
There will be occasions when you may feel there are matters which ought to engage the sympathy of the judge. Be very careful how you present them. Illness, bereavement, family breakdown may be relevant matters that the judge will want to take into consideration. But the judge will appreciate your plea more if you can present these matters in a 'low key' manner. The more objective you appear to be, the more sorry the judge is likely to be for your client.

Always remember that you are an advocate and your role is to make 'submissions' to the court. They may be very persuasive and you may feel deeply that you are correct. But you will lose credibility with many judges if you appear to have become personally involved in the case. You are not there to advance your personal views. Also, many judges dislike advocates referring to their clients by their first name in their submissions. You may not agree, but your opinion is not really relevant – you are there to persuade, and that usually involves accepting the conventions that the judge expects you to follow.

If you have time (and you should try to make time) go and listen in to a 'pleas' morning (often held on Fridays) and watch how experienced advocates present their cases. Note how they address the court. You may be surprised how short a really effective plea can be. But don't try too hard to copy them – judges expect young advocates to advance their cases with enthusiasm and might be more than a little disconcerted if you address them like a Silk of 40 years' experience!

**Finally:** What have we missed out? The vital importance of finding out in advance as much as you can about your tribunal. Know your judge!

**An excellent website:** The CPS has put a 'Sentencing Manual' online for its own Crown Court advocates. But anyone can use it. It is very easy to navigate. Just Google 'CPS Sentencing Manual'. You start by looking at the section setting out the offence your client is charged with. This shows you the Guidelines (if any) issued by the Sentencing Council and summarises decisions of the Court of Appeal (Criminal Division) dealing with that type of offence. It tells you the relevant statutory provisions and maximum sentences. It identifies potential aggravating and mitigating factors for the offence in question and describes the ancillary orders that the Court might consider making. The side bar enables you to navigate to a special section on sentencing young offenders. It gives you the relevant *Archbold* references. In fact it is just what you want!