

## CHAPTER 2

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# Initial Client Meeting and Interview

The initial client meeting occurs at approximately the eighth stage in the criminal justice process. The defendant or someone on his behalf has contacted you and either hired you (which means you have received a sum of money to retain your services), expressed an intent to hire you, or requested a meeting with you to discuss the matter and determine whether to engage your services.

Most attorneys meet with the defendant first in order to determine whether or not to take the case. With no money exchanged, the question becomes how much to discuss and review with the defendant and, ultimately, how much advice to give. Problems sometimes arise if the attorney decides not to take the case after such a meeting.

First, the potential client may rely on representations or advice you give, thereby creating a legal, contractual relationship, requiring the attorney to take some action on behalf of the client. For example, if you meet with a defendant in jail and promise to file a motion to modify his bond, you have an obligation to file the motion. Additionally, filing the motion under your signature ordinarily acts as an entry of appearance designating you as attorney of record for the defendant. Therefore, always consider how you are perceived by the defendant. Second, the attorney finds herself giving advice without getting payment for the services. I am confident you did not purchase this book to assist you in giving free criminal legal advice.

If you have a meeting with the client to determine whether you want to take the case, advise the client up front that you are not yet his attorney. Advise that you are not there to give legal advice. Explain that if you are not retained, you are not responsible if he acts upon any statements made by you during this meeting.

Inevitably, every potential client will want free advice. There is no bright line distinguishing how much to review or how much counseling to give. For the most part, it comes down to the attorney's comfort level with the client and the level of crime he is charged with.

If I perceive during the initial meeting that the client will be difficult, I likely will not take the case. Clients that are very demanding, accusing, and argumentative are often not worth my time. They inevitably require much more time and input than they are ever willing to pay for. You will know these people when you meet them.

You should never take a case that is above your experience level, unless you intend to enlist the help of a more experienced attorney. For example, you should not take a rape, homicide, tax evasion, or securities fraud case during your first year of practice. An attorney has an ethical obligation to effectively, competently, and zealously represent his client. It is very unlikely that you will have gained enough experience in your first year of criminal defense practice to competently handle the issues that arise in such high-stakes (I refer to them as such because the potential penalties are so great) or complex cases.

I have written most of this chapter assuming you have already been retained. I do not discuss how to find clients and how to decide whether to accept a client's retention.

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## WHAT SHOULD YOU DO PRIOR TO MEETING WITH THE CLIENT?

Prepare as best you can for the initial client meeting. Include the following in your preparations.

### *Determine Defendant's Charges*

It is important to try to determine the charges. Never rely entirely on the defendant or the person who contacted you on the defendant's behalf (this could be family or friend) to accurately advise you of the pending charges. Previous clients have informed me that the pending charges were simple domestic violence matters when the charges actually involved matters such as attempted first-degree murder, kidnapping, or rape. That fact that the client has lived with, has slept with, or is related to the victim does not make the charge a "simple domestic matter."



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## TIPS FOR DETERMINING THE CLIENT'S CHARGES

1. *Ask the client or the person who initially makes contact.* Ask the nature of the charges during your initial contact with the defendant or the individ-

ual contacting you on his behalf regarding your representation. At the very least, try to determine the jurisdiction in which the charges are filed during this initial contact. Your questions might go like this:

- ▼ Do you know what you are charged with?
- ▼ Do you know if it is a felony or a misdemeanor?
- ▼ Do you know the court in which these charges are filed? If not, do you know who is prosecuting the case—the city, the county, the State of Colorado, the United States government?
- ▼ What does the piece of paper look like that notifies you of the charge and your court date? Does it say somewhere at the top of that piece of paper, “In the City of . . . , In the County of . . . , In the State of . . .”?
- ▼ Okay, because it says “In the City of Lakewood,” I will assume the case is charged in municipal court. Since municipal courts in Colorado handle only traffic and misdemeanor matters, your charge is probably a misdemeanor.
- ▼ Does this piece of paper you have include a case number or filing number written upon it somewhere? Give me both of those numbers, please.

This exchange will likely provide you enough information to seek out the exact charge and its jurisdiction.

2. *Complaint and Information.* At some point early in any criminal proceeding, the client must be given a copy of the charging documents, often combined into one document called the Complaint and Information. This document notifies the defendant of the charge and criminal statute or code under which the crime is charged. This document is prepared by the investigating officer and issued to the defendant and to the court in cases of traffic tickets, some petit offenses, and some misdemeanor offenses. Otherwise, it is prepared by the prosecution and issued to the court, which is supposed to issue it to the defendant. Sometimes, the defendant does not receive the document, fails to provide the attorney with a copy, or, in most cases, misplaces it. If the defendant cannot provide you with a copy of his charging documents, you will need to obtain a copy. The Complaint and Information can be obtained in any of several places:

- ▼ *Criminal court clerk.* Ordinarily, these documents are public records and can be obtained from the criminal clerk of the jurisdiction in which the charges are filed (sometimes for a small fee). The court in which the charges are filed will always have a clerk’s office, which has a physical address and public access in addition to a public access

phone line. Some courts will have separate clerks for civil, criminal, appeals, probate, etc. Ask to speak with the court clerk who handles criminal matters. Give the clerk the defendant's name, and if you have it, case number. (Case information should be attainable through either.) At the very least, ask the clerk if you can have a printout of the computer screen describing the charge.

- ▼ *Prosecuting attorney.* If the clerk does not help, contact the prosecuting attorney's office and ask to photocopy or review their copy of the charging document. To find the prosecutor assigned to the case, call the prosecution attorney's office for the jurisdiction in which the charges were filed.
- ▼ Tell the person who answers the phone that you are an attorney trying to determine the prosecutor assigned to a case. Either the person on the other end of the line will be able to help you or will refer you to someone in the office who can. Give that person the defendant's name, and if you have it, case number. (Case information should be attainable through either.)
- ▼ If the case has not yet been assigned to a prosecutor, ask to speak with someone who can give you a copy of the charging documents, or at a minimum advise you of the charges. Thanks to technology, any prosecutor (or his legal assistant) should be able to bring the matter up on a computer monitor and read to you the charge and its accompanying statute number. If, for whatever reason, the prosecutor will not give out copies of charging documents, ask him to tell you the exact charge and the statute under which the crime is charged.

I have never had either request refused. However, if both requests were denied by the prosecutor, I would file a motion with the jurisdiction advising the court of my difficulties in obtaining this easily accessible information from the prosecutor and asking for the court's prompt intervention. Defendants have a constitutional right to know the exact nature of the crime with which they are being charged. Likewise, that right extends to any potential defense attorney. (After all, the prosecutor does not get to charge crimes and pursue prosecution in a vacuum.) Once the court hears of this flagrant abuse of the defendant's rights, you will no doubt get a court order directing the prosecution to provide you with this information.

- ▼ *Jail personnel.* If the defendant is in custody, contact the jail that houses inmates for the relevant jurisdiction and ask the jail personnel about the charges for which the defendant is being held. They usually have this information at their fingertips.

### ***Determine the Elements That Form the Basis for the Charge***

- ▶ *Review and copy the statutes or codes listed with the charge.* If you are able to determine the charges, review the statutes describing the violation. Copy the statutes at issue for your file.
- ▶ *Review and copy the uniform jury instruction or jury charge for the particular statutes.* Most state and federal jurisdictions have a set of uniform, or “pattern,” jury instructions or jury charges describing the elements needed to establish the offense to the jury at trial. Jury instructions describe the applicable law in “plain English” or give direction to the persons serving on a jury concerning the law of a case. These uniform instructions are usually well-founded in case law and often have been written and prepared by a judicial body at the request and under the supervision of the jurisdiction’s appellate courts or local bar association.

The instructions must be given to the jury at the close of all evidence. Failing to give these instructions to the jury or deviating from the exact wording of the instructions in giving them to the jury often invites prejudicial error by the court. If the court’s prejudicial error acts to substantially deny a defendant of a constitutional right, then she is entitled to a retrial (if found guilty). (This information is discussed in more detail in Chapters 9 and 10.)

