10 MISTAKES

THAT CAN SABOTAGE YOUR CRIMINAL CASE

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DEDICATION

This book is dedicated to defendants who still believe that something good is coming their way. They know that the future might bring about an unfair trial, a criminal record, or even jail time, but it could also be an opportunity to restore their lives and reputations. Perhaps they can come out of the blazing furnace without hair singed, without robes scorched, and without even the smell of smoke. (Daniel 3:27).

Because they embrace hope, they are willing to read this book, to be curious, to ask questions, to watch videos, to put together a witness list, to help issue subpoenas, to chase down recordings; to go over their testimony again and again, to study the exhibits, to practice testifying before photos of make-believe jurors taped on the wall, and to tell their attorneys about the exciting plans they have made in their lives "after this whole thing is over."

This book is not for everyone. It was not written for individuals who desire the quickest, cheapest solution, regardless of how it affects them in the long run. If these defendants don't care about the future, then they don't need a book to help them get where they're headed.

It was also not written for individuals with a negative, know-it-all attitude. These individuals are offended by help and encouragement, and any ideas that their attorney comes up with are met with comments like, "That would never work." They always think they're the smartest person in the room, but all of their (perceived) intelligence is used only to criticize others or the situation. Even when a good opportunity comes along, they find a way to diminish its value.

Defendants don't have to be happy about their circumstances or go into a case with rose-colored glasses, but they must at least believe that there is an appropriate strategy to achieve measurable results, whether or not going to trial is the way to get there. If you think the bright light at the end of the tunnel could only be an oncoming train, then you are already abandoned.

DISCLAIMER

The content in this book is intended to be general legal information for unrepresented defendants. I do not know the specifics of your case, and this book is not legal advice based upon the particular details of your case. I do not automatically become your attorney just because you are reading this book. If you are already represented by an attorney, then you should listen to him or her. With that out of the way, happy reading!

There are many more than ten mistakes that can sabotage your criminal case, but I have provided a "Top Ten" list to identify some of the greatest possible blunders. This book focuses on what matters most – your criminal case – but I also spend several pages on how to select a criminal defense attorney because having the wrong attorney can lead to many of the other mistakes. Several mistakes follow from not having an attorney, and therefore being unaware of your legal rights, while the remaining mistakes occur from relying on the wrong people for legal advice.

I hope that criminal defendants (both in and out of jail), and the friends and family who care for them will use this guide to learn which actions must be taken, should be taken, and should never be taken.

MISTAKE #1

THINKING THAT YOU DON'T NEED AN ATTORNEY IF YOU'RE PLANNING TO PLEAD GUILTY

Many people prefer to believe that an attorney has little effect on the outcome of a case, so they do not have to regret how little time and money they invested in picking one. Perhaps they think that an attorney can only help when the case is a clear winner – the victorious legal argument is out there waiting to be announced, and the defendant just needs any available mouthpiece to show up and deliver it (like pizza). Or, if a case is a sure loser, it's best to just save their cash, place their hands against the wall, and wait to be slowly marched away to prison – any attorney will be fine since they don't have much control over the case anyway.

The problem with either line of thinking is that a case is rarely already determined to be a winner or a loser; its status can change in an instant, based on many factors, including whether you gave a statement, what witnesses are found, and – yes, the arguments that your attorney makes. It is simply too early to be making hasty decisions about not needing an attorney, or thinking that any attorney will do.

I've never once heard a convicted felon brag about how much money they saved, or how quickly they got from jail to prison by rushing into a guilty plea. If anything, they usually feel the exact opposite way. Before making any decision, you need to speak with an attorney. Put your ego aside, get your wallet out, and accept that you do not know enough about how the criminal process works. Even if you do know it all, it's tough to get the proper perspective with your head resting on the chopping block.

In some courtrooms, you cannot plead guilty without an attorney; in others, you can, even though it is highly discouraged. Some defendants joke that this is for "job security" when the judge requires them to hire an attorney, but it's actually the court's way of protecting you from getting railroaded. Think about this – the same police who sneered when you "lawyered up" will certainly do the same thing if they get charged with a crime. Heck, even attorneys and judges hire an attorney when they get in trouble – that should really tell you something.

You need an attorney even if you're going to plead guilty for a number of reasons: negotiating the best possible agreement, making sure that you understand what evidence would be allowed in your case before deciding that you have no chance, and understanding what alternative sentences are available.

YOU NEED AN EXPERIENCED NEGOTIATOR

a) **Getting the best deal possible:** Imagine that a prosecutor tells you that you can plead guilty to a charge and receive ten days in jail – is that a good deal or not? The prosecutor then tells you that this deal is only good for the next few minutes. Don't be pushed around by these tactics – tell them that you need a new court date to hire an attorney. (And then actually get an attorney before the next court date).

b) **Properly documenting the terms of the negotiation:** This happens both in the court proceedings and in the plea paperwork. When the judge or the prosecutor says something unclear about the negotiated agreement, your criminal defense attorney might jump in there with a tiny correction "for the record." Perhaps your attorney doesn't like the way that the prosecutor said "jail sentence of two days" without explaining that you had already served two days, so he or she says, "with credit for two days already served." You might not have any idea what that discussion was about, but that back-and-forth is your attorney fighting to make sure that you receive every possible benefit.

What if you plead guilty without an attorney and go to jail, and on the day you expect to be released, the jailer tells you that you have two more days to go? You realize now that the prosecutor must have forgotten to give you jail credit for the two days you spent in jail before you bonded out. Since you didn't have a lawyer to double-check (or even complete) the paperwork and ensure that it was correct, you have no way to get it straightened out.

c) **Knowing the additional consequences of your plea**: Imagine that you plead guilty to a domestic assault because the prosecutor offers you a time-served plea. Later, when you try to obtain a handgun permit, you are told that you can never own a handgun again. If you had hired an attorney, you would have known the consequences of entering that plea beforehand, but now it's too late. Perhaps your lawyer could have even negotiated the offense down to a simple assault, which would have carried less penalties. Since you only talked with the prosecutor about how much jail time was involved, you never learned the additional ways that the conviction would affect you.

YOU WILL KNOW WHAT CHANCE YOUR CASE WOULD ACTUALLY HAVE

You might be thinking, "Well, I know that the police have a lot of evidence against me, so what's the point of fighting any of it?" Let's say that you receive a DUI charge. Do you know whether the police made a lawful stop of your car? Do you know whether the police followed the correct instructions when they gave you the field sobriety test? Are the police still using a test that the court has decided is unreliable and inadmissible? It's possible that the evidence that would be used against you was obtained illegally and could be excluded from the trial. If there is a good argument to keep that evidence out of the trial, your attorney can file a motion to suppress, and the prosecutor will have to explain why that evidence should still be allowed to be used. If you don't hire an attorney, then you will never know if you had a chance to win your case.

Even if you hire an attorney, and it turns out that your best option is to enter a plea, at least you won't have to wonder what might have been. You can't go back to court a year later and say, "I know that I pleaded guilty before, but I'm thinking that maybe I should have gone to trial. Can I get a do over?"

It's sort of like if you opened an old trunk in the attic and found some antique jewelry inside – it might be worth thousands of dollars, or it might be complete junk. Wouldn't you take it to a professional appraiser before selling it? Or would you rely on the people who wanted to buy the jewelry when they said it was worthless? Your attorney will tell you the value of the evidence that you have, in comparison to the value of the evidence that the prosecution has; how the evidence compares to the statutes and jury instructions for that particular offense; and what the risks are if you don't take the prosecution's plea offer and go to trial. Just like the jewelry appraiser, take your case to the legal professional before selling it cheap.

YOU MAY BE ABLE TO KEEP YOUR RECORD CLEAN THROUGH A DIVERSION

If you meet certain requirements, you may be eligible for a diversion. Diversions come in two forms: pre-trial diversion, and judicial diversion.

