

Tuesday, January 22, 2008

### **Negotiating in the t'ai chi moment.**

Â Yin YangÂ T'ai chi works not only for trial battle, but also for negotiating an alternative to having a trial. Â The great thing about being fully prepared for trial is that it makes one not only ready to do better at trial, but also to do a better job in negotiations. The maxim remains true that by preparing cases to negotiate they are more likely to go to trial, and by preparing cases for trial, they are more likely to be resolved by negotiation. Â For instance, it is a sunny Friday afternoon, and I drive up for trialÂ to a rural Virginia county courthouse that I have never visited before (so I check in advance about the prosecutor and judge from a local lawyer). The prosecutor gives me a friendly greeting, and suggests that, this being Friday afternoon, I make a reasonable disposition proposal. My client is charged with drunk driving and reckless driving, and will have his commercial drivers license suspended if convicted of drunk driving, and any Virginia suspension period for reckless (the judge has the option to suspend up to six months for reckless) will carry over to his commercial drivers license. The prosecutor insists that DWI be part of any negotiation. I talk with the arresting police officer, and recognize that my client has a small chance at best of beating DWI at trial. I explain to the prosecutor why my client needs to go to trial unless we enter a guilty plea involving no DWI conviction and no suspended driving. The prosecutor agrees to a guilty plea to reckless driving only, the judge goes along with it, and everyone is out of the courthouse less than one hour after the afternoon session began. The result meets the prosecutor's goal of finishing court early on a sunny Friday afternoon, and the client's goal of keeping his commercial driver's license intactÂ and serving no jail time (in fact, he is not even put on probation). Â Several weeks later, another client and I arrive at one of the more crowded Maryland courthouses for trial. He is accused of drunk driving. The arresting officer shows up, but not the breath technician, whose presence we timely demanded many weeks before. After talking to the police officer, it appears our client -- even without the breath technician's presence -- has a very good chance of losing on the driving while impaired charge (a lesser included offense of driving under the influence) at the very least. The police officer is more than happy to talk, and it turns out that he has no problem with any level of leniency offered by the prosecutor. I wait awhile to speak with the prosecutor, who is dealing with a long line of witnesses, lawyers, and unrepresented defendants. When the proceedings resume, the judge makes clear, in so many words, that he wants to move the large docket along. After that happens, I go up to the prosecutor nonchalantly, who offers for my client to plead guilty to a jailable offense. I point out that the breath technician is not available, and counter with a proposed disposition only involving an admission to two non-jailable moving violations. The prosecutor thinks about it, and ultimately agrees. We benefit from a combination of an absent breath technician whose presence we demanded, and the presence of a judge who wants to move the docket along. Â In both of the above instances, not only were we successful in obtaining such excellent negotiated results, but we truly were going to go to trial if the prosecutor did not remove the drunk driving counts from the plea negotiations. In both cases,Â I chewed the fat amiably withÂ the prosecutors and copsÂ (that I can do; breaking bread with them is another question).Â We got to yes by focusing on the overlapping goals of both sides, by doing it in a way that was non-confrontational and that made clear that nobody on the other side would lose face, and by our being in the t'ai chi moment. Nothing ventured, nothing gained. Jon Katz.

Posted by Jon Katz in Drunk driving/DWI/DUI at 00:00