All practitioners should have their own hard copy of these uniform instructions. You may find uniform jury instructions on the Internet or through the various private computer research assistance services.

A Sample Jury Instructions is included as Exhibit C on the enclosed CD-ROM. ♦♦

- ▶ *Take note of key language.* In reviewing the relevant instructions, pay particular attention to key language in the instructions such as “with the intent to,” “knowing that,” or “with reckless disregard to.” These phrases often make the difference when it comes to the client’s defense. I often tell my clients that these words are legal words that may act as an impediment to raising certain defenses, depending on the type of crime.
- ▼ *Strict liability crimes* have no defense other than that the crime never occurred or someone else did it. The prosecution need not prove that the act committed by the defendant was done with intent or knowingly. For example, statutory rape is a strict liability crime and has no defense other than that no crime was committed or that the defendant didn’t do it. If the prosecution can establish that the defendant had sexual contact with a minor, then there is no defense such as consensual sexual contact (otherwise known as lack of intent) or lack of

knowledge regarding the victim's age (otherwise known as knowingly committed the crime). In other words, proof of statutory rape does not require that defendant *intended* to have sexual contact with a minor or *knowingly* had sexual contact with a minor. Therefore, it may not be a defense that the defendant did not know the age of the victim. The mere proof of the occurrence of the act makes the defendant guilty.

- ▼ Some jurisdictions limit the types of defenses that can be run for *general intent crimes*. A general intent crime requires proof that the defendant intended to commit the conduct charged but requires no additional element of intent such as premeditation or knowledge, whereas specific intent requires that the defendant intended to commit the conduct charged and an additional element of intent. For instance, some jurisdictions do not allow the defense of voluntary intoxication (knowingly consuming an intoxicating substance thereby becoming so intoxicated that the defendant could not knowingly appreciate the nature of his actions) if the crime requires only proof of general intent.
- ▼ In most jurisdictions, premeditated first-degree murder is a crime of *specific intent* because the defendant must have both intended and premeditated the murder. In a jurisdiction that makes the distinction between specific and general intent, a defense of voluntary intoxication will be allowed in the prosecution of premeditated murder and it will not be allowed in the prosecution of an unplanned murder.

### ***Determine the Potential Penalty the Charge Carries***

Next, review the criminal code for the potential penalties that the defendant will face should there be a judgment of guilty as charged. Determine if the crimes charged subject the defendant to mandatory imprisonment or if the charges carry a non-prison/jail sanction (probation, diversion, deferred judgment, suspended imposition of sentence, etc.).

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## **WHAT SHOULD YOU COVER DURING THE FIRST CLIENT MEETING?**

The following areas of inquiry may be relevant during the initial meeting. These topics are in no particular order.

### ***Show Empathy***

Try to show some empathy no matter what horrendous thing the defendant is accused of committing. You have to earn a level of trust in order to effectively

represent your client. You need to know everything about the client. If the client does not trust you, he may not be entirely forthcoming with you. Without trust, you can not adequately and effectively represent the client.

Starting off with compassion for the client is a good way to start building this relationship of trust. You might say something like this:

I am sorry this is happening to you. I am sorry you are facing circumstances that require you to seek my help. I do not yet know your background or the entire circumstances that brought you to me, but I want you to know I will do whatever I can to ensure that your rights are protected and that the system treats you as fairly as it can.

### ***Explain the Attorney–Client Privilege***

Explain that everything the client tells you during your meetings is privileged and confidential, that no one is allowed to know what you and the client discuss. This means that no one can force either of you to reveal the content of your discussions. And this privilege extends to everyone associated with the defense team.

Warn the client that the privilege can be lost if she reveals matters discussed in your meetings to other people—and this usually includes spouses.

### ***Explain the Importance of Secrecy***

Tell the client the following:

- ▶ Do not discuss your charges or the facts of your case with anyone. This includes your family and friends.
- ▶ If asked about your case, refuse to answer questions. In doing so, be polite and explain that your attorney has advised you not to discuss the matter with anyone.
- ▶ You can not discuss the case, because anyone you discuss it with can be brought into court and forced to testify about your conversations.

I often tell the story of a client of mine who was charged with rape. We claimed that he had consensual sex with the alleged victim. Unfortunately, when asked by his friends outside of my presence, he denied ever having sex with the woman. The prosecutor later brought the friends in to trial to testify against the defendant after he testified that he had in fact had consensual sex with the alleged victim. The prosecutor consequently argued to the jury that defendant's complete denial to his friends was evidence of his guilty mind.

### ***Advise against Speaking to the Judge or Prosecutor***

I also advise the client to refrain from contacting the judge or prosecutor prior to any plea or conviction. I have been surprised at the number of defendants

who write the prosecutor or judge from jail asking for leniency. Clients often make incriminating statements in these letters that can later be used against them at trial or at the time of sentencing.

This advice is equally applicable to the client's friends and family. Letters and statements providing support or requesting leniency are appropriate, but only after the defendant is convicted of something. Until that point, everything said to the court and prosecutor should be screened through the defendant's attorney.

### ***Stress the Importance of Honesty***

Tell the client to tell the truth at all costs.

I advise my client that I cannot effectively represent her unless she is completely honest with me about everything, including her personal background. I remind her that everything that is discussed stays between us and is protected by the attorney–client privilege. I tell the client that if she tells me that she is going to lie, then I can not present her lie to the jury. I add that if she lies to me and I find out through the course of investigation that she is lying, then I can no longer pursue the defense supported by the lie. It is illegal for me to suborn perjury, and I can not and will not support her if she intends to lie on the stand.

If she lies, I will attempt to withdraw from her case. If the court refuses my request, the law requires me to put her on the stand and let her testify in the narrative. In other words, I cannot directly ask her questions that elicit her lies. I merely will say, after advising the court I intend to have my client testify in the narrative, “Is there something you would like to say to the jury?” (There have been attempts in various jurisdictions to revise this narrative testimony rule over the years. Make certain to review the local ethical rules in regard to proceeding without suborning perjury from your client.)

### ***Review the Defendant's Criminal History***

Have the defendant give a detailed review of his criminal history, including any juvenile convictions and every arrest. If the defendant indicates that he has never been convicted of a crime, do not accept that as the final answer. Some defendants believe that juvenile offenses, DUIs or DWIs, driving while under suspended or restricted license, and various misdemeanor offenses are not considered criminal convictions—but they are under the law and in the eyes of the court.

Previous convictions become relevant in determining the penalty that the court may impose if a conviction result. (This includes previous traffic, petty, misdemeanor, and felony offenses.) Sometimes previous convictions require the court to impose a mandatory sentence.





## TIPS FOR DETERMINING CRIMINAL HISTORY

Question the defendant as follows to determine criminal history:

1. “Have you ever been arrested?”
  - ▼ “What happened with the case after your arrest?”
  - ▼ “Was the case dismissed without prosecution?”
  - ▼ “Was the case dismissed after you completed a deferred judgment or sentence, a suspended sentence, or some sort of program required of you by the court or prosecutor?”
2. “Have you ever had contact with law enforcement for any reason?”
3. “Have you ever been brought to court for any reason?”
4. “I understand that you were advised that your juvenile record was sealed. However, if I am going to properly advise you of the potential penalties that you face, I must know all about your juvenile record. I promise, anything you tell me about any juvenile crimes or arrests will not go outside of this room without your permission.”
5. “Have you ever gone to jail? How long were you in custody?”
6. “Have you ever served time in prison?”
7. “Have you ever served time in a juvenile detention center? How long were you in custody?”

### RELEVANCE OF CRIMINAL HISTORY: BAIL BOND

Criminal history is important in obtaining a bond (also referred to in some jurisdictions as “bail”) or reducing one already imposed. I cannot count the number of times I have requested my client’s bond be reduced only to be rebutted by a prosecutor’s complaint: “But Your Honor, the defendant’s NCIC report reveals he has been arrested 12 times in his life and convicted twice for aggravated battery and convicted once for . . .” NCIC is the National Criminal Information Computer. It’s a rap sheet maintained by the feds that includes every contact with the legal system.