With a **pre-trial diversion**, you never have to enter a guilty plea. Instead, the prosecutor might allow you to reset your case for an agreed length of time to see if you can keep from getting additional charges. At the end of that probation period, your original offense may be dismissed. This is certainly the defendant's preferred choice between the two diversions, but it is rare and can only be taken if the prosecutor agrees to it. You should almost put this option out of your mind because prosecutors are getting really stingy with this one.

With a **judicial diversion**, you must actually enter a guilty plea to the offense. Your attorney needs to ensure that you are eligible for judicial diversion before you enter the plea. If the judge grants your diversion, your sentencing is deferred (held off) for a probationary period to see if you can keep from getting additional charges. If you make it through probation, you can return and get the offense taken off of your record.

The biggest difference between the two diversions is that if you get in trouble during the judicial diversion probation period, then you have already pleaded guilty! You will no longer get the original offense taken off your record, and now the sentence that was originally held off will come back to bite you in the butt.

You shouldn't really compare the two types of diversions with each other because you won't get that choice; instead, you should compare taking a diversion to not taking one. The

advantage to both diversions is that you will not serve any jail time and you can have all of the records completely erased! It is the same result as winning at trial after jumping lots of hurdles – one local judge calls diversion the Cadillac of probations.

Diversions are an excellent option for first-time trouble makers who can stay out of trouble and want to keep their records clean. Many people would prefer to avoid the embarrassment, expense, and delay of going to trial even if they maintain their innocence, because they believe that the offense will ultimately be erased anyway.

MISTAKE #2

CHOOSING YOUR ATTORNEY FOR THE WRONG REASONS

Attorneys can be the wrong pick for your case for many reasons: because they are inexperienced, they have personal issues that are a distraction to their practice, or they are simply not willing to put in the work that it takes to get the job done right. I have listed several reasons below to consider before hiring your attorney.

BECAUSE THEY HANDLED YOUR DIVORCE

There is no rule that says attorneys can only handle one type of case. Many attorneys practice in various areas and excel in them all; my warning here is that you should not automatically think that because you had an attorney who did a great job on your personal injury case or divorce, he or she would automatically do a great job on your criminal case. Feel free to use the same attorney if you feel comfortable with him or her, but do your homework first.

BECAUSE THEY'RE FAMOUS

Every city has a few criminal defense attorneys who are household names. They might have earned it through hard work, they might be an efficient marketer, they might have had 'that one famous case,' or they might just be old as dirt.

The hope is that this type of attorney can bring a firestorm of media attention to your case and leverage that pressure to get a good result. Unfortunately, many clients of famous attorneys have learned that these types of attorneys are only eager to work the cases that place them in the spotlight, and that these attorneys often neglect the not-so-famous cases. Even worse, sometimes these attorneys are eager to maintain the impression that they strike gold on every case, and they begin to take only winners. This, in turn, leads to their becoming soft and untested.

Some of the best non-famous attorneys take the same advice they give their clients: they stay under the radar and keep their mouths shut. You've never heard about their biggest victories because the client would like for it to remain private.

Famous attorneys can be awesome, awful, or ho-hum average – just like not-so-famous attorneys. There is no direct relationship between their recognition in the community and their skill level. Rely on former clients rather than former cameras.

BECAUSE THEY'RE INEXPENSIVE

Just like blue jeans, cars, and everything else, there isn't always a direct connection between cost and quality. First, focus on quality, and then you can worry about price.

So then, how do you determine quality? The best indicator of future performance is past performance. If you have a friend who has used a criminal defense attorney in the past, that's a great place to start. The problem with seeking testimonials is that you might not want to tell other people that you have criminal charges, and you might not have any friends who will admit that they did either. In that case, the next best thing is to look online at client reviews of attorneys' past clients. There are a number of rating sites like AVVO.com that rate lawyers. Pay attention not only to the attorney rating, but also to client reviews. If the attorney isn't soliciting client reviews, it might be because they would not be favorable. The attorney doesn't have to have 1,000 client ratings, but you want to see a consistent track record of highly satisfied clients.

You can also look at accolades and designations that have been awarded by industry organizations. Not all of these awards are created equal; some of these are acknowledgments of excellence by other attorneys or clients, while others are nothing more than 'pay to play' organizations. Pay particular attention to attorneys who are certified specialists in

the area for which you need them. For example, if your attorney is a Certified Criminal Trial Specialist, this means that he or she meets some of the highest requirements in experience, ethical representation, and performance.

Now you can finally compare prices, but at least all of the attorneys you are now considering would be good selections. If you don't create a short list of qualified attorneys before looking at price alone, then you'll be comparing apples and oranges (or should we say lemons).

With regard to price, you know that you usually get what you pay for. Imagine that you haggled a desperate attorney down to an unusually low price. What does that tell you about his or her business? Even if that attorney honors the low price, he or she will probably exert the minimum effort to conclude the case. If one attorney says he will handle your case for $500 and the other $50, do you think they will put in the same amount of work? (Sure, since we live in a perfect world!)

What's more likely is that the attorney practices a high volume of cases, and you will be sitting in the courtroom for several hours waiting for that attorney to finally get down to your 'petty' case. I say 'petty' not because it's petty to you, but because it's the least important case to that attorney, who will always think to himself, "That's the case that I did for a reduced fee. I need to keep my higher-paying clients happy before them." Before you get too upset at lawyers in general, remember that this is how every service industry operates – my point is that while you're bragging about the ten hours that you spent finding the cheapest attorney in town and haggling him or her down even lower, you don't realize that you're at the very bottom of that attorney's totem pole.

Another possibility is that the attorney is pulling a 'bait and switch' on you. While you think that you have settled up with the attorney, he or she is sticking a hand in your face every time you go back to court. "Defending your Constitutional rights? That costs extra." "Oh, did you want to actually fight the charges? Did you want to see the discovery in the case? Did you want me to meet with your witnesses? Pay me more money." Some of these attorneys will say, "Pay me this much now, but if you don't give me the rest later, then I'm off the case." These attorneys are almost hoping that you don't come up with the rest of the money so that they can keep your hefty initial payment and they don't even have to lift a finger to kick your case to the curb. Soon, you'll realize that you should have hired a more ethical attorney who was upfront and honest about the total costs of representation.

While there is no direct relation between how much a defendant spends and how much 'justice' is received, saving money on an attorney can end up being quite costly. Very few things in life should be handled by the lowest bidder, and your freedom certainly isn't one of them.

MISTAKE #3

DISCUSSING YOUR CASE WHILE IN JAIL

JAIL PHONES

You will not be successful arguing that telephone booths and other public places are entitled to Fourth Amendment protection. It is completely legal for law enforcement to listen to and record everything that you are saying on these calls. (Katz v. United States). To be fair, there is usually a big sign in the jail visitation room that says, "No reasonable expectation of privacy," or "All calls are being recorded" – that is the jail's way of telling you to be smart or suffer the consequences.

When your family calls you about the case, you should only discuss things like how everyone misses you, whether your boss will hold your job, whether they can make bail, how the search for an attorney is going, and when your next court date is.

If your family starts asking, "Did you do it?" or "I talked to the State's witnesses and they said they aren't going to come to court," then you are cruisin' for a bruisin'. You should quickly change the subject and tell your family that you don't want to talk about that. You may even have to hang up if they can't take a hint. Otherwise, you can expect a new indictment for intimidating a witness, tampering with evidence, a higher bond, or a CD sitting on the prosecutor's table marked, "Jail phone calls." When in doubt, just pretend like the police are listening to everything you are saying when you're on a jail phone, because they probably are.

OTHER INMATES

There is a reason that you've never heard of the "cellmate-client privilege" – because it doesn't exist.

When you are in jail, you are surrounded by desperate people who really don't give two squirts about you. Even though you may think that your fellow inmates understand what you're going through and that you are all in this together, that doesn't mean that they wouldn't "turn State's evidence" on you for an extra pair of socks. You should be wary of any inmate that asks for details about your pending case. The best response is to say, "Man, I don't want to get into that." You can always blame your attorney and say, "My lawyer told me not to talk about it with anybody."

