A. Getting Familiar with Your Case

*Every great success needs two things: a goal and not quite enough time to finish it.*

—Leonard Bernstein

*There are no other cases. This is the case.*

—Paul Newman

as attorney Frank Galvan in *The Verdict*

In order for you to do a good job for your client, you must become familiar with his case. Getting familiar with the case takes time. You must carve out what time you can to do it. As early as possible, you must be able to get a sense of its strengths and weaknesses, to prepare you for deciding whether and how it should be tried.

By far the most common complaint voiced by those engaged in the practice of public criminal defense is lack of time. There simply isn’t enough of it. There are too many cases and not enough hours in the day to address them fully. And it will never get any better. The most important thing you can do is learn to manage your time and resources efficiently. You must develop a method of triage that
enables you to size up a case quickly, so that you can get a sense of what kind of case it is, whether or not it is likely to resolve short of trial, and what it is going to require to successfully resolve it. This is critical, for it will help you to avoid a typical pitfall of many trial lawyers: not being able to distinguish a good case from a bad one.

Pleading out your good cases and trying your bad ones is a common malady in this business. Unaddressed, it can lead to ruin. Before long, you will find yourself losing more of your cases, so that your opponents would rather force you to trial than negotiate a plea. Things will begin to snowball and get ugly real fast. With more cases to get ready for trial, you will end up with less and less time to work your other cases. You will then become so overwhelmed that you will become frightened of your cases and lose confidence in your ability to win them. You will then fall into the worst trap of all: not being able to properly prepare cases that you do try, so that you are not prepared for trial. Your confidence will erode. You will find yourself working longer hours, later into the night, and on weekends. You will then panic and look for a way out. You will seek a continuance or offer last-minute deals capitulating to the demands of your opponent just to end the case and take some pressure off of you.

Except the pressure is not off for long. The next unprepared case is sitting on your desk, staring you right in the face. With your weakness having been exposed to your opponents, they will exploit it. You’ll hate your job and begin to fantasize about taking time off, or even quitting and going into private practice, or entering an entirely different profession.

So, to repeat, start by knowing a good case from a bad one. Work with as many experienced colleagues as you can. Once you develop those skills, you will have gone a long way toward avoiding unnecessary stress on your physical and mental health.

No matter how simple or obvious a case appears to be at first glance, every case you undertake has the potential of blowing up into a complicated mess that ends up in a lengthy jury trial, complete with numerous pretrial motions, expert witnesses, and media coverage. And more often than not, it’s that simple little case that landed on your desk at 4:45 p.m. Be careful. Don’t be overconfident. Do not underestimate the ability of a seemingly insignificant case to transform into a disaster of biblical proportions before your very eyes.
This also means never accepting a case that you don’t intend—or are not willing—to try.

Never approach a case cavalierly. Never forget whose interests are at stake, the power you are responsible for, and the care with which you must discharge that responsibility. Your clients’ legal rights, freedom, and sometimes their very lives are on the line. You must be vigilant at all times and mindful of the consequences of your actions.

While interning for a firm during law school, I failed to appreciate the gravity of that duty while working on a case. One day one of the partners pulled me aside and said, “Listen to me. We are trial lawyers. We operate at levels most other attorneys can’t even comprehend. We are like professional racing drivers driving Ferraris at top speed. We must have total concentration at all times. If we take our eyes off the road or our hands off the wheel for even a split second, the consequences will be catastrophic. Now pay attention, goddammit.”

B. Private Attorneys and the Fee Agreement

As private counsel, you have the enormous luxury of deciding whether to accept or reject any case that comes through your door. That decision is typically driven by several factors: (1) whether your schedule permits you to take on a criminal case (understanding, of course, that criminal cases are on a “fast track” with the court docket and thus take priority in scheduling. This means that the clock is usually ticking, and deadlines are fast approaching); (2) your willingness and ability to represent the client in light of the particular charge; and (3) the amount of the fee you require and the client’s ability to pay it.