If the defendant truly has no record or has a minor record (at most, traffic offenses and one misdemeanor offense), his chances of being granted a reasonable bail increase.

A sample NCIC Rap Sheet is attached as Exhibit D. ❖

### RELEVANCE OF CRIMINAL HISTORY: EVIDENCE

Criminal history is also important because it may appear as evidence against the defendant in his trial. In some jurisdictions, if defendant takes the witness

stand, every crime for which he has ever been convicted may be introduced as impeachment evidence against him. In other jurisdictions, the prosecutor may introduce only those crimes that are relevant to the defendant's truth and veracity should he take the stand, i.e., crimes of honesty or felonies. In still other jurisdictions, the prosecution may introduce such evidence only if defendant raises the subject (for example, defendant places into evidence his good character or he testifies he has never been in trouble with the law.).

Even if the defendant chooses not to testify, evidence of the same or similar conduct may be introduced as evidence in the prosecution's case in chief in order to establish proof of motive, opportunity, intent, plan, knowledge, identity, or absence of mistake or accident.

### **RELEVANCE OF CRIMINAL HISTORY: SENTENCE**

Criminal history is relevant to any current criminal case because potential penalties are often based upon past convictions. Recent trends in sentencing law make previous convictions relevant to the jury's verdict should the defendant be charged with a crime such as possession of a firearm after a previous felony conviction. In that instance, the jury will be asked to find beyond a reasonable doubt that defendant has a previous felony conviction.

Many jurisdictions sentence defendants based upon their criminal records, with the potential sentencing range increasing in cases where the defendant has prior convictions (most often prior felonies are used to enhance the sentence, but some jurisdictions use prior misdemeanors to enhance as well).

Some jurisdictions even allow the sentencing judge to impose "aggravated sentences" or "upward departure sentences" when the defendant has previous convictions for the same or similar offense. For example, a defendant charged with a sex crime or a sexually motivated crime who has a prior statutorily defined sex offense conviction may be subject to a mandatory aggravated sentence. Harsher penalties for second-time DUI/DWI convictions is another an example of this type of enhanced punishment scheme.

### ***Review the Charging Document***

If no charging document is available, review with the defendant the charges that you have discovered during your preinterview preparation, as discussed earlier in this chapter.

If a copy of the charging document is available, ask the defendant if he knows what he is charged with. This provides an opportunity to judge the defendant's level of sophistication and his level of competency (both mental and as to the criminal justice system).

Sometimes the defendant's knowledge of his charges is all that you will have available at this first meeting.

### ***Review the Elements of the Crime***

The charging documents often do not adequately or simply describe the elements of the crime charged. Their purpose is merely to put a defendant on notice of the crime charged. Some jurisdictions refer to this as “notice pleading.”

The charge is often stated in the Complaint and Information as follows:

Scott W. Storey, District Attorney for the first judicial district of the State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the court of the following offenses committed, or triable, in the county of Jefferson:

**Count 1—Possession of a Controlled Substance—Schedule II: 1 Gram or Less (F6)**

On July 14, 2005, Defendant, John Doe, unlawfully and knowingly possessed one gram or less of a material, compound, mixture, or preparation that contained methamphetamine, a schedule II controlled substance; in violation of section 18-18-405(1),(2.3)(a)(I), C.R.S.

In reviewing this charge with the defendant, I say, “They claim you were in possession of control of less than a gram of methamphetamine on July 14, 2004.” I then review all of the elements and relevant definitions that are set out in the pattern jury instructions of Colorado (if they are available) and answer any questions the defendant may have regarding the same.

For the above charge, the Colorado elements of proof as they appear in the pattern jury instruction for this crime (and as I would review them with the client) are as follows:

1. That the defendant,
2. In the State of Colorado, on July 14, 2004 in the County of Jefferson,
3. Knowingly or intentionally,
4. Possessed one gram or less,
5. Of the schedule II controlled substance, methamphetamine.

A person acts “knowingly” with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts “knowingly” with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result.

A person acts “with intent” when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial whether or not the result actually occurred.

“Controlled substance” means a drug or other substance or an immediate precursor which is declared to be a controlled substance under Sections 18-18-203 through 18-18-207 C.R.S., including methamphetamine.

“Possession” as used in these instructions does not necessarily mean ownership, but does mean the actual, physical possession, or the immediate

and knowing dominion or control over the object or the thing allegedly possessed. "Possession" need not be exclusive, provided that each possessor, should there be more than one, actually knew of the presence of the object, or thing possessed, and exercised actual physical control or immediate, knowing dominion or control over it.

### ***Address the Defendant's Questions***

#### **LEGALITY OF THE CHARGES**

You will inevitably be asked by the defendant why certain acts with which he is charged are criminal. As an example, I was once asked by a client why possession of images of underage boys engaged in certain lewd acts was criminal when the same images could be found in books at the local library. Though I have never perused the shelves of the local library for these images, I was hesitant to discount the defendant's claim. I responded, "I don't know why the legislature criminalizes certain acts. I am just here to represent you on this charge. Perhaps you should contact your local legislator and discuss that with her."

As an additional example, when my clients are charged with high-level drug offenses for possession of small quantities of drugs or with an attempted drug-manufacturing crime for purchasing boxes of cold medicine (for which the constitutional issues have been well settled), my response to such questions includes, "I hear you, man, you're preaching to the choir. I don't like the charge, maybe even the judge won't like it, but the legality of the statute making this a crime is well settled. Should you get convicted, you should take the matter up with the appeals court. For now, let's work on making this charge go away or getting a less severe penalty."

Sometimes a constitutional issue will arise with the particular conduct charged. In the rare event that happens, advise the client about addressing the issue on the motion to dismiss. (Motions to dismiss based upon constitutional grounds are addressed in Chapter 5.)

Sometimes, nothing you can say will ease the client's mind. In that event, just let the client vent. Sometimes the best thing we can do for our clients is to just listen to them. Often, that is all they really want from us.

#### **POTENTIAL PENALTIES**

The client will likely ask what potential penalties she faces. (You will have determined the potential penalties prior to the client meeting.) Preface your explanation by saying, "I am not saying that you will receive this sentence. I am merely advising you of the worst-case scenario." Let the client know that the potential penalty may increase if she has criminal convictions that she has forgotten to discuss.

Depending upon the severity of the crime, type of criminal conviction, and the jurisdiction, typical penalties may include one or a combination of the following:

- ▶ *Fine.* The court may order the defendant to pay a certain sum of money by a certain time.
- ▶ *Restitution.* The defendant may be ordered to pay a sum of money to the victim as compensation for the victim's loss. Most jurisdictions now require mandatory restitution to include certain costs incurred by various law enforcement entities, such as laboratory testing or extradition expenses (I once had a client ordered to repay Sedgwick County, Kansas, over \$3,500 for extraditing him via a private plane from Las Vegas).
- ▶ *Community service.* This type of punishment requires the defendant to work a number of hours for a local charity, nonprofit organization, or court-approved entity without compensation. The defendant repays the community for his crime by performing some useful public service.
- ▶ *Probation.* Instead of spending time in jail or in prison, the defendant is placed on probation for a period of time. She must not get into any trouble with the law and must follow any conditions the court imposes. The defendant may also be required to
  - ▼ Report to the jurisdiction's probation department on a regular basis.
  - ▼ Refrain from using alcohol or any drug unless prescribed by a physician.
  - ▼ Undergo random drug screens at the defendant's expense.
  - ▼ Attend anger-management classes.
  - ▼ Attend driver-safety classes.
  - ▼ Attend counseling.
  - ▼ Successfully complete a substance-abuse-treatment program.
  - ▼ Attend Narcotics Anonymous or Alcoholics Anonymous meetings for a designated period of time and a designated number of times per week or month.
  - ▼ Obtain a high school diploma or its equivalent (GED).
  - ▼ Live in a halfway house (described below) for a specified period of time.
  - ▼ Pay restitution ordered by the court.
  - ▼ Write an apology letter to the victim.
  - ▼ Pay probation supervision fees (to help the jurisdiction recoup the cost of the supervision expenses).