It's possible that the victim in your case is the relative or friend of an inmate sitting right next to you! Why put yourself in a situation where some bunkmate now wants to mix it up with you? Nothing is gained by getting into the details of your case with other inmates.

It's also best not to carry around paperwork showing your charges, so that you don't have to constantly guard it to keep the other inmates out of your business. This is especially true if you're charged with a sex offense – you might as well place a sign on your back that says, "Insert shank here."

PLANTS

It's not just the other inmates that you have to watch out for – the police can place an undercover officer in your cell with the purpose of getting a statement out of you. He might smear some dirt on his face, get assigned as your "cellie," and then sit on your bunk and ask, "Hey, are you guilty of what you're accused of? Won't you feel better if you admit it to someone? You can trust me. Is it true? Did you do it?" Okay, so maybe they aren't that obvious, but any similar conversation should make you suspicious.

I once had a case where an undercover officer convinced an inmate to "confess his sins in prayer." The undercover officer led the man in a group prayer, and after the inmate confessed what he had done, the undercover testified against him using the man's prayer confessions. The confession was not ruled to be confidential under the clergy-penitent privilege because the plant did not pretend to actually be a minister, and the confession was made publicly in front of several other people.

People may ask, "How do I know if an inmate is trying to do this?" or "How can I tell if an inmate is an undercover officer?" Just be quiet – then you won't have to figure out who is who.

TAKING LEGAL ADVICE FROM YOUR CELLMATE

Some inmates love to tell others about how much they know about the legal process. Even though they don't have access to any legal research (cases, statutes, rules of procedure), and never passed the bar or even took a legal class, they somehow know more than the people who feed their families as criminal defense attorneys. This inmate's advice is usually worth what you pay for it – absolutely nothing. At best, you give away a few cigarettes for some legal quackery; at worst, they provide advice that you actually take and suffer from.

Unlike what you see in movies, your attorney doesn't "have it out for you" and he or she doesn't give you crappy advice just to screw up your case on purpose. It can sometimes feel natural to complain about your criminal defense attorney – you're in jail and he or she is at home sipping expensive wine in front of a toasty fireplace (while not working on your case) – that's at least how these "jailhouse lawyers" tell it. These self-appointed advisors will say things like, "I knew somebody who had the same lawyer as you, and your lawyer did a terrible job on that case. There was no evidence at all, and your lawyer still lost." This is just a made-up story so they can look better by comparison than someone who actually knows the law.

The interesting thing about these jailhouse lawyers is that even though they know everything, they haven't chosen to represent themselves in their particular cases. Tell them to eat their own cooking, and to quit giving advice that they won't follow themselves. You may be desperate to hear some good news when this person tells you about "this one guy" who filed "some motion" that got the charges dismissed in one hour ... but don't let your circumstances cloud your vision. If this inmate knows how to get out of jail immediately, why is he or she still there? A person with multiple convictions doesn't become a criminal defense attorney any more than a person with multiple health issues becomes a doctor.

Besides for the fact that this inmate's legal advice is uninformed, the other problem with seeking advice from an inmate is that you'd have to tell him or her all of the private details about your case before receiving any advice. This "let me give you my legal opinion" gimmick might just be a set-up to get a confession out of you, so that they can tattle to the prosecutor's

office. This person could even be wearing a wire and recording everything you say. Even if you're innocent, it doesn't help to provide the prosecution with a recording of you cursing the person who falsely accused you.

MISTAKE #4

SPENDING YOUR MONEY ON A BOND WHEN YOU CAN'T AFFORD IT

Somewhere out there, a grandmother is desperately searching the Yellow Pages so she can bail out a family member tonight. In her devotion to bring a loved one home, it will never cross her mind that getting the inmate out of jail could be the worst possible thing to do in the case.

This concerned grandmother will gather pay stubs, titles, multiple forms of identification, recruit half of the neighborhood to act as co-signers, and rush straight down to the bondsman. She doesn't know if she'll get her money back, how much money she'll have to pay, what her obligations as a "surety" are, and whether this is a loan or just a third-party processing the bond with the court. Maybe the bonding companies can explain the process, but maybe they aren't the best people to ask since they are the ones about to receive this fast cash.

Bail is the temporary release of a criminal defendant before trial. A Bond is an amount of money in cash, property, or financial instrument posted with the clerk to make sure that a defendant attends all required court appearances. Bond allows an arrested person to be released from jail until the case is completed, whether through trial, plea, or dismissal.

There are several different kinds of bonds:

With a **Cash Bond**, a customer goes to the Clerk's Office and pays the entire bail amount. If the defendant's bail amount is $5,000, then the customer pays $5,000 to get the defendant out of jail. No bondsman is involved. As long as the defendant makes every court

appearance until the case is completed, the customer will get the remaining money after court costs and other fees. Cash bonds are rare because few people can afford to pay the bail amount in full.

With a **Corporate Bond**, a customer goes to a bondsman's office and pays approximately 10% of the bail amount to the bondsman. If the bail amount is $5,000, then he or she pays $500 to the bondsman. This is a contract between the customer and the bondsman, so the customer doesn't get this money back even if the defendant makes all of the court appearances.

The bondsman will post a bond to the Clerk's Office and commit to being responsible for the total bail amount of $5,000 if the defendant does not appear in court. If the defendant goes on the lam, the bondsman will probably hire a bounty hunter to find and return the defendant to jail. If the customer does not pay as agreed, the bondsman will probably sue the customer and all of the co-signers in civil court.

A **Corporate Bond and Loan** is the same as the Corporate Bond, except that if the customer cannot pay 10% of the total bail amount, they pay a lesser percentage and enter into a high-interest loan with the bondsman for the remaining amount of the 10%. If the customer can pay 5% of the bond, he or she might pay $250 to the bondsman, and receive a loan from the bondsman for the remaining $250. Once again, the customer makes payments, doesn't get any money back, and may get sued if he or she doesn't pay the money as agreed.

Nobody wants to leave a friend or family member in jail, but think about the big picture – defendants need to worry more about the next three years, not the next three weeks. Before bailing someone out, ask yourself whether you can really afford to do it. Are you going to scrape the money together and then not have anything left for the legal defense? If you have to choose between a bond and an attorney, you need to focus on the attorney.

Family members will often help a defendant get out of jail, but they may feel that getting an attorney is up to the defendant. While the family has good intentions, they do not realize that they are disqualifying the defendant for a public defender and setting him or her up for a very ticked-off judge, who wants to know why the defendant has access to money to bail out of jail but can't pay for an attorney. For repeat offenders, the judge may ask why the defendant always seems to bail out of jail when he or she is arrested, yet owes two thousand dollars in unpaid fines and court costs.

If a defendant bails out, he or she will have follow-up court dates to report back to the judge about who has been hired for an attorney. This court date might only be two weeks away, so the defendant doesn't have a lot of time to get it together. Getting a lawyer rarely seems to be the first priority of the recently released defendant – instead, he or she is eager to forget the terrible jail experience, and dealing with the offense often seems too overwhelming. However, when the defendant keeps going back to court to tell the judge that he or she still hasn't hired an attorney yet, the judge will usually revoke the defendant's bond, which means that the defendant can end up right back in jail anyway. Now the family has completely wasted their money – and they still owe more money to the bondsman. Instead of helping financially to hire an attorney, the family must now honor the former bond agreement to avoid getting sued in civil court.

Revoking bond: There is no guarantee that a defendant who is out on bond will remain out of jail until the conclusion of the case. There are a lot of ways that the defendant can lose his or her bond, such as missing court, being late to court, getting new charges, or not complying with pre-trial probation requirements like checking in, filling out job applications, passing a drug test, etc. If the defendant isn't acting right or doesn't have reliable transportation, the bond will not last for long.

For the defendant's family: If you are considering bailing out a loved one who has a substance abuse issue or who is likely to re-offend, you should know that any new charges received while a defendant is out of jail on bond will 1) result in the bond getting revoked and 2) the defendant being sentenced consecutively (one after the other) on the current and new charges. Sometimes the toughest, smartest decision you can make is to let that person remain in jail and focus on obtaining good legal representation for them.