As a private attorney, one of the reasons you are in business is to make money.1 This means being mindful of the kinds of cases you accept and the amount you charge the clients for your services. You will quickly learn that when it comes to criminal defense, few clients can afford large fees. Even fewer can afford to pay them in full in advance, which is what a private attorney must insist upon. Despite this, some criminal lawyers will agree to discount their fees and delay full payment, simply because they want to help the client or because

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1 Believe me, there will be days when this becomes unclear.
accepting a reduced or partial fee is at least something, whereas the feared alternative is to have the client walk out the door and hire someone else.

One of the most difficult and important words that a private criminal defense attorney can ever learn to use is “No.” While it is true that there will be days (hopefully not many) when the payment of even a small fee will seem welcome, discounting your fee out of fear that you need the money and the client will leave and hire someone else is one of the worst traps an attorney can fall into. For it takes just as much time and effort to undertake the defense of a criminal case for a small fee as it does for a large one.

You will find yourself working yourself to the bone for a pittance. Moreover, you will quickly gain a reputation in the community as a criminal lawyer who will work “cheap.” This usually means that you will attract a number of criminal clients who will want you to work yourself to death on their behalf and will be unable or unwilling to pay even the reduced rate that you have reluctantly agreed to quote them. You will have a growing list of clients who owe you money and who will seldom, if ever, pay. Worst of all, you will not be able to get out of the case you have undertaken. The court will not care whether or not you have been paid. You have entered your appearance on behalf of your client, and the fact that you haven’t been paid is of no concern to the court. A motion to withdraw from the case will usually be denied. You are in it until the bitter end.

It is far better to set your fees according to how busy you wish to be and what the competitive rate in the marketplace is, and then stick to your guns. When a client calls and asks you or your paralegal whether you will accept a reduced fee or partial payment, be ready to politely—but firmly—respond that you cannot do so. The fee is what the fee is, and it is payable in full at the outset of the case. No exceptions. Be ready with a list of referrals to other competent counsel.

To be sure, there will be some fees that you will see walk out the door, but let them go. You will earn a reputation as a quality attorney with class. Your commitment to the cases that you do undertake will yield noticeable results. You will begin to get the big cases with correspondingly bigger fees. That is because the more trouble people
find themselves in, the higher the fee they expect to pay for legal help. Look at it this way: it is far better to reject ten cases, each of which would have paid you $1,500, and to accept the one case for $15,000. You will end up doing a much better job on that one case than you would on those ten others.

C. Public Defenders

As a public defender, you are mercifully relieved of the hassle of negotiating a representation fee with each client, as well as the stress of worrying about paying monthly bills, overhead, malpractice insurance, payroll, advertising, and a thousand other expenses. In return for a monthly income that would not support a goldfish, you enjoy the privilege of working 38-hour days, representing the most despicable people imaginable, with no viable defense, and no help.  

When you receive a file, do not set it aside and tell yourself, “I’ll review that when I have a few minutes.” You will never have a few minutes. Other matters will interrupt you and distract you, with the result that the file will be buried under a pile of other files and papers (which you’ve also set aside to review “later”), and before you know it you are in serious trouble. Instead, take ten minutes, grab a cup of coffee, and review the pleadings. Schedule a time as soon as possible to meet with your client. If he is out on bond, arrange to meet him in your office. If he’s in jail, go see him as soon as possible. If the case is a misdemeanor, you will need to meet him in court at the initial appearance to enter an initial plea of “not guilty.” If it’s a felony case, he may have a preliminary hearing coming up in a few days. You will need to determine whether you will attend and cross-examine the state’s witnesses or waive the hearing. You cannot make that decision without first meeting with your client.

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2 And that’s just your first week!
3 Almost without exception, a plea of “not guilty” is entered. You need time to obtain and review all of the state’s discovery materials and review them with your client before you can determine whether a guilty plea will be entered at a later date.
D. Meeting the Client

I’ve learned that people will forget what you said, they will forget what you did, but people will never forget how you made them feel.