For many of these, the idea is that there are programs in the community that support offender reformation without incarceration.

- ▶ *Incarceration.* Incarceration comes in various forms:
  - ▼ *Jail.* Traffic offenses, petty convictions, misdemeanor convictions, and low-severity-level felonies are punished by incarceration in jail. Jails are run by the local municipalities (cities and counties). The amount of time served in this facility is at the discretion of the court. Ordinarily, however, the court's discretion is confined to a certain window of time for each crime pursuant to statute. For example, the maximum incarceration penalty a Colorado court can impose for a petty offense is six months in the county jail. The maximum incarceration penalty that can be imposed for a non-DUI traffic infraction is one year in the county jail. And the maximum incarceration penalty that can be imposed for a misdemeanor is 24 months in the county jail.
  - ▼ *State or federal prison.* Prison is reserved for felony and federal crimes. The length of the sentence is prescribed by statute for each crime for which the defendant is convicted, though some jurisdictions give judges wide discretion as to the amount of time that can be imposed. As with misdemeanors, the statutes prescribe a sentencing range for the particular offense. For example, Colorado assigns each felony crime a severity level ranging from 1, the highest, to 6, the lowest. For a severity level 6 crime, the court has discretion to sentence the defendant from one to four years. For a severity level 5 crime, the sentencing discretion ranges from one to eight years.

If applicable, discuss the period of parole. Most jurisdictions require that a defendant be supervised for a period of time on parole after he has served his prison sentence.
  - ▼ *Halfway house.* This is a government-run or -funded facility in which the defendant is sentenced to live for a period of time. It is different from incarceration as the defendant is allowed to interact with the community. Inmates are allowed to have jobs and participate in certain activities of free society. However, all activities have to be approved and monitored. The inmates are required to sleep in the facility. It is called "halfway" because it represents a place between full incarceration and living freely. It is a reintegration incarceration, wherein the defendant is required to show that he is amenable to less supervision or absolute freedom. Halfway houses are utilized by municipalities, states, and the federal system.
  - ▼ *Boot camp.* These incarceration programs are designed to be like military boot camps. The defendant is sentenced to complete a period of time in the boot camp. Ordinarily, incarceration in these facilities is

reserved for younger adult offenders and offenders who have been convicted of low-severity-level offenses or nonviolent offenses. The inmates march, exercise, and address their guards/trainers like they are military superiors. They attend classes on various subjects, including GED classes and drug treatment and education classes. Often, when an inmate graduates from the program, he is released back into the community and placed on probation. The idea is to teach the defendant discipline and self-respect. The belief follows that those traits will help reform the defendant and reduce recidivism.

### ***Review Discovery with the Defendant***

Criminal discovery includes all documents, police reports, audio and videotape recordings, CDs, DVDs, diagrams, reports of physical and mental exams, reports of scientific exams and tests, witness lists, transcripts of grand jury or inquisition testimony, demonstrative evidence, and physical evidence in the custody or control of the prosecution or its agents (which includes law enforcement officers and anyone working for law enforcement)—essentially, any tangible thing that is relevant to include defendant in the involvement of the crime (inculpatory evidence), to exclude the defendant (exculpatory evidence), or to set punishment. Defendants have a right to see all discoverable information.

A sample Police Report is included as Exhibit E on the enclosed CD-ROM. ♦

### **AFFIDAVITS**

If the case involves a felony, at this point you may have only the affidavit of probable cause or the affidavit in support of the arrest or search warrant. These are sworn statements, usually sworn to by the lead or supervising detective. They summarize the facts that the state relies upon in bringing the charges and establish the initial probable cause for the court in order to justify detaining the defendant on the charges.

These documents can be obtained from the criminal court clerk, the judge, or the prosecutor's office. They are ordinarily in the public record (although the court can order them sealed from public view in high-profile matters) and can be obtained without having to formally enter as the attorney of record on the case.

A sample Affidavit of Probable Cause is included as Exhibit F on the enclosed CD-ROM. ♦

### **CRIMINAL DISCOVERY AS IT DIFFERS FROM CIVIL DISCOVERY**

Criminal discovery differs from civil discovery, in part because the defendant's freedom is in jeopardy and because the plaintiff is a governmental entity. Criminal proceedings invoke far more constitutional rights than civil proceedings do.

As such, the defendant is not required to go searching for the evidentiary issues. He is entitled to everything relevant to include him in the involvement of the crime, to exclude him in the involvement of the crime, or to set his punishment. The defense does not have to conduct depositions or submit interrogatories, requests for production of documents, or requests for admissions to have access to the prosecution's discovery. The prosecutor has a legal duty to disclose all inculpatory and exculpatory evidence.<sup>1</sup>

Most jurisdictions do not allow depositions or allow them only upon a finding by the court that the testimony of the deposed witness is material and it is necessary to take the deposition in order to prevent a failure of justice, e.g., the witness is dying, is on the verge of becoming incompetent, or is highly likely to leave the jurisdiction before trial.

Although many jurisdictions have reciprocal criminal discovery rules (which means defendant has an obligation to disclose certain information to the prosecution), the defendant's duty to reciprocate discovery is often limited to allowing the prosecution to inspect exams, experiments, diagrams, and physical evidence that is material and that the defense intends to produce at trial.

#### **GIVING DEFENDANT COPIES OF DISCOVERY**

You might give the defendant copies of discovery documents to review along with you and to keep for himself. Sometimes defendants can find hidden gems in the discovery that you have overlooked.

If the defendant is in custody, use your judgment regarding whether to give a copy of these documents to the defendant. Other inmates, and sometimes jail guards for that matter, may read through or even steal a fellow inmate's discovery. This often happens in high-profile cases or cases in which the defendant is charged with rape, kidnapping, or aggravated robbery (charges that carry a significant sentence). Copies of the discovery in the wrong hands may subject the defendant to hatred, ridicule, and even violence.

Stolen discovery can also be used by fellow inmates to lend credibility to jailhouse confessions alleged by these inmates to have been given by your client. These inmates create these fake confessions to get more lenient treatment for themselves. They approach the police or the prosecutor and contend that the defendant made incriminating statements to them about his case. They may claim facts that appear in the discovery as factual statements made to them by the defendant.

Another concern is that the press may publish information obtained from stolen or leaked discovery. No matter your client's guilt or innocence, you do not want specific facts of your case to be published in the press. It may contaminate the jury pool.

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<sup>1</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976).



## OBTAINING ADDITIONAL DISCOVERY

Discuss with the defendant the methods of obtaining additional discovery according to your jurisdiction's practices and procedures. If the defendant has been in jail for a few days, assume she has been conversing with the "jailhouse lawyers" (inmates who give legal advice, usually bad, to other inmates). They may have told your client that her lawyer should file a motion for discovery. Sometimes these motions are necessary and sometimes not.

The prosecutor owes you discovery documents even without an order so long as you have formerly entered your appearance as attorney of record in the case.<sup>2</sup> I have found that a simple letter to the prosecutor requesting copies of all discoverable information works quite well. Only when informal requests go unanswered do I file a motion to compel discovery and attach my letter to the motion as an exhibit to show the court the prosecutor is being naughty.

In Jefferson County, Colorado, one of the jurisdictions in which I practice, attorneys need merely make a phone call to the district attorney's discovery department. A fax of an entry of appearance or a court order of appearance will suffice as an official discovery request. My practice aside, make certain you are aware of the local rules regarding discovery. (You can find these in your jurisdiction's statutes or code.)

### ***Ask for the Client's Side of the Story***

I do not always want a detailed recitation of the client's story at the beginning of our first meeting. This is because I may be stuck with the initial story he tells me. If he tells me that he committed the crime, I cannot later assist him to testify if he did not. That would be suborning perjury. (On many occasions, the client tells me one thing at the first meeting and then the complete opposite at trial.) Instead, I have the client review the discovery and the preliminary hearing testimony before I ask for his side of the story. It gives him some time to see the information everyone has, which encourages him to tell the truth. It also gives me some time to review the discovery and to grasp the evidence presented by the prosecution at the preliminary hearing in order to help massage the defendant's story out of him. (I do not have to believe the client's story. I just have to sell it to the trier of fact.)

