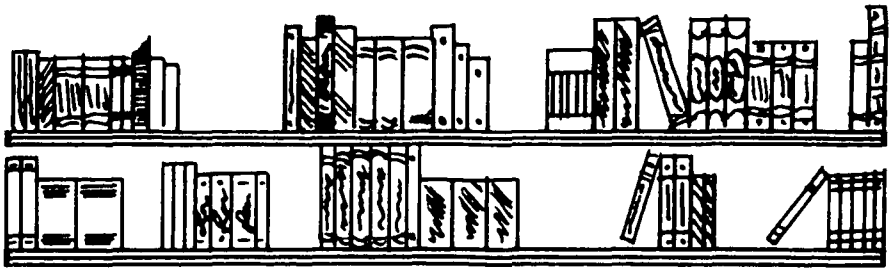
Litigator's Bookshelf



Sink's Guide to Staying Afloat in Political Criminal Trials

by Michael E. Tigar

Political Criminal Trials: How to Defend Them by John M. Sink (Clark Boardman Co., Ltd., 666 pp., $27.50).

I have never met John Sink, but would like to. He has written an informal, easygoing book about trying political cases, drawing on his experience in representing defendants charged with various offenses arising from events in Santa Barbara a few years ago. Despite his personal involvement, his book is only slightly egocentric and only mildly tendentious.

Also, it's a pretty good book. It should help deal with two problems that confront the young advocate about to represent a defendant in a political case. The first problem has been created by judicial and prosecutorial outrages and lawyers' reactions to them: The mistaken notion that careful lawyering and legal craftsmanship are useless in the face of governmental repression has gained currency. Sink shows what a well-prepared, aggressive legal defense can accomplish—not always, and not in the face of persistently egregious official conduct, but often enough.

The second problem was brought home to me in law practice, law teaching, and in the representation of political defendants. The profession of political lawyering has its superstars. Political defendants vie for their services, and their light eclipses their less famous brothers and sisters. The less famous, less experienced lawyer fears that he or she can never match the performance of these luminaries. Anyone with such a fear ought to read John Sink's book. It confirms my view that a conscientious well-prepared lawyer, who does a lot of homework, will do the best job defending a political case, regardless of the lawyer's previous experience in such matters.

Vicarious Experience

Nobody should be fool enough to think that one learns how to try a case—political or otherwise—from reading a book. Anybody who reads this book and tries to memorize John Sink's better lines for eventual use in court has missed the point. But every prospective criminal trial lawyer should read it, to learn from Sink's well-reported vicarious experience. It goes on the shelf alongside Arthur Weinberg's *Attorney for the Damned*, and Wellman on *The Art of Cross-Examination*.

I am impressed by Sink's ability to set down the main outlines of a political case—the decision to bring the charge, the problem of client relations, discovery, pretrial motions, use of documentary and photographic evidence, jury selection, impeachment of police officers and informers, preparation of defense witnesses, and opening and closing argument.

John Sink brings to trial law the perspective of a forty-five-year-old lawyer who started his practice in a litigation office, trying cases for self-insured corporations. He says in a biographical statement, which un-

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fortunately is not printed in his book, that "it seems to me ironic that a lot of things which have proved useful for defending people in criminal cases were learned for a very different purpose." Not so ironic, I think. The best advocates at the criminal bar have been those who turned the skills learned in defense of privilege to better use. Darrow resigned as a railroad lawyer to defend Eugene Debs; and he was to gather more experience in railroading from then on than he had before. Edward Bennett Williams spent the first few years of his practice litigating for the transit company.

On the whole, Sink makes a great success of applying just plain trial skills to the special problems of the political case.

I am not so happy, though, with the collection of material he has chosen to include in his appendices. The draft discovery motions are useful in compiling lists of requests in almost any jurisdiction, but the case-law citations are almost exclusively from California state courts. California's liberal criminal discovery law is hardly representative of the nation as a whole. It would have been better to focus upon the federal, constitutional law defining the prosecutor's obligation to disclose, especially with respect to production of potential impeachment material on prosecution witnesses. Then, Sink might have cited some articles, annotations and other materials which would give a young lawyer a place to begin research no matter where he or she practices.