—Maya Angelou

Your relationship with your client is paramount. Your entire case rests on your ability to effectively tell your client’s story. You must approach your client from the standpoint that he is not just someone you represent; he is the person you are fighting for. He does not need a lawyer; he needs a gladiator—a warrior as big and as powerful as he can get. Therefore, the better you understand your client and his case, the better and more effective warrior you are going to be.

As a general rule, the more time you spend with your client the better. This is especially true if he is not a likeable person or if his story is going to be a particularly hard sell. Your most important task in that instance is to find something in your client to love and concentrate on that. If you do not find a way to love him—really love him—you cannot authentically believe in him or his story, much less sell it to a jury. No matter how ruined, every human being has a quality about him that is worthy of your love. You must find it.4

It is easy to find reasons not to visit with your clients, especially when they’re in jail. But put yourself in their shoes. They often have few friends, no family support, no resources, no faith in themselves and very little in you. The last thing in the world your client needs is proof that his last hope on this planet—you—have abandoned him, too.

As soon as you possibly can after taking the case, meet with your client. DO NOT DELAY. At the first meeting, do not begin by jumping immediately into the facts and details of the charges. There will be plenty of time for that later. Your client is no doubt frightened, knows no one, and may have never been incarcerated before. Jail is a terrifying experience. Everyone and everything is a threat. Your client has no idea what is going to happen to him, but all he can

4 Gerry Spence imagines his client as a young child, full of innocence, hope, and promise. Before the world turned on him.
think about is the worst-case scenario. He sees no hope. He desper-ately needs someone whom he can trust to be his friend and give him something to hang on to. You must be that person.\(^5\)

Therefore, the most important thing you can present to your client at the first meeting is a smile, a calm demeanor, and a confident sense of hope. There’s always hope. Things are rarely as bad as they seem. Give your client a reason to calm down and an opportunity to relax and think rationally.

Later, when time allows, spend time listening to your clients’ story. Don’t act as if you are pressed for time, even if you are. They’ve been rejected by “important” people their entire lives. Show them that you are different, that you care about them, that you believe in them, and that you are there to fight for them. After all, that’s all they’ve really ever wanted—someone who will stand up for them and make their voices heard. Quite often, whether you ultimately win or lose the case matters little to your client. What they will forever remember is how you treated them and how you made them feel when the chips were down. This lies at the very heart of the reputation that you will earn in the community.

Try to give your client choices. He has so few. The realization that he has no choice but to plead guilty or go to trial and lose is traumatizing to say the least. The more choices your client has, the more power and control he will feel he has over his case, as well as his life. It will empower him. More importantly, it creates hope—the possibility that there is a way out of the mess he’s found himself in.

One of the most important discussions you can have with your clients is to clarify what it is they want you to do for them. For the private attorney, it may appear obvious that if they’ve hired you, they must want you to represent them and to win if it goes to court. But sometimes appearances can be misleading. Sometimes our assumptions can be wrong. They may be seeking something from you that you are not able to provide. Don’t fall into the trap of assuming that you know what it is the clients want you to do for them. Simply ask them directly. Take a moment, and ask, “What would you like me to do for you in this case?” Be prepared for them to be taken somewhat aback by this question. This may be the first time in their lives

\(^5\) Now you really begin to see why we are referred to as “counselors.”
that anyone has ever thought enough about them to ask them what they really want.

It is a critically important question. Their answer might surprise you. Whatever they ask of you, be as honest as you can in your response. Do not overpromise; chances are you will underdeliver. If you are certain you can provide what they seek, then tell them that. If you are certain you cannot, then tell them that, too. “Why?” you might say. “Why tell them bad news right out of the box?” Ask yourself this question: When do you want them to hear the bad news? Now, when you can discuss it and deal with it openly and honestly, or when the verdict is announced in open court? Be honest and realistic, even perhaps a bit conservative in your assessment of their situation. It is far better to underpromise and overdeliver than the alternative.