During the initial meetings, you may ask certain questions of the client, searching for answers to various "bad facts" (facts that are ugly or contrary to the defense strategy) that appear in the discovery. (You can do this even if you are trying to avoid a detailed narrative.) For example:

- ▶ "If you weren't drinking, can you explain the empty beer cans the police say they found all over the kitchen counter?"

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<sup>2</sup> *Id.*

- ▶ “If you did not hit him, how did he get the gash across his forehead?”
- ▶ “Why would she say you raped her when you are saying the sex was consensual?”

### ***Explain Upcoming Proceedings***

Advise the defendant of the proceedings yet to come and how these hearings usually work. The key criminal proceedings are often in the following order:

- ▶ *Advisement* (often happens within the first 48 hours of arrest wherein the defendant is advised by the court of the charges against him and of certain constitutional rights)
- ▶ *First Appearance and Appearance of Counsel*
- ▶ *Preliminary hearing* (if felony charges)
- ▶ *Arraignment*
- ▶ *Pretrial conference*
- ▶ *Pretrial hearings* (motions hearings)
- ▶ *Trial*

### **ADVISEMENT AND FIRST APPEARANCE**

The Advisement is often the first proceeding after the defendant's arrest or receipt of summons. It usually occurs within 24 hours of arrest. Failure to bring the accused before a judge within a reasonable time or the time prescribed by statute may result in the defendant's release without prosecution and without the need to post bail. (However, the prosecutor has until the expiration of the statute of limitations to file charges.)

In the Advisement, the defendant appears before a judge and is advised of the charges against him, certain constitutional rights (usually his *Miranda* rights), and the amount of bail. After this, the court will set a date for the client to appear with counsel.

If the defendant is in custody, either the defendant is transported from the jail to this proceeding, the proceeding is held in the jail, or the defendant appears in court from the jail via closed circuit television.

If you do appear at this proceeding, your job is simple:

- ▶ Enter your appearance on the record (and in writing if required by the court)
- ▶ Listen to the charges as read by the court
- ▶ Enter your client's plea
- ▶ Ask for bail to be set or argue for a lower bail if the court is open to such requests at that time. The court has broad discretion in addressing bail and may take into account the following:

- ▼ The nature of the crime
- ▼ The weight of the evidence
- ▼ Family ties
- ▼ Employment
- ▼ Financial resources
- ▼ Character and mental condition
- ▼ Community ties
- ▼ Prior convictions
- ▼ Prior failures to appear in court
- ▼ Prior bond forfeitures

Sometimes the defendant will appear at the Advisement without counsel. The court will then set a First Appearance or an Appearance of Counsel in order to give the defendant an opportunity to appear with an attorney and set the matter for future proceedings.

You will often not meet with your clients until after the Advisement. (Advisement and First Appearance are discussed more fully in Chapter 3.)

#### **PRELIMINARY HEARING**

If charged with a felony, the next pivotal stage is the preliminary hearing. The preliminary hearing is a proceeding in which the prosecution presents its evidence to the court and the court determines if there is sufficient evidence to hold a trial. In explaining the proceeding to the defendant, emphasize that the proceeding is not a trial. Too often, clients mistakenly believe that the case will be thrown out at preliminary hearing. In reality, maybe one case in 500 is dismissed by the court at the preliminary hearing.

**PROSECUTION'S ROLE** The prosecution always has the burden of proof in criminal cases. The burden of proof required of the prosecution at this hearing is very low. It is not proof beyond a reasonable doubt. The prosecutor's burden of proof requires him to prove to the court that there is probable cause to believe the crime has been committed and probable cause to believe the defendant committed the crime.

Sometimes, I describe the prosecutor's burden of proof to the defendant this way: "The judge need only determine that if we went to trial right now on the evidence that was presented, there is a 51 percent chance that a jury would find you guilty after listening to this evidence."

The court must view all evidence in the light most favorable to the prosecution. The court does not judge the strength of the prosecution's case or whether the prosecutor can prove the defendant guilty beyond a reasonable doubt at trial. Most jurisdictions relax the rules of evidence for preliminary

hearings. Often, the prosecution is allowed to present its whole case based upon hearsay evidence.

**DEFENSE COUNSEL'S ROLE** The defense is allowed to cross-examine the prosecution's witnesses, make argument with regard to the prosecution meeting its burden of proof, and present a limited amount of evidence. Cross-examination should be used to box the witnesses in to certain points (from which they can not deviate from at the time of trial or else you will impeach them with a transcript of their preliminary hearing testimony) and to explore issues not necessarily clear or apparent in the discovery. Should their testimony differ later, their preliminary hearing cross-examination testimony can be used to impeach them.

I advise the client during the initial meeting that I probably will not be presenting witnesses at the preliminary hearing. Doing so would be an unnecessary reveal of our trial strategy. I emphasize, however, that I will be attacking the prosecution's case by cross-examining its witnesses and making argument to the court about the prosecution having not met its burden of proof of probable cause. I was taught that presentation of defense evidence through calling witnesses at this stage unnecessarily reveals the defense theory of the case to the prosecution; that witnesses should only be called if there is no other way to explore what the witness will say at trial. (In the thousands of cases I have defended, I have always found another way to explore what the witness will say at trial.)

Most courts will not permit the defense to call witnesses to testify to matters outside the scope of matters testified to by the prosecution's witnesses or which may duplicate the evidence presented by the prosecution's witnesses. In other words, the court restricts your ability to go on a discovery fishing expedition. (You can always have your investigator interview the witness outside of court.)

Under no circumstances should the defendant testify at the preliminary hearing. Doing so will cause the defendant to waive his Fifth Amendment right against self-incrimination.

## ARRAIGNMENT

The arraignment is a proceeding in which the defendant enters a formal plea on the record. The choices of pleas to be entered are

- ▶ Not guilty
- ▶ Guilty as charged
- ▶ Nolo contendere, or no contest (which has the same effect as a guilty plea, but nolo contendere cannot be used as evidence in a subsequent civil proceeding related to the same issue)

- ▶ Guilty pursuant to a written plea agreement with the prosecution

The defendant may also enter no plea and stand silent, in which case the court enters a not guilty plea on the defendant's behalf. A defendant will stand silent if there is an issue as to the court's jurisdiction, e.g., something wrong with the charging document.

The effect of formerly entering a plea at arraignment is to start the clock running on the client's right to a speedy trial. The Sixth Amendment of the Constitution provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy trial." This protection is applicable to the states through the 14<sup>th</sup> Amendment.

Each jurisdiction has its own procedural statute that regulates the time in which a criminal defendant must be brought to trial. In Colorado, for instance, a defendant charged with a felony must be brought to trial within 180 days after entering a plea of not guilty. This right can be waived by the defendant. It is often waived to provide counsel more time to prepare for trial or to negotiate a plea agreement.

A trial date is usually set by the judge at the time of arraignment. If not, the court will set a pretrial conference at a later date to set the trial date and address and schedule any other outstanding matters to be resolved before trial.

What is important to tell the client about this stage is that it involves entering a formal plea of not guilty, if a plea agreement has not yet been reached, and requesting the matter be set for a jury trial. If I know that the client wants me to pursue a plea offer from the prosecution, I tell him, "I know you want a plea offer, but I have to plead you not guilty and request a jury trial in order to protect your constitutional right to a speedy and public jury trial should plea negotiations fail."

## **PRETRIAL CONFERENCE**

Pretrial conferences, at which the parties discuss the anticipated length of the trial and the likelihood that the matter will ever go to trial, help the court and the parties set the calendar for the case. This is a housecleaning tool used by the court and counsel to keep the case on track and resolve any pretrial issues. Sometimes a court will set several pretrial conferences throughout the course of the case at either party's request. These conferences are usually held some time after the Arraignment (six to eight weeks) and before the trial (four to eight weeks). Pretrial conferences can be set by the court or set at the request of either party. If a trial date is not established at the time of arraignment (by motion of the parties), the court will set a trial date during this proceeding.

