

Working with Attorneys

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This article describes salient points criminal defendants should consider as they contemplate defense strategies.

My research required that I spend thousands of hours each year interviewing hundreds of prisoners. Besides having been convicted of federal crimes, the men with whom I spoke shared another experience in common. They all relied upon attorneys to represent them through their criminal proceedings.

I've learned a great deal from my discussions with these men. Some were represented by public defenders, and others used their own resources to retain counsel. Some maintained excellent relationships with their attorneys, while others had less satisfying experiences.

New offenders who are confronting criminal charges may find this information helpful as they deliberate the most appropriate strategies in responding to legal struggles.

Honesty

Regardless of whether an individual retains an attorney or relies upon public defenders, if he is targeted for prosecution he must understand the importance of honesty. I have learned that for many defendants, this concept is challenging to embrace. During the earliest stages, people want to minimize or deny their involvement in any type of criminal activity. Yet by misleading their attorneys, they deprive themselves of good legal counsel. Sometimes they set themselves up for disaster.

An attorney cannot prepare an adequate defense without complete honesty from the defendant. Expecting good representation without providing full disclosure to the attorney is like expecting a captain to chart a course without a compass. The defendant who withholds

information from his attorney must realize that he is limiting the attorney's ability to reach the best possible outcome. Surprisingly, I've interviewed many bright and successful men who served longer sentences not because of their initial crimes, but because of the lies they initially told.

David, for example was a graduate of UCLA. He had degrees in economics and psychology, suggesting that he was bright, disciplined, and level headed. Following college, David built a career as a stock broker, eventually landing a position as an account executive with one of Wall Street's premier brokerage houses. While there, David partnered with Adam, and together they built a book of business managing assets with a value in excess of \$300 million.

Robert, who managed a hedge fund, became one of David's and Adam's accounts. As the team observed Robert's trading patterns, both David and Adam became suspicious. Every month Robert's trades were losing money. Despite the poor performance of the hedge fund, Robert continued to attract new investors. David and Adam suspected that Robert was orchestrating a fraud, using new investor money to cover losses in the hedge fund's trading account. In time their suspicions were confirmed. Yet rather than close Robert's account and report the fraud to authorities, the team of brokers manufactured documents in a futile attempt to shield themselves from scrutiny.

Authorities eventually closed Robert's operation and arrested him. The brokerage house fired both David and Adam, and advised them to retain counsel. Having had no prior experience with the criminal justice system, David paid a \$50K retainer to an acquaintance with a general law practice. The lawyer had no prior experience in representing defendants charged with crimes involving violations of federal securities laws. Adam, on the other hand, hired a specialist.

At that early stage, although both David and Adam had been fired, neither was yet charged with criminal wrongdoing. They retained counsel as a precaution, just in case the criminal investigation of Robert's hedge fund widened to target others. It did.

Whereas Adam was completely forthright with the attorney he retained, David lied. Instead of admitting his knowledge of Robert's hedge fund fraud, David assured his attorney that he had no idea that Robert had been misleading investors. Adam had hired a specialist in white-collar crime, and Adam told his attorney everything, including details of the fraudulent documents created to cover the team's knowledge of Robert's scheme.

Upon listening to all that Adam had revealed, his attorney went into high gear. Before the federal government's investigation was able to gain much traction, Adam's attorney was able to negotiate a grant of total immunity. Because of that immunity agreement, Adam was never prosecuted. He retained all of his professional licenses. The guidance Adam received from his attorney would not have been possible without complete honesty.

David's attorney, on the other hand, made no proactive efforts to shield David from prosecution. Instead, the attorney took David at his word when David said he was oblivious to the financial fraud that Robert was orchestrating. Attorneys for the Securities and Exchange Commission and FBI agents eventually called to question David. David's attorney, who had no prior experience in dealing with such matters, told David not to worry, as he had nothing to hide. Not knowing that both Adam and Robert were cooperating with prosecutors, David perpetuated the lie of his innocence.

In their quest for convictions, government attorneys were content to let David dig himself in deeper. He walked into the interrogation totally unprepared, blind to the perils of his deceit. A few weeks after the debriefing, prosecutors notified David's attorney that the government was indicting David on fraud charges, as well as obstruction of justice and lying to federal officials.