Many of your clients may be angry and unwilling to participate in reasonable and meaningful conversation. Remember that anger is a secondary emotion. It is a response to something else. Almost always it is grounded in fear. Many of our clients have endured traumatic childhoods, including verbal, physical, and sexual abuse, sometimes at the hands of their own parents. They trust no one, for everyone they’ve ever trusted and believed in has betrayed them and let them down. It is therefore no surprise that when our clients express anger, they are really reacting to the chronic and overarching fear they have endured for much of their lives. Look beyond your clients’ anger, not only as a way of understanding and communicating with them, but as a device by which you can also help the jury understand and connect with them.

When you meet with your clients, be as positive and reassuring as you can. They know that things are bad, and you don’t need to pile it on. Be hopeful and upbeat if possible; give them the feeling that even though they’re in a tough spot, you are there with them and you will never, ever, abandon them, betray them, or sell them down the river. You will always be honest and truthful with them. Look them in the eye and tell them that. You are their champion. Promise them that you will see them as often as your schedule permits. If they’re in jail, at least once a week, if possible. And it doesn’t have to be for long. Sometimes you may not have any news to report or anything of substance to discuss. It doesn’t matter. They need to see a friendly face once in a while, if only for a few minutes.
If you see your client in jail on a fairly regular basis, even if only to spend a few minutes shooting the breeze and seeing how he’s doing, the most amazing thing will happen. Your client will begin to feel that you are there because you really do care about him, and not simply because you’re being paid to do it. He will look forward to seeing you. It will be the absolute highlight of his week. He will be excited to share things with you. He will be proud that you represent him. He will brag to other inmates what a good job you are doing for him, even if you’re not actually doing all that much. He may even start to believe that if someone like you cares about him, his life is worth living.

It will have collateral ripple effects as well. Other inmates will notice that you care about your client and that you take time to visit him. They will soon ask their own attorneys why they aren’t doing the same for them. You will be approached in the jail by other inmates who want to fire their attorneys and hire you. This will, of course, translate outside the walls to the local community at large. You will even be noticed by the jail guards as someone who cares. They will begin to show you extra (or at least some) respect. They may allow you to fudge a little bit on the time limits set for visitation. They will like to talk to you. They will even refer other new inmates to you who have yet to hire an attorney. Most amazing of all, you might even receive a call one day from a law enforcement officer who saw the way you treated your client and wants to hire you to represent him in his own legal matter. And to think all you ever did was to show some kindness to someone you didn’t know and to whom you owed nothing other than legal advice.

As you meet and get to know your client and his story, keep in mind the following guidelines for improving and enhancing your relationship with him:

**Five Universal Truths**

1. People feel the need to be **respected**.
2. People would rather be **asked** than be **told**.
3. People have a desire to know **why**.
4. People prefer to have **options** over **threats**.
5. People want to have a **second chance**.
Good Listening Skills

- Eye Contact
- Avoid Distractions
- Body Language
- Gestures
- Silence
- Acknowledge the Story (“I hear you”)
- Validate (“What you say is important to me”)
- Empathize

E. Investigation

Victorious warriors win first then go to war, while defeated warriors go to war first, then hope to win.

—Sun Tzu

He who knows only his own side of the case knows little of that.

—John Stuart Mill

Perhaps more than any other factor, a thorough investigation is the key to success in the courtroom. The great trial lawyers investigate their cases far more exhaustively than their opponents, for it is in the details that the key to a successful case lives. That being said, no matter how strong you believe your case to be, trial is always a risk. As will be repeated throughout this manual, it is always better to settle a case if you can than to go to trial. Therefore, the goal in case preparation is to win the battle without resorting to fighting. In other words, prepare your case so well that your opponent is afraid to step into the courtroom with you.