Some courts require a pretrial order that sets forth all resolved and unresolved issues to date. Each party is required to sign off on the order. I often

request a pretrial conference to buy time to negotiate a better plea offer or to continue talking my client into taking the plea. If the request is granted, the court often requires the client to waive his right to a speedy trial so that the client cannot later claim that the delays violated his right to a speedy trial.

### **PRETRIAL HEARING**

Next, I explain how and when pretrial motions—which include suppression of evidence motions, motions to dismiss, and motions to exclude certain evidence (motions in limine)—will be argued to the court. Any proceeding that occurs between the arraignment and the trial may be referred to as a pretrial hearing.

### **TRIAL**

If the client asks, I give a rough explanation of the trial procedure and what to expect. But generally, I reserve in-depth trial procedure explanations for a time closer to trial because of the extensive amount of information to be covered with the client during the initial meeting.

#### ***Give a Case Timeline***

Advise the client of a timeline on which you expect the case to flow (It is always best to err on the side of longer time estimates to the client. The client will love you if you can get the case resolved sooner).

- ▶ Most misdemeanor cases can take six months or more for a resolution.
- ▶ Felony cases can easily take up to a year before resolution.

A timeline is important because it impresses upon the defendant the seriousness of the matter and enables him to plan his life, if out of custody, or resolve himself to a potentially significant jail stay if in custody.

Most defendants are initially frustrated with the length of time it takes to resolve a case. It helps to explain to them that the timeline is designed to ensure that their rights to due process are protected. It takes time to compile the necessary evidence and develop a strategy to proceed to trial or effectively negotiate a plea.

Most prosecutors are not realistic or just not willing to entertain plea negotiations until the eve of trial or the court ordered plea cutoff. They can be lazy and sometimes do not learn much about their cases until the last minute. It is not until they really know their case that they realize that a plea offer should be extended.

#### ***Explain the Decisions the Client Must Make***

Tell the client that, as his attorney, you make the decisions regarding what motions to file, the process by which discovery is obtained, the process by which

case investigation is conducted, the procedural strategy, and the trial strategy. Then explain that the following decisions belong exclusively to the client:

- ▶ *Whether to have a preliminary hearing.*
- ▶ *Whether to approach the prosecution about a plea bargain.*
- ▶ *Whether to enter or accept a plea.*
- ▶ *Whether to have the trial before a jury or the judge (bench trial).*
- ▶ *Whether to run an entrapment defense.* An entrapment defense tells the trier of fact that the defendant committed the crime, but that she would not have done it had the police not illegally enticed her to do it. This defense is very risky because it requires the defendant to admit that she committed the crime charged.
- ▶ *Whether to run a “lesser-included offense” defense.* This defense alleges that the defendant is not guilty of the crime charged but is guilty of a similar, less severe crime. The defense asks the jury to convict the defendant, but on the less severe crime. Proof of the essential elements of the crime charged necessarily establishes the elements required to prove the lesser offense.<sup>3</sup> An example of an opening statement for such a defense:

The crime of aggravated burglary requires that the prosecution prove that the defendant entered the home with the intent to commit a theft from the home. Defendant in fact entered the home, but he did not commit the crime of aggravated burglary. He committed the lesser-included crime of criminal trespass. He had no intent to commit a theft in the home. He merely entered the house to flee from the pursuing police. He thought the house was empty.

The charging document may charge defendant with a primary offense and a “lesser included” or “in the alternative” offense. In that instance, you ask the jury to find defendant guilty of the lesser of the two defenses.

- ▶ *Whether to run a defense that admits defendant’s presence at the crime scene, but denies his guilt.* In this circumstance, defense counsel advises the jury that the defense does not deny that defendant was present at the scene, but explains that the defendant was merely an innocent bystander. An example of an opening statement for such a defense:

Defendant was in fact at the Borden house at the time of the murders. But as he waited in the car while the murder was committed, he had no idea that his codefendants lacked permission to enter the home. The defendant had no idea they were about to commit the robbery or the murder that followed. He is not guilty of the crime of felony murder because he lacked the requisite intent to commit the robbery.

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<sup>3</sup> *Armintrout v. People*, 864 P.2d 576 (Colo. 1993).

- ▶ *Whether to run an insanity or mental disease or defect defense.* It sounds oxymoronic, doesn't it—asking a crazy person whether to run the “crazy” defense? But most jurisdictions require a defendant's permission to use such defenses. It is like running a lesser-included defense. In an insanity defense, the defendant admits to committing the crime, but claims that she lacked the requisite mental capacity to be in control of her faculties.
- ▶ *Witness tampering.* Tell the defendant that he must not approach any witness about the case. To do so is a crime called witness tampering or witness intimidation.

In order to avoid an allegation of witness tampering, advise the defendant to not contact any of the witnesses listed by the State, even if the witness may be favorable to the defense. In some jurisdictions, the court will issue a restraining order forbidding the defendant from having contact with any of the witnesses listed in the charging document or endorsed by the prosecution. In case there is not a restraining order, and defendant is living with the alleged victim or other witnesses, defendant should move out.

Advise the defendant that if you feel it necessary to obtain additional statements or verify statements that appear in the discovery, you will be contacting the witnesses through your investigator, in order to avoid any allegation of witness tampering.

I tell my clients that I do not want them speaking to any potential defense witnesses about the case in order to avoid any appearance of impropriety or any argument by the state that the defendant has coerced, implanted, or enticed the witness's testimony.

These admonitions are equally applicable to the defendant's family and friends. Any attempt to contact the witnesses by the defendant's family and friends is seen by the prosecutor and the court as if the defendant made the contact himself, and may be interpreted as witness tampering.

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## WHAT INFORMATION SHOULD YOU OBTAIN DURING THE FIRST MEETING?

### *General Client Information*

It is good to begin the interview with simple questions involving the following information:

- ▶ Address, both physical and mailing
- ▶ Occupants in defendant's residence
- ▶ Phone numbers (home, work, cell, and pager)



- ▶ Employment history
- ▶ Educational level
- ▶ Military experience and whether discharged honorably
- ▶ Marriage
- ▶ Children and grandchildren, including names and ages
- ▶ Nature of support for the children and, if applicable, grandchildren
- ▶ Previous and present treatment for mental health issues
- ▶ Physical or mental disabilities
- ▶ Medication and medical care currently under
- ▶ Prior and present substance-addiction problems
- ▶ Prior criminal history (as discussed previously in this chapter)

It may be helpful to your practice to prepare a questionnaire that addresses these issues. I have found it much easier to ask these questions of the client myself and take my own notes regarding the answers. For whatever reason, I receive more complete answers and information this way.

Earlier in my career, I asked clients to fill out such a form. Too often, clients failed to adequately complete the form. Many criminal defense clients are not well educated and do not have the patience to complete the forms. They do not trust the criminal justice system and often will not put such information on paper in their own writing.

#### **ADDRESS AND PHONE NUMBERS**

Sometimes the defendant's physical address is relevant as it may be the actual scene of the alleged crime or be near the crime scene. Mailing address and phone numbers are necessary for maintaining contact with the client.

#### **OCCUPANTS OF DEFENDANT'S RESIDENCE**

A list of occupants and their relationship to the defendant is relevant for several reasons:

- ▶ *The defendant may still be living with the alleged victim.* This often happens in domestic dispute cases, where the alleged victim is the defendant's spouse, significant other, or relative.
- ▶ *The court may issue a restraining order on behalf of the alleged victim.* This is a court order that requires the defendant to stay away from a certain individual. Violation of the order could subject the defendant to civil contempt, bond forfeiture, and additional criminal charges for violating a restraining order. The order is often required by statute, or the court may make it a condition of the defendant's bond or conditional release. In that

case, either the defendant or the alleged victim must find a new place to live while the case is pending.

Note: You can file a motion to have a restraining order removed if the alleged victim will consent. But I have found the courts more and more reluctant to lift these restraining orders, no matter how ridiculous the charges may be, how long the couple has been together, or how many children they have together. Judges have become more sanctimonious and protective, for a lack of a better term, toward domestic violence issues. They feel as though in refusing to lift the restraining order, they are protecting the alleged victim from herself.