Making matters worse, the attorney informed David that he would have to retain new counsel to represent him. The initial attorney said that he was not prepared to defend David against such grave federal charges. Had David been honest with his attorney from the outset,

David would not have wasted the \$50K retainer, and he likely would have found better and more experienced counsel to guide him through those crucial initial proceedings.

I met David in a federal prison camp, where his aggravated charges resulted in a seven year prison term. Without the additional charges, and with credit for and acceptance of responsibility, David could have received a term of 36 months or less if he would have cooperated.

Specialists

As David's example shows, defendants should communicate openly and honestly with their attorneys. Another finding I have surmised from my research suggested that, whenever possible, defendants should secure representation from attorneys who have extensive experience in the matter at hand. Although all attorneys must be licensed to practice law, those who specialize in criminal defense for specific crimes, in specific jurisdictions, generally are more fluent with local rules and customs. A defendant charged with felony violations of the federal tax code would generally be better off with a tax specialist as opposed to an attorney who made a name for himself as a trial lawyer for state murder charges.

Jeff was a man I met in federal prison camp whose case illustrates this point. He told me about the methodical approach he undertook to find an attorney. Jeff had been a financial officer for a publicly traded corporation. When an investment he made on behalf of his employers had gone bad, authorities were notified. In time, Jeff was served with a target letter, informing him that he might be charged with federal crimes of wire fraud.

Rather than living in denial, Jeff became proactive. He discussed the problem openly with his wife, his extended family, and those he trusted in his network of support. Everyone agreed that the threat was serious and that he needed top-level legal representation. Jeff and his wife considered suggestions they received from professional acquaintances. After interviewing

several attorneys who specialized in white-collar crime, they agreed to retain an attorney who had previously served as an Assistant U.S. Attorney.

Jeff paid nearly a quarter million dollars to his defense attorney. To meet the fee requirements, he and his wife had to sell most all of their assets, and take on some debt. They understood the seriousness of Jeff's problems and knew that hiring a specialist would not come cheap. Yet in Jeff's case, the money was well spent. As a former prosecutor, Jeff's attorney was intimately familiar with the federal wire-fraud statutes. Further, the attorney had excellent personal relationships with the prosecutor and with the FBI agents involved in the case. As a consequence of broad legal experience, Jeff said his attorney was successful in persuading the government to drop demands for a nine-year sentence. Instead, the prosecutor soft pedaled, agreeing to a plea agreement that netted Jeff a three-year term.

Besides using great care in selecting defense attorneys, well-heeled defendants may do well to add more professionals to the team. In an effort to persuade prosecutors to reduce felony tax charges to misdemeanors, Gary, another friend I made at Taft camp, told me how he hired a team of forensic accountants to audit his financial records for several years. The objective report prepared by the auditors served its purpose, as Gary pleaded guilty to misdemeanor crimes rather than felonies, and he served less than eight months in the camp. Had the specialists failed to make the case, Gary said that he would have served five years.

Defendants should beware, however, of attorneys who consider the clients as little more than sources of revenue. I had the privilege of befriending and learning from Lee, a successful businessman from Northern California who served time with me at Lompoc camp. A CFO from one of Lee's companies built a case for the IRS against Lee. When the government charged Lee with tax evasion, he hired the top tax attorney in San Francisco.

The attorney had previously headed the U.S. Attorney's prosecutorial tax force in San Francisco, but he had been in private practice for 15 years when Lee hired him. Lee told me that

the attorney had never intended to litigate Lee's innocence through a trial, but he strung Lee along with possibilities. The attorney had even gone so far as to orchestrate two mock trials, which Lee paid to set up, in an effort to see how jurors would react to potential trial strategies. The total cost for Lee's defense exceeded \$300K, but the case never went to trial. The attorney advised Lee to plead guilty only after legal fees had piled up. Lee said that he believed the attorney had a strategy of pleading guilty from the beginning, but the attorney prolonged the case to increase billings.

Costs of Attorneys

Defendants who retain counsel should have a clear understanding of the costs associated with setting afloat a legal battleship. As all Americans know, attorneys are at the high end of the prestige professions. Attorneys have invested dearly in their educations and their practices, and the only commodity they have available to sell is time. I've never known an attorney who billed time at less than \$100 per hour; I've known some whose services demanded in excess of \$1,000 per hour. Remember that an attorney and staff may need to devote many hundreds of hours to prepare a superb defense for even a routine felony trial. Those with even the simplest mathematical skills can figure out why costs for trial rise quickly.