For the defendant: If you are in jail but your family hires an attorney, the attorney may also be able to get your bond reduced at a later time. In addition, you will have instant access to legal advice before you say or do anything bone-headed that makes your case worse. Your attorney can begin to lay the groundwork for legal remedies such as getting evidence thrown out or cross-examining witnesses, which could be lost if you wait too long to get an attorney. Whether you are in jail or out of jail, you're always better off having an attorney that is already working on your case.

You may wonder how a family can hire an attorney if the defendant is in jail. The right attorney will be happy to meet with the family, accept the money on behalf of the defendant,

and visit the defendant in custody. In these situations, the attorney must remind the family that even though they are paying for the defendant, they are not the client and do not have any influence on the case. The attorney should only work with the family if the family understands that the attorney works for the client.

If a defendant cannot afford either a bond or an attorney, then the court will provide an appointed attorney. Some defendants gripe about getting a public defender based on the belief that these attorneys will not have the time to handle the case adequately. However, in many misdemeanor cases, these defendants spend a few days in jail, have their jail fees waived, and receive a time-served offer or even get the charges dismissed. If defendants are in this financial situation, it would be better just to tell the judge that they need the public defender, rather than bail out, now need a private attorney, and be set up to fail.

Bond and preliminary hearings: It is extremely important to understand that if a case is set for a preliminary hearing and the victim or witness does not show up to testify, the charges can be dismissed and the defendant can be released.

In that situation, the defendant can be released without ever having to even pay bail. I often tell limited-income families who do not believe that the witness will show for the preliminary hearing to consider waiting until after the hearing to bail out a family member, in the hopes that the bail amount will be reduced or completely dropped. Also, the hearing will be scheduled more quickly if the defendant remains in jail.

If the attorney makes a motion to dismiss the case because the witness does not appear for the preliminary hearing, then the bond will end with the case. This means that the family will have to pay the bondsman again when the case is indicted into Criminal Court. These families often say, "Please do not make a motion to dismiss the case, because then we will have to pay another bond again." The attorney's ability to raise the pain level for the prosecution is therefore limited, and the defendant often waives the preliminary hearing, just to keep from losing the bond; now the case will go automatically to the Criminal Court instead of being presented to the grand jury.

MISTAKE #5

TALKING TO THE POLICE WITHOUT AN ATTORNEY

WHAT TO DO IF THE POLICE ASK YOU TO SPEAK WITH THEM VOLUNTARILY

Should you talk to the police if you are a suspect? The answer is no. But what if you are innocent? The answer is still no. But what if they just want to rule you out as a suspect? Um, no. But what if people will think you are guilty if you do not? You are not listening – No, No, No! There is no scenario that will lead to a different answer than no.

Okay, so you have good intentions – you want to be helpful. You have been led to believe that a quick conversation with detectives will "clear up the confusion" and get this mess over more quickly. Naturally, you are eager to address the issue directly rather than "hide behind your lawyer," as they say. Innocent people don't need lawyers, right? Wrong.

The problem is that you do not understand how an interrogation works or what its purpose is. An interrogation is not a search for truth; it is a search for a conviction. It is an opportunity for the police to collect additional evidence to confirm their existing suspicion, so they can arrest you. It is a game that they are playing, and you don't even know the rules.

How could you expect to win?

You think that you can "nice" your way out of suspicion by going along with the police's requests, but you cannot. The police are not your friend – they are doing their job, which is to investigate and prosecute crimes. The "good cop" routine is part of their training to pull out additional information from you – a psychological tactic to encourage you to be more forthcoming. Google "The Reid Technique" if you think the police don't have this mind-screw down to an exact science.

If you cannot resist the seductive temptation to be voluntarily interrogated, then you might as well pack a toothbrush for your eventual jail stay. If they had everything that they needed, they would have already arrested you – and you're about to waltz in there and give them the missing pieces. When the police ask you to sign here, here, and here on the form that waives your Fifth and Sixth Constitutional protections, will you begin to see that this is a terrible idea?

Here are some of the tricks that the police can and will use against you:

* They can lie to you and tell you that they found your DNA.
* They can pretend that a witness identified you at the scene.
* They can say that your spouse is in the other room writing a formal statement against you.
* If your story is too consistent, they will say that it's made up.
* If your story is not consistent enough, they will say that it's made up.
* If they don't like your version, they will have you go over it and over it until they can "interpret" it differently.
* If they can't get an actual confession, they'll settle for word games and mind games.
* If they believe that you have confessed, they will stop investigating the case for alternative explanations because they think your statement seals the deal. Don't let the police make you feel guilty for refusing to be a chump.

Here are a few true stories similar to what you may encounter if you don't have an attorney present. I represented each of these defendants and did not make these facts up, so don't dismiss these warnings as something ripped off of prime-time television.

The One Question Curveball: A man was accused of shaking his baby to death. The police told him that they wanted to "just ask him one question." He went to be questioned, believing that the police would just ask him whether he shook the baby or not. After three hours of answering the same questions over and over again, he finally said, "Enough." At his trial, the interrogating officer said, "Man, you should have seen how quickly he ran out of the room when we started turning up the heat." The man's cooperation was used against him even though he said nothing incriminating.

The recent Supreme Court case Salinas v. Texas held that if you have not been placed in custody and have not received Miranda warnings, and you voluntarily respond to some questions but not others, the prosecution can use your silence in response to the later questions as evidence of your guilt.

The Helping Hoax: I represented a man who had a limited education, which was immediately obvious to anyone who met him. The interrogating officer continued to use the word "provocative" to describe the minor's behavior, and he insisted that the man agree. My client was too embarrassed to admit that he did not know what "provocative" meant, so he just started saying "Sure" to everything that was asked. The man trusted that the officer had his best interests because the officer kept telling him that he liked him and wanted to help him during the interrogation.

During the trial, the officer kept repeating the word "provocative" as if it was something the man had originally come up with himself. I confronted the officer at trial and he finally admitted that he'd brought up the word first. I also asked, "Did you make a promise to help my client?" He grinned widely and said, "Sure did ... I helped him right into a jail cell." Even though the jury thought it was a sleazy tactic, they still convicted the man in large part due to the perceived confession.

The Guessing Game: A man went into an interrogation and could not remember what happened the night before because he drank so much he passed out. The police asked him over and over what happened, and the man kept insisting that he did not recall the prior night's events. The police then shifted their tactics and came up with a list of complicated, made-up scenarios, all of which would make the defendant guilty.

The police then asked, "Maybe it happened like that. Is that possible? Is it? We're not saying that you did it or that it went down that way, but you must admit that it is possible if you don't even remember that night." Since the man had already said multiple times that he didn't know what had happened, he said something like, "I guess that it's possible, but that would not happen because that is nasty and I'm not like that."

The man agreed that the act was "possible" in the factual sense that he and the minor victim were not 500 miles away from each other on the night in question. The officer then went to the trial and testified, "I asked the defendant whether he molested that little girl and he nodded his head up and down and said that it was possible. He can't remember for certain, but he believes that he might have done it." The officer suggests that anything possible is also "probable." The fact that there was no forensic evidence to support such an act was lost on the jury, and the man was convicted for the offense. This jury verdict might as well have read, "guilty of guessing."

The Forty Fact Fraud: A woman insisted on going into an interrogation without an attorney. The interrogating officer asked questions that were nearly a half-page long. The officer packed nearly forty facts into the question and then asked, "Yes or no?" When the woman nodded her head up and down, the officer interpreted that to mean that she accepted the entire statement as true, but the woman's agreement was merely that the officer had gotten the story basically right – she didn't know that this was considered an admission of all of the extra tucked-in facts. At trial, the officer gave the jury the impression that the woman had specifically agreed with each individual fact, and did not reveal how the facts were snuck into a three-paragraph question. (And of course, if the woman had broken down the questions into a lengthy explanation rather than provide a Yes or No answer, the officer would have testified that she was being "evasive.")