- ▶ *These individuals may be used as character witnesses or alibi witnesses.*

### **EMPLOYMENT**

Judges are hesitant to send a working, taxpaying member of society to prison or jail. Employment is also relevant to setting the amount of bail because a working client is seen as less likely to jump bond and abscond.

### **EDUCATIONAL LEVEL**

Educational level is relevant because the client may not be able to read or understand the documents provided. Thus, you may need to read the documents or interpret their meaning to the client.

In addition, the judge may want to know the defendant's education record when imposing conditions of a non-prison sanction. I have had many clients ordered to obtain a high school diploma or its equivalent as a condition of probation.

Education may also be relevant to the strategy of defense. It could be important in determining if the client acted or was capable of acting in accordance with a course of conduct required to commit the crime, that is, whether the defendant acted knowingly, with a particular required intent.

You may want to advise the client to earn a high school diploma or its equivalent while the case is pending in an effort to receive a more lenient sentence from the court should the defendant enter into a plea agreement or be convicted at trial.

### **MILITARY SERVICE**

Honorable discharge from military service shows the court that the defendant can be well-disciplined. Military service is relevant to setting bail because you can argue that the defendant's success in the military shows that he will always make his court appearances and follow all bond conditions. It is relevant to sentencing because you can argue that successful completion of mili-

tary service shows that the defendant can successfully complete probation or any conditions of sentence imposed upon him.

#### **MARRIAGE AND FAMILY**

A stable family relationship is a favorable sign of defendant's character. Faithfulness to a spouse and support of a family are signs of good moral character. Thus, marriage and family inquiries are relevant for mitigation in both bond and sentencing issues. Further, I have found judges less likely to send certain defendants to prison when they are the sole support for their spouse, children, or grandchildren. Some judges do not like creating wards of the state or welfare recipients by virtue of their decisions to send a defendant to prison.

A member of the family may also be a witness or codefendant to the crime. As previously discussed, there may be a restraining order forbidding contact with the alleged victim and witnesses. Also, courts issue restraining orders forbidding contact with the codefendants.

#### **PHYSICAL AND MENTAL HEALTH**

Mental health is important to the determination of the client's competence to proceed and assist with his defense. A matter cannot proceed if a defendant is mentally incompetent. If you believe that the defendant may be mentally incompetent to proceed, you must file a motion with the court requesting that the matter be removed from the docket in order to have the defendant's competency evaluated.

You can determine that a client is mentally incompetent to proceed if the client shows any sign of mental illness. For example, if the client thinks that you are George W. Bush or that the spirit of Bruce Lee lives in your diamond pendant (both have happened to me), have his competency evaluated.

The court can order an evaluation by a court-approved, neutral expert. This may involve taking the defendant into custody, if she is not already, and sending her to a state facility for testing and monitoring. (This falls under the category of a pretrial motion. This motion is addressed further in Chapter 5.) You may want to enlist the assistance of a psychological evaluator of your choosing, to avoid the lengthy, and often cumbersome, process of having the court order the evaluation.

Mental condition helps make the decision whether to use a mental disease or defect defense. If mental or physical health is a potential defense strategy issue, you may advise the defendant to have a physical or mental examination before entering into a plea agreement or sentencing.

Health can be useful evidence when arguing for a non-prison penalty or a mitigated sentence. Again, judges are hesitant to imprison the mentally ill,

mentally disabled, physically disabled, or dying. Some judges simply do not want the state to have to pay for the extensive treatment that the defendant will require.

It is often useful to inform the court about the defendant's health conditions during sentencing hearing. Often, judges order defendants to work full-time as a condition of probation or other non-prison sanction. If this is the case in your jurisdiction, the judge should know if the defendant is unable to work full-time.

### **SUBSTANCE ABUSE**

Substance-abuse issues are important because sometimes it is necessary to have the client complete a rehabilitation program prior to trial or sentencing. A defendant's voluntary submission to treatment can help with the potential penalty. (Your jurisdiction should have a list of treatment programs that are acceptable to the court.) The program will provide the defendant with proof of attendance or completion with an executed release that complies with medical privacy rules (the HIPPA law).

Judges are often pleased to see that the defendant has taken the initiative and checked himself into treatment rather than waiting for the court to order him to do so at the time of the bond hearing (some courts order the defendant into substance-abuse treatment as a condition of posting bail) or sentencing.

Substance abuse by your client is relevant to running certain defenses such as voluntary intoxication and mental incapacity. Substance abuse is often a sign of a psychiatric problem such as bipolar illness or depression. I find that many of my clients self-medicate because they have other psychological issues that have never been properly diagnosed or treated. This is true even for clients who are not charged with drug crimes. You will find an undercurrent of substance abuse in most blue-collar crimes.

A sample Client Questionnaire is included as Exhibit G on the enclosed CD-ROM. ♦

### ***Authority to Plea Bargain***

You will have a good idea at some point during the initial interview as to whether the client wants to enter a plea agreement rather than try the case. The client often blurts out in the beginning that he does not want to take the matter to trial—he just wants you to keep him out of jail.

You must have the client's consent to approach the state regarding a plea offer. It is good to get this permission during the first meeting if the client has indicated an interest in pleading the case. This alleviates any unnecessary delay and helps to minimize legal fees and expenses.

Early plea bargaining is good for the attorney's credibility with the prosecutor. Often, the best weapon a criminal defense attorney has in his arsenal is

his credibility with the prosecutor. Attempting an early resolution of a case that should probably not go to trial helps to maintain this level of credibility. (The defendant should avoid trial in a case with a legally obtained confession, several eyewitnesses, and credible physical evidence.)

In discussing plea authority you might state the following:

Now that you have heard about the charges, the prosecution's burden of proof, the discovery, the potential penalty, and the way the process works, do you have some thought as to how you want to proceed? In other words, would you like me to pursue plea negotiations on your behalf?

If the client proclaims his innocence and demands that the matter be dismissed or go to trial, you may want to get plea negotiation authority anyway. This discussion is as follows:

Even though you do not want to plead to anything, will you still give me permission to talk plea with the prosecutor? That will not bind you to anything; it just gives me permission to talk freely with the prosecutor. You never know, my plea discussions may lead the prosecutor to realize she has a weak case and to dismiss it. Also, although you cannot think of anything you would plea to right now, she may offer something that, at a later date, you just can not resist. After all, you have nothing to lose by at least letting me feel the prosecutor out.

Assure the client that you will advise him of any plea offer and that you will never accept or bind him to a plea agreement without his permission. (For more discussion on the issue of plea agreements and negations, see Chapters 5 and 7.)

### ***Validity of Evidence***

In order to determine potential suppression issues (to be raised before trial by motions to suppress evidence, discussed in Chapter 5), ask the client how the evidence against him was obtained (whether a warrant to search was issued or he was taken into custody and questioned).

### **SEARCH**

Ask if defendant's person, home, or car was searched, and whether defendant gave permission for the searches. If consent to search was given, find out if defendant was in custody when they searched his person, home, or car.

- ▶ A search of the person is allowed if the defendant is in custody or under arrest. Anything found through the search of defendant's person subsequent to a lawful arrest is not a violation of the Fourth Amendment.
- ▶ The home cannot be searched without a warrant after the defendant is in custody or under arrest, unless certain exigent circumstances exist.

- ▶ Likewise, unless the car is being impounded or certain exigent circumstances exist, it cannot be searched without a warrant.

#### STATEMENTS BY THE DEFENDANT

Ask the client if he gave a statement to the police, and where he was at the time. Was he in custody when the statement was made? Whether defendant was in custody is often determined by the totality of the circumstances. The totality of the circumstances must support the fact that the defendant was not free to leave. Consider the following circumstances:

- ▶ Was defendant in handcuffs?
- ▶ Was he in a patrol car?
- ▶ Was he in a police station?
- ▶ Was he taken somewhere away from the initial place of contact, and if so, was he free to leave?
- ▶ If in custody, were his rights recited to him before making any statement? Only statements given during “custodial interrogation” are subject to suppression pursuant to *Miranda*.<sup>4</sup>

#### LEGALITY OF ARREST

Sometimes a defendant is illegally arrested. Your jurisdiction's statutes will proscribe the grounds for a lawful arrest. Any evidence obtained as a result of an unlawful arrest is subject to suppression under the Fourth Amendment.