Innovation and creativity are the hallmarks of a good investigator. Thinking “outside the box” yields great rewards in this business. A general rule of thumb regarding investigation is that “more is better.” If you want to get a good feel for what your client was experiencing at the time of the incident, visit the scene personally with your investigator. Take numerous photographs—more than you think you’ll ever need. View the scene from every angle. Ideally, visit the scene at the same time of day or night the incident occurred. Sometimes the presence or absence of light makes all the difference. Due to the placement of certain objects, sometimes witnesses
are not able to see what they claim to have seen.\(^6\) Also, visiting the scene will likely prompt you to think of questions the jury may have regarding the evidence. Your ability to anticipate those questions will enable you to provide answers during the trial that will be to your advantage.

Another area of investigation concerns conducting thorough interviews of the witnesses. If possible, interview the state’s witnesses, including the “victim” and any experts. The prosecutor doesn’t represent them, so there is no ethical issue regarding your making contact with them. Therefore, he is not permitted to prevent you from interviewing them. While some witnesses may elect not to be interviewed, you should at least make the effort. You would be surprised how often the prosecutor fails to interview his own witnesses.

Many attorneys interview witnesses by themselves. This avoids having to take the time to prepare your investigator or other third person to do it. While there is nothing wrong with that, it makes you a witness if the persons you’re interviewing change their story later at trial. Therefore, whenever possible, have your investigator interview witnesses rather than doing the interviews yourself. Or, if you prefer to conduct your own interviews, then bring along a third party, such as your investigator or your paralegal, so that you can call them to testify at trial if the witness changes her story.

While it may seem counterintuitive to talk about the importance of jury instructions in the early phases of case preparation, the importance of designing your investigation around the jury instructions you anticipate submitting to the court at the end of trial cannot be overstated. Having a solid handle on what elements of the charged offenses the prosecutor must prove at trial will drive your investigation and help guide you in preparing your defenses. As soon as possible after taking the case, study the charges and related jury instructions in order to start planning where your investigation should go.

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\(^6\) Case in point: An attorney was representing a defendant charged with delivery of a controlled substance to an undercover officer in a bar. The transaction was allegedly witnessed by another officer who testified that he was looking through the window of the front door of the bar at the time. Upon visiting the bar, the attorney discovered that while the front door did have a window, it had been boarded up and painted over for several years. The case was dismissed.
1. Private Attorneys
As with virtually anything in life, the quality of the result you obtain depends on the amount of effort you put into it. Garbage in, garbage out. This is certainly the case with investigation. There is no substitute for thorough investigation. Most private attorneys engage in small-business operations and thus may not employ full-time investigators. That is a luxury that only bigger firms can usually afford. A good investigator is worth every penny. Great cases have been won or lost on the strength of the pretrial investigation. This is often the case in criminal prosecutions.

With all due respect to law enforcement investigators, they are often unable, due to time constraints, to invest the kind of time and effort into a case that it really requires in order to accomplish a first-class job. As a result, stones are left “unturned,” thus allowing the defense attorney to take advantage of numerous opportunities. If you undertake the defense of a criminal case, be sure to determine as early as possible whether you might need the services of an investigator. Discuss that with your client, for you will need to have an understanding early on as to the amount such services will cost and whether you or your client will front the expense.

2. Public Defenders
Most public defender offices employ investigators. This is a wonderful resource that is often underutilized. You will know early on in your case whether you will need to use the services of your investigator. Don’t hesitate to do so.

Since your investigator will no doubt be busy with assignments in other cases, try to engage him as early in the case as possible, so that he will have the time to do what you need him to do. Take the time to brainstorm ideas with your investigator in order to maximize the effect of his efforts. Think outside of the box. Put yourself in the jury box. Ask yourself what evidence you would like to see if you were there and how you would like it presented. Crawl inside your client’s “hide” and see the case from his eyes. Why did he do what he did? Consider how you wish to present the evidence to the jury to ensure they see it the way he did. In this business, you are limited only by your imagination. The more creative you are, the better your chances are of winning.