The Revision Rip-off: An officer told a defendant that he must have had his timeline wrong, because a toll gate camera proved that he passed over a bridge at a very specific time. The defendant – not aware that the officer can lie to him – did his best to revise his timeline to conform to this "known fact." The defendant thought that he and the officer were "figuring it out together," because he did not know that the officer was lying the entire time.

At trial, the officer testified that "when I confronted the defendant about his whereabouts, he admitted that he originally lied about his timeline." It was never revealed that the officer lied about the toll gate, and the toll gate footage never came out – the officer never revealed the twisted context that resulted in the defendant trying to retrace his steps. The timeline was not even material to the case; the officer just wanted to be able to say that he had caught the man in a lie.

The Polygraph Pinch: An officer invited a man to take a polygraph test and said, "What is the harm? The results of the lie detector aren't admissible anyway. You will be ruled out as a suspect if you pass." The results of the test were inconclusive, and the officer used the semi-incriminating statements from the polygraph test to harass the man for nearly a year before the charges were finally dismissed.

The results of a polygraph test are not admissible, but the statements made during the test are admissible. The police cannot show that you failed, but you also cannot show the jury that you passed! (And by the way, you will not "pass" the test; it will always show up as "inconclusive" when the results are in your favor.)

The Sex Sells Scam: A defendant accused of having intimate relations with a minor had been sitting in jail and hadn't seen a woman for over a week. Although a lawyer had been appointed to represent him, an attractive, nice-smelling female polygraph administrator said she had come "just to visit him," and remarked what a shame it was that they wouldn't be able to spend some time together. He gladly waived his right to have his attorney present as the female officer touched the defendant's hands, smiled at him, and used suggestive language about how good-looking the defendant was. She later made statements about how "lucky that girl was to be with such a handsome man."

Later, the agent "got hot" during the interrogation and removed her jacket. This foolish defendant thought the female officer was genuinely attracted to him. He learned, however, that if he did not flirt back with her, or go along with her sexual suggestions, the officer would clam up and say, "Well, maybe we just need to take this polygraph test and I need to get out of here." As long as he played along with her dirty talk, she continued to pour on the sugar. Naturally, she was secretly recording him as he responded to her sexual questioning.

Although this female was qualified to conduct polygraph tests, she enjoyed concluding her "test" by bragging to other officers how "she never even turned on the machine." (Instead, she turned on the defendant.) Later, the prosecutor edited out this agent's inappropriate discussions from the interrogation. The prosecutor also tried to make sure that the agent wasn't available to testify at the trial, and only wanted to introduce the defendant's statements. It took a special defense motion to get the entire conversation between the officer and the defendant, rather than just the defendant's "confessions."

Note: Even after you've hired an attorney, the police can continue to try to get you to talk to them. It is your right to have an attorney present – but you can waive that right, which is an incredibly dumb thing to do. I always give my clients permission to use me as an excuse for why they can't attend a police interview – they say, "I wanted to come visit, but my lawyer won't let me." The police may not like it, but they must respect it.

The Off-the-Record Ruse: When you go to the police station voluntarily, the police do not have to read you the Miranda warning, so do not think that your words are "off the record." Even if you convince them to turn off a recorder, they can always testify to what they heard come out of your mouth. "Off the record" does not exist! You and the interrogating officer do not have a "gentlemen's agreement" – even if the officer "really liked you" and saw that "you are the real victim here." This is all just the good cop routine.

The Privacy Ploy: A young adult is in the police department's "interview room" (interrogation room). The officer calls the young man's mom and tries to get the mom to guilt the boy into confessing. The boy asks if the officers can leave the room so that he can talk to his mom privately.

The officer smiles and says, "Absolutely" ... because there is a secret camera and microphone hidden in the wall clock! At trial, the police insist that the boy should not have had a reasonable expectation of privacy, and the footage is used against him.

Perhaps these officers have good intentions, but their games are often more about trying to outsmart a nervous suspect than getting to the truth. Remember that a false confession not only incarcerates the wrong person; it allows the guilty person to go free! Even people who are tough on crime should want to get the right results.

You will get your chance to tell the truth later – on the stand. Tell the jury directly what happened if you want to explain ... but until then, zip it!

WHAT TO DO IF THE POLICE INTERROGATE YOU NON-VOLUNTARILY

Even though I hope I've convinced you not to speak with the police voluntarily, in some cases, you don't get a choice. This section addresses how to handle a non-voluntary police interrogation.

If there's one aspect of criminal procedure that most Americans are familiar with, it's the following famous phrase: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney. If you cannot afford an attorney, one will be appointed to you. Do you understand these rights as they have been read to you?"

But what happens when a defendant is never read his or her rights?

In Miranda v. Arizona, the Supreme Court of the United States case held that police must give a Miranda warning (above) to criminal suspects prior to custodial interrogation, to make sure that the person is aware of his or her Constitutional rights (specifically, the Fifth Amendment right against self-incrimination, and the Sixth Amendment right to have an attorney present during questioning).

If the police bring out an incriminating statement from a suspect without reading the "Miranda warning" or "Miranda rights," then the statement will not be admissible. If the suspect receives the Miranda warnings, and makes a knowing, intelligent, and voluntary waiver of his or her rights, then any self-incriminating statement made is admissible. (Admissible means that it can be used in court.)

Notice two things: The Miranda warning is only required prior to "custodial interrogation." This means that you must be 1) in police custody, and 2) be subject to police interrogation. Therefore, no Miranda warning is required when you speak with the police at your house, at your job, standing on the corner, etc. (no police custody).

Also, just because you are at the police station doesn't mean that you are necessarily in police custody – the test is "whether a reasonable person would have felt free to leave." (If not, you are probably in custody). Therefore, if the police call you and ask you to come down to the station "just to talk," and you voluntarily go to the station and make self-incriminating statements, then Miranda is not required.

What about if you didn't feel free to leave the police station, but you volunteered a statement while waiting for your lawyer to arrive during a time when the police had halted questioning? Imagine that you blurted out a self-incriminating statement on your own – that statement can be used against you, because you weren't being subjected to interrogation. A suspect can invoke his rights and then waive the rights that he or she just invoked merely by speaking about the case.

The only punishment to custodial interrogation without Miranda is that the police lose the ability to use the self-incriminating statements. The police don't have to drop the charges against you, they don't have to immediately let you go, and they aren't subject to civil liability merely for failing to Mirandize you.

It's actually common for police not to give the Miranda warning. Imagine that the police are called out to investigate a possible aggravated burglary claim. They arrive on the scene to find a suspect walking out of another person's house (without the owner's permission), with a bag full of stolen items taken from inside the house. The suspect is caught red-handed and immediately arrested. In that situation, the police have all of the evidence that they need. They do not have to take that suspect back to the station and try to pull a confession out of him ("custodial interrogation") because they have first-hand knowledge of his offense, and they can testify to what they saw.

The big rule here is that if a person is subjected to custodial interrogation without a Miranda warning (or he or she invoked the right to remain silent, and the questioning wasn't halted), then any self-incriminating statements made would be inadmissible. However, you can see from the above analysis that Miranda is not required in many situations. Miranda protection is not as broad as you probably think it is.

Three recent U.S. Supreme Court decisions have reduced Miranda protection even further. The Court recently decided in Berghuis v. Thompkins that a suspect must "unambiguously" invoke the right to remain silent by telling police that he or she wishes to do so. (That means that you gotta be very clear about it, or it doesn't count.)

If you sat silently and did not express to the police that you understood your rights, and during continued interrogation answered a question to the police, then the statement is admissible. You have not waived your rights because you haven't explicitly said, "I wish to remain silent." therefore no Miranda is required. (This is similar to the requirement of a suspect to tell police that he or she wants a lawyer, as held in Davis v. United States.)

The Court also held in Maryland v. Shatzer that a suspect who invoked his right to remain silent must do so again after a two-week period. This amount of time is to allow for a person to be re-acclimated to normal life and free from the pressures of custodial interrogation. The rule is not "once invoked, always invoked."