Determine if the crime for which defendant was arrested is an arrestable offense. Some traffic offenses, petty offenses, and misdemeanor offenses are not arrestable offenses. Also, determine if there were sufficient statutory grounds to arrest the defendant for the crime alleged. If the offense is non-arrestable, the arrest is unlawful and any evidence obtained pursuant to the unlawful arrest should be suppressed.

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#### WHAT SHOULD YOU NOT DO DURING THE MEETING?

- ▶ *Never promise the client results.* Don't guarantee that you will be able to get the case dismissed, win a suppression motion, win at trial, or get the client probation, deferred judgment (diversion), or a suspended sentence.

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<sup>4</sup> In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that the Fifth Amendment privilege against self-incrimination (that no person “shall be compelled in any criminal case to be a witness against himself”) is fully applicable during a period of “custodial interrogation.”

- ▼ Promising the client results may assure you an invitation to speak with the disciplinary administrator, grievance board or attorney regulation board. It is unethical to promise results.
- ▼ Failing your promise may expose you to civil liability. Such promises are often seen as contractual guarantees or warranties upon which the client will rely should your promised results not materialize.
- ▶ *Opinions about the potential for success are permissible.* You need not avoid giving the client your opinion about odds or giving your opinion as to the likelihood of certain outcomes. When my clients ask me for odds I simply tell them that criminal litigation is a “crap shoot” and that it is difficult to be certain of the ultimate outcome. Many variables play into it.  
If the client continues to insist on odds, I may tell him, “The best I can give you are 50-50 odds.” (The last I heard, the national defense success rate was 11 percent for outright “not guilty on all charges” verdicts at trial.<sup>5</sup> Quite enlightening, if you thought the O.J. Simpson, Robert Blake, and Michael Jackson verdicts represented the norm. Of note, I have met numerous attorneys with long, distinguished careers who have rarely, if ever, been successful with a motion to suppress.)
- ▶ *Do not confuse making promises with puffing yourself to the client.* There is nothing wrong with boasting about your abilities or successes. After all, you have got to convince the defendant to hire you. It is OK to tell the client that you believe yourself to be a good lawyer (“damn good,” if you’re feeling sassy). On a few occasions, I have opined that I would try the case better than the prosecutor. I follow that up with, “But even if I out-try the prosecutor, there is no guarantee that you will be acquitted.”
- ▶ *Never speak poorly of the prosecutor, judge, or other attorneys with whom the client is consulting.* Speaking poorly of other attorneys or the judge will come back to haunt you. At some point, you can expect the client, or someone on his behalf, to reveal the bad things you have said to the person who was the subject of your insults. I learned this lesson the hard way: A client of mine wrote a judge and told her, “Although my attorney says you’re a bitch, I think you are a very understanding judge.”
- ▶ *Do not tell the client that you are close to the judge or prosecutor.* Advising the client that you have a close relationship with the court or the prosecutor may also come back to haunt you. You will regret these claims when the client tells the judge, on the record, after she has been sentenced to something more than she thought she deserved, “But Judge, my attorney told me that you and she were close.” Clients usually do not comprehend the rules of ethics. Thus, it is best not to give them any rope to hang you with.

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<sup>5</sup> The Western Trial Advocacy Institute, Laramie, Wyoming, July 2005.

## **WHAT DECISIONS SHOULD BE MADE BY THE END OF THE INITIAL MEETING (OR AT LEAST BEFORE THE PRELIMINARY HEARING)?**

### ***Whether to Proceed with the Preliminary Hearing***

As discussed earlier in this chapter, the decision to have a preliminary hearing belongs exclusively to the client. Often, this decision is made during the initial meeting, but the client may need to think it over for a few days. If the client is at all hesitant about waiving the hearing, then he should be given some time to think over the decision and your advice.

Preliminary hearings are beneficial for several reasons:

- ▶ They enable the defense to learn the prosecutor's strategy. The prosecution's strategy is not often apparent in the charging document and the discovery.
- ▶ A preliminary hearing can be good trial strategy for the defense because you can box the various witnesses into certain testimony that will be beneficial to your trial strategy or theory of the case.
- ▶ Often, after the hearing, the prosecutor realizes he has a weak case and dismisses or makes a reasonable plea offer.
- ▶ Although the court may bind the matter over for trial, the court may feel that the a trial will be a waste of time and resources. Sometimes this causes future rulings to be very favorable to the defense, thus resigning the prosecutor to dismiss or extend a reasonable plea offer.
- ▶ After hearing how compelling the evidence is against him, the defendant may become more receptive to a plea offer.
- ▶ After hearing the judge rule, "I find probable cause to believe a felony has been committed, and probable cause to believe that defendant, John Doe, has committed that felony," the defendant may become more receptive to a plea offer.

Preliminary hearings are waived for any of several reasons:

- ▶ The defendant may want to plead to a lesser offense and resolve the matter quickly.
- ▶ It may be a matter of trial strategy: You do not want the prosecutor to learn the weaknesses of her case and have time to repair them before trial. (For example, your cross-examination can expose that certain scientific tests were not conducted. The prosecutor may order these tests to be conducted, and their results may be damaging to the defense.)



- ▶ You may want to prevent the victim or another witness from giving sworn testimony.
  - ▼ The witness may disappear before trial and you do not want his sworn testimony available to be used as a substitute.
  - ▼ You do not want the witness to practice her testimony. The first time you want her to tell her story is in front of a jury. Witnesses forget and may be less helpful to the prosecution at trial.
  - ▼ The witness may change her story from the statements initially made to the investigation officers. You do not want the prosecutor using the transcript of the preliminary hearing to impeach the witness should her change of story be beneficial to the defense strategy. (The prosecutor can impeach her own witness.)
- ▶ The preliminary hearing may be waived to avoid any further pretrial publicity. I have been surprised at how the publicity of a case diminishes by the time of the trial when the matter is not covered continuously by the press. (Ordinarily, press coverage is not favorable to the criminal defendant. You will want to avoid negative press coverage in order to prevent the jury pool from being tainted.)

(Preliminary hearing strategy is discussed more thoroughly in Chapter 3.)

### ***Whether to Pursue an Insanity or Mental Disease or Defect Defense***

The client must give permission to run this defense at trial. Most jurisdictions have a pleading or notice requirement for these types of defenses. This means that the defense must formally plead not guilty by reason of insanity either on the record or through a notice pleading that notifies the prosecution of the intent to rely upon the defense (some jurisdictions require a plea of “guilty by reason of insanity” or the like.) In these jurisdictions, it is best to know during the initial meeting or sometime soon thereafter if this defense will be pursued. It may be necessary to file your notice or plead the defense before the preliminary hearing.

Note: The fact that the defendant appears to be perfectly sane at the time of the initial client meeting does not foreclose running the defense. Defendants are sometimes placed into immediate psychiatric treatment at the time of arrest. The jail administrator has broad discretion to have the defendant evaluated or treated or to pursue civil commitment proceedings for the defendant’s safety and the safety of other inmates.

The prosecutor may request the court to order evaluation, treatment, or civil commitment after observing the defendant or being advised by the

arresting officers of odd behavior. If the prosecutor has a reasonable belief that the defendant is not mentally competent to proceed with the case, she has an obligation to request psychiatric assistance on behalf of the defendant.

The insanity may have been temporary and manifested itself only at the time of the crime. For example, the defendant may suffer from post-traumatic stress disorder (PTSD), and was having a flashback at the time of the crime. Most people with PTSD are normal most of the time. They act out or have mental breakdowns only when they encounter certain stimuli.

### ***Whether to Plead an Alibi***

As with the insanity defense, most jurisdictions require that the alibi defense be formally pled. Often, the defense is required to disclose a list of witnesses to the alibi and their last known contact information. Therefore, a decision to run this defense should also be made during the initial meetings.