For help in presenting material like that on discovery, prospective authors should look at the first-rate job done by the National Lawyers Guild in its looseleaf book, *Representation of Witnesses Before Federal Grand Juries.*

Irrelevant Instructions

I also find it incongruous that Sink includes requested jury instructions from the Ellsberg-Russo *Pentagon Papers* case. These instructions have little to do with the state crimes dealt with in the body of the book—disorderly conduct, assault on a police officer, riot, arson and such. Most of these instructions present issues which are not likely to arise, at least in quite that form, in other federal political cases.

Having eliminated the Ellsberg-Russo material, Sink might have had space to deal in more detail with the general problem of drafting and requesting instructions which will be helpful in final argument. Too, I rather wish he had focussed on some of the difficult evidentiary problems in conspiracy cases, particularly the co-conspirator hearsay rule and the admissibility of post-conspiracy statements on such theories as "false exculpatory statement." In my experience, few trial lawyers know how to approach and deal with these problems, particularly when it comes to framing objections to testimony. A comparison of the California and federal rules would have been useful, particularly given the codification of evidence law in California and the prospective adoption of federal rules of evidence.

Sink omits full consideration of some other issues which often arise in political trials: entrapment, unlawful electronic surveillance, and illegal searches for tangible objects.

Surprisingly often these days, conspiracy trials against the leaders of political organizations are based upon plans and conduct fomented if not originated by a government informer. Sink's suggestions on cross-examination of the informer might usefully have included a discussion of the limits on admissibility of informer testimony. Clearly the government may not rely upon an informer (or anyone else) to prove a crime the defendants were entrapped into committing.

Informer's Credibility

If the government knows, or has reasonable grounds to suppose, that its informer is a liar, it ought not to be able to use his testimony. The case law supports this kind of limitation. Material casting doubt upon the informer's credibility is producible under *Brady v. Maryland* and its progeny, and the informer shoud be examinable on the *voir dire* to bring out why the jury should be insulated from the infection of his purchased testimony.

Moreover, the defense of selective prosecution deserves close attention in any comprehensive study of political trials, though perhaps not in a work like Sink's which is mainly devoted to tactical and trial problems. Prosecutorial discretion is so powerful a weapon against dissent that a growing number of courts are wisely placing limits upon its egregious misuse.

Sink might also have examined the application of search and seizure law in political cases. The Supreme Court has decided that warrantless electronic surveillance for domestic "national security" purposes is unlawful. But what of evidence garnered from other kinds of political surveillance and from the ubiquitous practice of dossier-keeping? These law enforcement practices infringe the interests the First and Fourth Amendments were written to protect, and there ought to be some remedy for them, at least in the suppression of evidence at a criminal trial. The Supreme Court's dismissal, in its 1971 Term, of a civil suit challenge to military intelligence-gathering on civilian dissidents was based on procedural grounds; the substantive question is still open. A vigorous program of pretrial discovery in a political case ought to explore these issues by demanding production of political intelligence files on the defendants.

All these criticisms do not detract greatly from the essential merit of this book. One problem remains, though, when all that is said. Why must lawyers always be "he"? And why does Mr. Sink believe it important enough to say two times in different parts of his book that women involved in the defense—as clients or witnesses, the notion of a woman lawyer not being discussed—should wear brassieres? It continues to disappoint though not amaze me that otherwise liberated lawyers should not treat naturally the entry of women into the legal profession and should be troubled by the manifestations of women's liberation. Does he think perhaps that a braless woman defendant or witness will be weighed by the jury and found wanton? If so, I disagree.

I learned from this book, though, and I suspect that civil litigators, young lawyers and law students will learn from it, too.