The Court also held in Florida v. Powell that while Miranda requires a suspect to "be warned prior to any questioning" and that "he has the right to the presence of an attorney" police must only "reasonably" convey this warning. (In the facts of this case, the police did not explicitly indicate that the suspect had a right to have an attorney present). The Court felt that the warning was sufficient and upheld the defendant's conviction. (So, when they aren't very clear about it, it does count!)

Based on these recent cases, a suspect may find the best reaction to custodial interrogation is to say "I wish to remain silent, and I want a lawyer," and then not say another word. If subjected to custodial interrogation at any later time, the suspect should repeat the above statement prior to each custodial interrogation. If you already have a lawyer, then tell them that you want your lawyer to be present and then don't say another word after that.

Note: This is not a complete review of the thousands of cases regarding Miranda, and should not be taken as such. These are just general principles. The United States Supreme

Court is continually chipping away at this, so if this book is getting some age on it, just assume things are even worse now.

MISTAKE #6

LYING TO YOUR ATTORNEY

Many defendants believe that if they tell their lawyer that they are guilty, the lawyer will not fight for them. Most criminal defense lawyers do not even want to discuss whether you are innocent or guilty because it is not relevant to their duty to zealously represent you. Sometimes a defendant is covering for someone else who committed the crime anyway, so an attorney wouldn't necessarily believe the defendant even if he or she admitted it. Defendants also wonder whether the attorney has an obligation to share this information. The answer is no – everything that you say to your attorney in private is a privileged communication and the attorney cannot share your statements to the police or anyone else.

If your criminal defense attorney asks you whether you're smoking marijuana or not, it's not so the attorney can go run and tell on you – you would have a tough time finding a criminal defense attorney who is an outraged prude. Besides, the conversation is privileged and your attorney can't reveal it anyway. The attorney is asking because if the judge asks him or her whether you can pass a drug test today, the attorney will be able to request thirty days to buy you some more time. If you lie to your attorney, he or she will proudly blast out that you'd be happy to take the test at this very moment, and then when you fail it, you're both looking pretty dumb.

Additionally, your attorney doesn't want to plead you to something like "time served," (which means that you don't have to serve any more jail on top of what you've already served) only to find out that you failed your first supervised probation drug test a week later, and now your time-served offer has turned into a probation violation that can land you right back in jail. So just be honest with them. Even if you are accused of something like raping someone and you did it, tell them what they need to know. The right attorney will not represent you

any less passionately; they will just not ask the witness to describe the private parts of the rapist, only to have her spend the next ten minutes perfectly describing your junk. Instead, the attorney can create a better legal strategy because he or she will have all of the available facts.

MISTAKE #7

FAILING TO TAKE ADVANTAGE OF A PRELIMINARY HEARING

A preliminary hearing (also called a probable cause hearing) is an opportunity for the defense attorney to ask questions of the prosecution's witnesses. The hearing is under oath, so the witness may be impeached at a later trial. If the hearing is successful (meaning that the charges are dropped), you will lose your bond. If unsuccessful, your bond remains. (See Mistake #4). Most defendants do not want to "win" the hearing for this reason. Even if the charges are dropped, they can be brought back if the defendant is indicted by the grand jury – this is not considered "double jeopardy."

Instead, these defendants want to take advantage of the hearing by cross-examining the State's witnesses and hearing what they are going to say. The main purposes of a preliminary hearing are: 1) to learn what the witness will say at a later trial, 2) to investigate the truth of the testimony before a later trial, 3) to lock in the testimony of the witness for later impeachment, and 4) to seek a lower bond or lesser charges before the case is indicted in Criminal Court.

Some attorneys flap a lot about how they are going to subpoena the State's witnesses to "see if they dare to show up." Then, when the witnesses appear and it is time for these attorneys to have the preliminary hearing, these attorneys flinch and say, "You don't want to have this hearing!" This opportunity should be more than just a gamble to see whether someone shows up; if the witnesses show up, then you should have the hearing in almost all cases.

If you are planning to take your case to eventual trial, then the preliminary hearing is the opportunity to start prepping the case. Juries love it when a witness gets caught fibbing.

The attorney has that high drama moment when he or she can say, "That's not what you said last time!" The problem is that if there was no "last time," there is no prior testimony to impeach.

Unfortunately, some attorneys don't believe that certain defendants deserve a trial because their charges are "not serious enough." They may say, "Oh, take the diversion and it comes off of your record," when you still want to fight the case itself. A diversion is a wonderful thing, but if you want to fight the case first, then make that clear when you hire the attorney. This mindset actually punishes you for having a clean criminal record.

MISTAKE #8

FAILING TO PREPARE FOR THE TRIAL

Jurors often find that actual trials are boring, repetitive, and confusing when compared to what they see on television. Many times, jurors do not even completely understand the difference between the competing versions of what happened. A poor trial presentation is often the attorney's fault, but the blame can be shared when the defendant does not help the attorney present a better case.

The attorney should ask the defendant questions about who was at the scene, what the witnesses will probably say, how the attorney can locate the witnesses, whether the event was captured on video, and the history between the defendant and the prosecution's witnesses. These questions should help gather evidence, but let's be fair – your lawyer is not a private investigator. It is not the attorney's job to find "a guy who goes by 'JoJo' and who used to live across the street." If you need actual investigative services, then you should have your attorney coordinate with an investigator or hire an investigator yourself. If you can't afford an investigator, then you'd better do the digging on your own.

It is common for a defendant to tell the attorney on the night before trial something like, "Hey, I have a witness who saw the whole thing." Naturally, the defendant will believe that

this still provides enough time for the attorney to use this witness. However, by this time, the witness might have moved to another state, can't remember the details, or won't take a day off of work to attend the trial.

A defendant might also say, "There is a security camera that recorded the entire thing," but since they haven't told the lawyer that for six months, the recording is long gone. A good attorney should begin asking questions well before this time in case the defendant doesn't know to bring up these facts, but the defendant does not need to wait to share this information.

These last-minute announcements present two problems – the first problem is that evidence and witnesses aren't always immediately available. Many people don't care if you're looking at a twenty-year sentence – they ain't comin' to court to testify unless your attorney issues a subpoena for them so that they do not lose a day of vacation. Security camera footage, 911 recordings, and witnesses take time to locate, especially when that evidence is in the hands of law enforcement or a private company.

The second problem is that the attorney is required to provide evidence that he or she plans to use much earlier than the day before trial. In the same way that the State gives us our "discovery," or (evidence that will be used against us), we have to give "reciprocal discovery" back to the State when we receive it. If a defendant hands me something on the night before trial – no matter how much it will help the case – I cannot introduce it into evidence because I haven't given it to the other side with the time limits required by the rules of criminal procedure.

It isn't like on TV, where an attorney's assistant bursts through the courtroom doors at the last second, holding up a piece of paper that wins the case. Defendants often think that just saying something like, "We just received this," will make it okay, but judges don't just say, "Oh, okay, well then let's throw out the rules of criminal procedure, since you just got it." If this piece of evidence is something that was available months ago, and it was only received at the last minute due to delay on the attorney or defendant's part, the judge will usually keep it out of the case.

While it doesn't make good television programming, trials are not like that book report you finished in tenth grade after pulling an all-nighter – trials require preparation that occurs weeks and months beforehand to get the best results. That's not to say that you have to work continuously for multiple months in every case, but you have to have provided certain things well in advance of the case or the judge will likely rule them inadmissible.

Great trial attorneys will appreciate this famous quote from Muhammad Ali: "The fight is won or lost far away from witnesses – behind the lines, in the gym, and out there on the road, long before I dance under those lights."

Trial excellence is the result of fact gathering, witness preparation, legal research, effective pre-trial motions, focus groups, exhibit preparation – and all of these things happen way before the first day of trial.

If your attorney isn't asking the right questions or preparing with you in advance, then it may be his or her fault. If you aren't meeting with your attorney or providing him or her with the information needed, then it may be your fault. Regardless of where the blame lies, you will be the one paying the price by getting convicted and going to prison. Don't let a winnable case turn into a loser merely due to a lack of adequate preparation.