Defendants should understand that the prosecutors will have worked on the case extensively before the defense attorney comes on board. From the beginning, the defense attorney must play catch up. During the initial meeting, the attorney may not know any more than the defendant reveals. In order to defend the case and client effectively, however, the attorney will have to learn more about the case than the defendant knows himself.

Competent defense attorneys will review and digest all the documents that the prosecutorial team has gathered. Those documents may be technical and extensive. Yet defense attorneys must familiarize themselves with every aspect of the case. That could mean the

retention of investigators, time for travel, and for interviewing others. Attorneys must also research law, write motions for the court, and make time to speak with defendants, sometimes in federal holding facilities.

Further, defendants may have family members who call the attorney to inquire how the case is progressing. This is tantamount to handholding. These practices take time and for attorneys, time is most certainly money. The defendant who chooses to retain counsel and prepare for trial ought to ensure that he is financially prepared to meet what can easily become extraordinary costs.

If a defendant has limited financial resources, he ought to weigh that as a consideration when deciding on whether to proceed through trial. After all, when a defendant goes to battle with a federal prosecutor, he takes on a formidable foe. The government has a deep bench of lawyers, paralegals, investigators, federal agents, and others who help prosecute the case.

Guilt or innocence notwithstanding, it is difficult for a defendant to fund a legal defense that equals in strength that of the prosecution. That does not mean there are not some Davids who defeat Goliath. Of course there are. I just don't meet those winners in prison.

Besides high financial costs, defendants must understand the risks associated with hardball legal tactics. Both sides of this criminal-justice contest want to win. The odds clearly favor the prosecution. If the defendant has the resources to launch a scorched-earth defense, pulling out all stops and taking the government to task at every opportunity, the defendant may increase his chances for acquittal. But in the unfortunate event that he is convicted, he likely will receive a sentence that is substantially longer than he otherwise might have received if he had accepted a plea agreement.

I am not suggesting one strategy versus the other. What I am suggesting is that the defendant be prepared for the exposure to downside, and to the wrath he will face from an unforgiving criminal justice machine if he puts the government to the test and loses.

Dan was a friend I met who learned this lesson of government vengeance the hard way. Dan had been the founder of a large heating oil company that operated in the northeast. His was a business model involving very high revenues, with very low profit margins. Dan's business grossed more than \$300 million per year. It was a venture that his father had begun, but one that had expanded significantly under Dan's leadership.

Because Dan's business served as a conduit between the oil suppliers and the end user, Dan was convinced that his company was not responsible for federal excise taxes. Indeed, Dan had several letters of opinion from prominent legal authorities that he relied upon in building his company. As far as Dan was concerned, he was distributing a commodity known as tax-paid fuel, exempt from federal excise taxes.

Dan received an inquiry from federal officials regarding his business practices. He was adamant that he was operating within the letter of the law. Federal authorities disagreed and slapped him with massive tax bills and penalties. Being a hard-driving, self-made entrepreneur, Dan refused to cow into government intimidations. He retained a criminal law firm and a civil law firm to defend his position. When one law firm expressed concern that the government's case may be formidable, Dan fired the firm and hired another.

Dan was convicted of all counts charged against him. He was sentenced to serve a 17-year prison term. In fighting the case, he washed through a personal estate of more than \$10 million, losing his business, his home, and his marriage of more than 20 years.

On account of Dan's lengthy sentence, he was required to begin serving his term inside the double fences and secure walls of a medium-security prison. After a few years of the madness that I describe in my book *Inside: Life Behind Bars in America*, authorities transferred Dan to a low-security prison in Fort Dix, where I met him. He was in his late 50s and had more than 12 years of prison ahead to serve.

When I interviewed Dan for the story I was writing, he said that he never understood the true costs of the legal war he was waging. The money he lost was not as important as the years he was required to serve. In the federal system, the term of imprisonment for white-collar offenses hinges on the dollar amount the court finds was involved in the crime. Dan's was a high-revenue business and the excise taxes he was found to have owed aggravated his sentence length.

In the beginning, the government offered Dan a plea offer that would have limited his exposure to 18 months in confinement. Not understanding the potential for devastation, Dan refused to accept a plea agreement and launched his scorched-earth defense. Dan regretted his decision. He said that if he had spent one week in custody before going to trial, he would have learned from the horror stories around him. By listening to descriptions of what happened to others who had been prosecuted in federal court, Dan said that he would have gladly accepted a plea deal. Instead, a lengthy prison term capped his formerly successful career.