There will always be plenty of last-minute developments when your case goes to trial; criminal defense attorneys rarely have any idea whether the witnesses can be located, what the witnesses will say, which witnesses will be called to testify, and whether the witness testimony will match the forensic evidence in the case. This occurs because the prosecution does not have to give us copies of witness statements.

Your attorney still has to deal with lots of last-minute revelations, so don't add to the list by expecting them to get ten new exhibits squeezed in at the last minute. Even if you are able to get the evidence admitted by some miracle, your attorney may not have enough time to figure out the best ways to use it.

MISTAKE #9

CONTACTING THE WITNESSES

Not every defendant who reaches out to the State's witnesses is trying to tamper with evidence or intimidate a witness. Sometimes, a defendant is just trying to take a hands-on approach and figure out what the case is going to look like. The problem with this is that,

regardless of your actual intent, you have placed yourself in a situation where the witness can get you in trouble by telling on you, and you can't disprove it.

If the prosecutor or judge hears that you contacted a witness, they aren't going to listen to a bunch of back and forth about, "Well, I was just asking them why they were telling these lies." You're going to be wrong right off the bat for reaching out to them at all. Defendants seem to know this in a situation where there is no relation between the defendant and the witness, but sometimes defendants don't think about this in cases where the defendant and the witnesses are family, friends, or knew each other before the case in some way.

Direct contact between the defendant and the witness is not required – if you reached out to someone else to reach out to the witness, that will still count. I once had a defendant get in trouble just for poking a witness on Facebook. Steer clear from them and if you see them around town, turn around and start walking away immediately to protect yourself from future allegations. If you drunk dial them in a moment of late-night weakness, those phone records will seal your fate if they turn you in.

Reaching out to witnesses is not only a great way to receive new criminal charges, but it is also a violation of your current bond conditions – that means that your bond will probably be revoked and you will sit in jail until your case finally goes to trial.

WHEN YOU LIVE WITH THE WITNESS

People often ask me in a case like a domestic assault, "How am I supposed to stay away from the witness? The 'victim' is my spouse and we live together and plan to stay together." No one is probably going to come to your house and check to see who is staying there, but if there is some new disagreement that happens at that house, you'll be the one the police come after. You could just be taking a shower on the other side of the house and not even know that your spouse got mad at you and called the police. There wouldn't even have to be a new charge – you're in trouble for being there at all! Now your bond can be revoked and you're going back to jail.

Do domestic assault defendants often continue to live at home in violation of their bond conditions? Yes, a lot of defendants can't afford to stay in a hotel for six months while their case is pending – but be careful if you have the kind of partner that keeps the police on speed

dial. Some defendants actually go back to court to get their bond conditions amended so that they can be in the house together, which is the best way to handle it.

WHY DEFENDANTS REACH OUT TO WITNESSES

I once watched a case where a defendant was accused of reaching out to the witness in the case. The prosecutor asked the defendant, "Did you try to call the witness in your case?" and the defendant said, "Yes, I did." The prosecutor asked, "Didn't you know that you weren't supposed to contact the witness directly?" and the defendant said, "Yes, I knew that." Finally, the prosecutor asked, "Well then, why didn't you go through your lawyer to reach out to the witness?" and the defendant said, "Because I couldn't get my lawyer to do it!"

Defendants often try to take the case into their own hands when they feel like no one else is working the case. An attorney who identifies himself or herself as the defendant's attorney is able to contact the witnesses directly to ask them questions about the case (although the person is not required to speak with the attorney.) You can either give the witness information to your attorney or leave the person alone, but do not try to contact them yourself.

MISTAKE #10

BEING AFRAID TO ASK QUESTIONS

There are many situations during a criminal case when the defendant has no idea what is going on, but they are afraid to ask questions. Sometimes when the defendant does not have a good relationship with the attorney, the defendant will ask questions to the clerk, the bailiff, and the judge, only to be told, "Ask your attorney." In addition, some attorneys will discourage you from asking questions, either because they don't want to spend the time to answer them or because they are concerned your questions will reveal that they don't know the answer.

If you can't ask anyone other than your attorney, and you can't get the answers from your attorney, then you need a new attorney. Don't walk into the courtroom and just keep saying "yes" until the judge stops asking questions, and then try to figure out what happened later – you might find out that you just pleaded guilty and have to go to jail, when you thought you were going to trial.

Do you understand what your attorney's theme and theory are in the case? Are you defending on the grounds of identity ("it wasn't me"), consent ("the witness is now changing his or her story"), a technical defense ("I am not guilty based on the requirements of the statute"), self-defense ("He started it"), or the State's inability to meet the burden of Beyond a Reasonable Doubt ("They haven't proved their case"), or something else? If you don't understand what the legal strategy for the case is, then you might unwittingly mess the whole thing up.

Jury trials are not usually presented with alternative theories, like "it wasn't me, but even if it was me, then the act was consensual." A trial is a competition between two theories to determine which is true. Defendants often want to try to go to the jury with fifty different theories about what happened to see which one sticks, but your attorney is going to the jury with the strongest argument only. Make sure that you understand what your attorney is presenting to the jury so that you and your attorney are on the same page.

Also, you need to know what things you cannot say, because certain comments can open up the door to allowing evidence that was formerly inadmissible. If you have a prior criminal conviction that the jury was not supposed to hear about, but you take the stand and blurt out, "I don't know why they're charging me with this – I've never gotten in trouble before," now the prosecutor can introduce your criminal record to show that you are lying.

Even though you aren't a lawyer (and probably don't care to be one), you're still a smart person and entitled to understand the basics of what's going on before, during, and after the trial. The judge will ask you whether you understand what is going on before important proceedings in the trial, and he or she will assume that you are understanding everything.

You will not be able to raise a defense later and say, "Oh, I didn't understand; I just went along with what was going on." Don't assume that everyone knows that you need some additional explanation, and don't be afraid to ask questions to your lawyer along the way. The right lawyer is happy to answer your questions to ensure that you understand the proceedings.

There you have it – the "Top Ten" mistakes that can sabotage your criminal case. After having read this book, you should be much more aware of the kinds of things that can go wrong during your case, but you probably still have lots of questions. That's okay – this book is not intended to address every possible situation that you might be dealing with, but to help you select the right attorney and keep from getting in hot water by doing something you shouldn't. Avoid these ten mistakes, keep your head up and your heart open, and perhaps something beautiful will happen when you finally get that chance to tell your story to the jury.

DEFINITIONS THAT ACTUALLY HELP

These definitions aren't very formal, but they might actually help you understand what you're reading, as you try to figure out what's going on with your case. Afterward, you can look into other sources or ask an attorney, but here's a head start!

Appeal: A process requesting that a higher court overturn the result of the trial court

Appointed attorney: An attorney who represents defendants that cannot afford an attorney. This can be a public defender or a private attorney appointed by the court if the public defender has a conflict or represents a co-defendant.

Arraignment: When the judge reads the formal criminal charge to the defendant

Arrest warrant: A paper that allows the police to arrest and detain an individual based on probable cause that the person has committed a crime

Bail: The temporary release of a criminal defendant before trial

Batson challenge: Objecting to the exclusion of jurors for unlawful discrimination (like race and gender)

Bench trial: Trial by judge (no jury)

Best Interest plea: When a defendant maintains his or her innocence but admits that there is sufficient evidence to convict (It is still taken by the court as a guilty plea)

Beyond a reasonable doubt: The standard of proof required for a jury to convict a criminal defendant

Bond: Property pledged to the court for the release of a defendant

Bond reduction hearing: A hearing where the defendant tries to show the judge that the he or she has ties to the community, cannot make the current bail amount, and/or is likely to appear for all court dates

Bond revocation hearing: A hearing where the prosecution tries to show the judge that the defendant should be taken into custody for receiving new charges or failing to appear for court

Burden of proof: The party that must prove its case (usually the prosecution)

Cash bond: The full amount of the bond required, paid in cash, to release a defendant from jail (see surety bond)

Character evidence: Trying to show that a defendant or victim has a certain character trait and probably acted the same way on a different occasion (example: the defendant has a hot temper and therefore probably started the fight). This argument is only allowed in some situations

Charge: A formal accusation made by a governmental authority that somebody has committed a crime

Charging document: The piece of paper with the accusation, such as an affidavit of complaint, criminal information, indictment, citation, or traffic ticket

Civil case: A case where a citizen (plaintiff) sues another citizen or business (defendant). If the plaintiff wins, the defendant must pay money

Criminal case: A case where a state or federal government entity (prosecution) sues a citizen (defendant). If the prosecution wins, the defendant may go to jail

Co-defendant: (Also called a charge partner). When multiple persons are charged in the same case

Community Corrections: Alternative sentencing (house arrest)

Concurrent sentencing: At the same time

Consecutive sentencing: One after the other

Consent: When a defendant allows the police to conduct a search, which excuses the requirement of probable cause

Custody: A defendant is in police custody if a reasonable person would not have felt free to leave

Defendant: The person charged with committing a crime

Discovery: Evidence that the prosecution intends to use against the defendant

Diversion: A program where a defendant can avoid jail time and have his or her record cleared after meeting certain requirements

Due Process: Sufficient notice of the charges, the right to have a fair decision maker, and the right to present testimony and evidence

Extradition: When one government entity transfers a defendant to another entity (example: Sent from Tennessee to Texas)

Evidence: Oral or written statements, exhibits (physical objects), and various documents presented during a trial

Evidentiary hearing: Any hearing where the judge rules upon the admissibility of evidence (example: suppression hearing)

Exclusionary rule: Prevents evidence that was unlawfully seized from being admitted into evidence

Exculpatory: Evidence that favors the defendant in a trial

Expert witness: A witness with specialized knowledge, skill, experience, training, or education whose testimony may assist the judge or jury to determine contested facts in the case

Felony: A sentence of one year or more of possible imprisonment

Fifth Amendment: The right to a grand jury, to avoid double jeopardy, to avoid self- incrimination, and to due process of law

Fine: Money that is assessed against you by the judge or by negotiation. Drug and DUI cases often have minimum fines written into the law. A fine is different than court costs

Fourth Amendment: The right against unreasonable searches and seizures

Hearing: A presentation of evidence or legal argument before the judge

Hearsay: An out of court statement used to prove the truth of the statement (example: an invoice by a mechanic to prove the amount of damage to a car when the mechanic is not present to testify)

Hostile witness: When a witness surprises the lawyer who called them and will not cooperate. Being declared hostile means that the lawyer can ask leading questions to limit the testimony of the witness

Hung jury: A jury that cannot reach a unanimous verdict. This usually results in a new trial

Impeaching a witness: Showing that the witness should not be believed due to bias, prejudice, a previous criminal conviction, or because the witness said something different previously

Inculpatory: Evidence that tends toward the defendant's guilt in a trial

Indictment: (See charging document)

Jail: The local holding facility before a person is convicted (See prison)

Judge: The finder of facts in a bench trial and the decider of issues of law in a jury trial

Jurisdiction: The court's authority to hear and rule upon a case

Lay witness: A witness that is not testifying as an expert

Misdemeanor: A sentence of less than one year of possible imprisonment

Mistrial: When a trial is cancelled before a verdict has been returned; often due to improperly admitted evidence, juror misconduct, or a hung jury. The court can hold a retrial when this occurs

Motion: A paper asking the court to take a specific action (examples: suppress evidence, amend the indictment, etc.)

Negotiated Agreement: (Also called a plea agreement). When your attorney and the prosecution agree on a charge and penalty rather than going to trial

Nolle prosequi: When a case is dismissed but can be brought back upon certain conditions

Preliminary hearing: A hearing to determine whether there is enough evidence to require a trial. Also called a probable cause hearing

Pre-trial hearing: A hearing on an issue that must be decided before the trial (example: whether certain kinds of evidence will be admitted at the trial)

Prison: Where a person is sent after conviction by the state department of correction (See jail)

Probable cause: Where the facts and circumstances within the officers' knowledge (with reasonably trustworthy information), are sufficient to believe that a crime is being committed. This is the standard required for a warrant, for making an arrest, or to search property

Probable cause hearing: (See preliminary hearing)

Probation: A suspended sentence (avoiding incarceration but still having to meet certain requirements)

Pro se defendant: A defendant that is representing himself or herself without an attorney. He or she will be held to the same standard as if they have an attorney

Prosecutor: The attorney representing the government, seeking conviction of the defendant

Public defender: (See Appointed attorney)

Reasonable Suspicion: A rational inference related to a particular individual based on specific facts. The suspicion must be more than a hunch but less than probable cause. This is the standard to frisk a person for weapons

Reciprocal Discovery: Evidence that the defendant intends to use against the prosecution

Release Eligibility Date: The first chance that you have to be released from prison. Depending on the length of the sentence, you may be released automatically or have to go before the parole board

Restitution: Money that must be paid to reimburse the victim for loss of physical property

Search: A search occurs when a reasonable expectation of privacy is infringed

Search warrant: A court order that allows law enforcement to conduct a search for evidence

Seizure: Meaningful interference with a person's property

Sentencing hearing: When the judge decides the penalty for a defendant who pleaded guilty or was found guilty. The defendant may testify but is not required to do so. Other character witnesses may also testify

Sex offender: A person who has committed a sex crime (example: rape, sexual battery, indecent exposure)

Sixth Amendment: The right to a speedy and public trial, an impartial jury, to be notified of the charges, to confront witnesses, to call favorable witnesses, and to have assistance of counsel

Statute: A state law (Example: Aggravated Assault is T.C.A. 39-13-102)

Suppression hearing: When the judge decides whether evidence unlawfully seized should not be admissible during the trial

Surety bond: (Also called a corporate bond). An agreement between a person and a bondsman, where the bondsman posts a bond so the defendant can be released from jail (see cash bond)

Testimony: Oral or written evidence given by a witness after being sworn and under penalty of perjury

Time-served offer: Although you are pleading guilty, the case is settled based on the jail time that you have previously served, so none more is need unless you violate probation

Verdict: The finding of fact made by a jury or a judge

ABOUT THE AUTHOR

J. Jeffrey Lee is one of only five Certified Criminal Trial Specialists in Memphis, Tennessee. He has been certified as a Criminal Trial Specialist by the Tennessee Commission on C.L.E. and Specialization and Certified as a Criminal Trial Specialist by the National Board of Trial Advocacy.

He has attended the Tennessee Criminal Defense College on numerous occasions, along with the renowned National Criminal Defense College in Macon, Georgia. He was recently inducted into The National Trial Lawyers Top 100 Trial Lawyers. However, the distinction that gives J. Jeffrey Lee the greatest pleasure is the Client's Choice award from AVVO, and the "10 Best" Client Satisfaction Award from the American Institute of Criminal Law Attorneys, because that means that his clients are pleased with the representation he provides. He is a member of TACDL (Tennessee Association of Criminal Defense Lawyers) and NACDL (National Association of Criminal Defense Lawyers).

Mr. Lee began as an Assistant Public Defender in the 25th Judicial District of Tennessee (Lauderdale, Tipton, Fayette, Hardeman, and McNairy Counties). His responsibilities included representing the indigent accused in General Sessions Court, Circuit Court, and the Court of Criminal Appeals. He performed a variety of matters, including preliminary hearings, suppression hearings, jury and bench trials, appeals, revocation hearings, and post-conviction hearings.

After working as a public defender, he formed his own law practice and he has recently narrowed and focused his practice in the area of serious felonies and sex crimes in an effort to serve an underrepresented and marginalized group of defendants who desperately need a first-rate defense.

The Law Office of J. Jeffrey Lee primarily serves the greater Memphis area. If you or someone you love needs legal representation, please contact the author.

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