Dan did not understand the downside of putting the government to the test. Instead of pursuing that line of questioning with his defense attorneys, Dan was fully invested in the strategy of total exoneration. My experience of interviewing others convinced me that many first offenders make such mistakes. Defendants should learn from these experiences and make efforts to learn from their attorneys about potential downside.

Court Appointed Counsel

The vast majority of felony defendants are indigent and use court-appointed counsel to represent them. These public defenders have nowhere near the resources that most prosecutors can employ. Those who represent indigent defendants also suffer through such demanding caseloads that it's frequently impossible for public defenders to provide the level of attention to an individual's case that either the defendant or the attorney would prefer. Opposing these over-

burdened public defenders against a well-resourced prosecutor's powers is like pitting a fly against a determined individual with a fly swatter; it's possible for the fly to avoid being squashed, but unlikely. When an indigent defender elects to proceed through trial with court-appointed counsel, he ought to be realistic in his expectations of how much time the court-appointed counselor will have available to prepare and launch a successful defense strategy.

This is not to imply that court-appointed attorneys are somehow less competent to handle the demands of a trial. I only want to underscore the fact that they are frequently overburdened. These attorneys are public servants, and I applaud their commitment to achieving justice for the underdog. Still, no matter how exceptional the court-appointed counselor's skills and intentions, the attorney's time may be spread so thin that it becomes virtually impossible for the public defender to commit the same level of resources to the case as the prosecution.

If an individual lacks resources, however, and must rely upon court-appointed counsel, I suggest the defendant consider the public defender's feelings and workload. No one wants to be taken for granted, and virtually all people respond more favorably to courtesy than to ridicule. Many prisoners mockingly refer to their court-appointed counselors as "public pretenders." Treating their counselors with disrespect, however, only reflects poorly on the defendant's character, and it may lessen the amount of effort the attorney is willing to spend on the case. If a court-appointed counselor has the responsibility of defending 20 clients, the defendant is far better off making efforts to help the counselor rather than ridiculing him or her, or expecting the attorney to act as a babysitter.

Although a defendant may lack the skills to participate in the crafting of legal strategy, he can do his best to help the attorney understand his background, his goals, and his case. If the defendant has writing skills, he should use those skills to completely narrate all facts of his case for his attorney. Tell it like a story, from beginning to end, in an easy to follow format.

Remember that the attorney has many responsibilities, and the better a defendant can relate all the ramifications of the case to his attorney, the more help the attorney can provide.

It's also important for the defendant to describe his background, and the downside to which he is prepared to expose himself. In order to advise the defendant properly, the counselor needs to know as much as is conceivably possible. If the defendant makes an effort to help, the counselor will not only be better prepared, but perhaps more inclined to bring some passion to the defense.

Final Word

Confronting criminal charges will bring stress, anxiety, and fear to those who have been targeted. The reason, of course, is that the targeted enter a world of the unknown. What is worse, shame sometimes prevents them from seeking guidance. The stigma of criminal charges leaves many who are targeted feeling isolated.

Although the targeted may be facing a life-altering disaster, some procrastinate about discussing options with trusted advisors. Even loved ones are sometimes left out of the loop. Those who operate from such positions of weakness have no one to rely upon besides their attorneys.

After having interviewed many hundreds of prisoners, I feel compelled to emphasize the importance of the attorney-client relationship. Defendants should use discerning judgment in choosing their attorneys. Those without resources should muster all the charm possible to co-opt the federal defenders. The attorney and the client must work together as a team, and honesty is essential. Without an unshakeable trust, opportunities for the best possible outcome vanish.

Besides relying on the attorney, however, prudence suggests that all criminal defendants should invest their time to learn as much as they can about the criminal justice system and the people it holds. For too many, that education does not begin until it's too late. In prison,

everyone seems to wish they had known more before. Like my friend Dan, many prisoners pay a heavy price for not fully having understood the battle they were fighting.

I urge those in my audience to read from the profiles I publish at MichalSantos.net. Those stories describe the experiences other prisoners have had. The more people understand about the system and the people it holds, the better prepared they will be to interact with their attorneys and to choose options that are best for their circumstances.