

Ten Lessons Learned In Switching From Criminal Prosecution To Criminal Defense

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The Paul Revere print of the Boston Massacre, 1770. (See #10 infra.)

1. Contrary to popular belief, criminal defendants don't confess their crimes to their defense attorneys and then ask for help with falsely testifying to the judge or jury.
2. Instead, criminal defendants lie to their defense attorneys. This is an inescapable part of the job of being a defense attorney.

3. The decision to waive a preliminary hearing, the decision to go to trial or plead guilty, and the decision to testify at trial are the client's decisions. The defense attorney should present a recommendation, but in the end it is up to the client. See, e.g., *State v. Denton*, 2011 WI 70, ¶72, 335 Wis. 2d 681, 712 (defendant may disregard attorney's recommendation on whether to testify). The client's informed decision may differ from the attorney's recommendation, and that's okay, even if it is frustrating for you as the attorney.

4. Prosecutors have an enormous amount of discretionary power, and that power is largely unchecked by judges, defense attorneys, journalists or voters. In the words of muckraking Madison journalist Bill Lueders, "Prosecutors have always been the justice system's most powerful and least accountable players."¹

5. When I was a prosecutor, I mistakenly concluded that I was a good lawyer because I won almost all my cases. In fact, the system is heavily weighted toward the prosecution, so any reasonably competent prosecutor should be winning almost every case. For example, statistics kept by Judge Nicholas McNamara over a 3-year period show that almost 99 percent of the criminal cases in his branch were resolved before trial. The other one percent included 39 criminal trials resulting in a jury verdict. The State won 77 percent of those cases (30 trials) and the defense won 23 percent (9 trials).² Moving from the DA's Office to the defense bar can feel like being traded from the Harlem Globetrotters to the Washington Generals.

6. A private bar criminal defense attorney is both a business owner and a lawyer. Part of being successful in these two roles is not violating either the formal SCR ethics rules or the unwritten rules of collegiality and professionalism.

7. You should do pro bono work. "Every lawyer has a professional responsibility to provide legal services to those unable to pay." SCR 20:6.1. However, the decision to work pro bono should be your decision, not your client's decision. When you do work for a client who chooses not to pay you, your client has effectively decided that you will be working pro bono for him.

8. As Biggie Smalls rapped, “Credit? Dead it.”³ If your client won’t pay you at the beginning of his criminal case, he won’t pay you after the case is over. It’s always better to have difficult conversations about fees at the beginning of the case rather than at the end of the case. If you use hourly billing, advanced fees (aka retainers) are permitted under SCR 20:1.15. Be careful: the rules for managing IOLTA trust accounts are complex, and violating the trust account rules can lead to you having to hire your own defense attorney. Another option is a flat fee paid up front, but the fee must be reasonable. See SCR 20:1.5.

9. The case is not about you the lawyer; it’s about your client the person. This principle is not as simple and easy as it may appear.

10. Criminal defense work is a noble profession. If I won the lottery, I would still be practicing criminal defense law. At least two future U.S. Presidents included criminal defense work as part of their legal practice. Abraham Lincoln defended a number of criminal cases, including the “light of the moon” murder case, in which Lincoln used an almanac to discredit a witness’ testimony that he had witnessed the murder by the light of the moon.⁴ John Adams successfully defended the British soldiers who fired into the crowd at the Boston Massacre. Years later, Adams wrote that his defense of the Boston Massacre soldiers was “one of the best pieces of service I ever rendered my country.”⁵

¹ Bill Lueders, *Watchdog: 25 Years of Muckraking and Rabbleroising* (2010) at 76.

² Judge Nicholas J. McNamara, “A Three Year Retrospective from One Dane County Criminal Court,” CLE presentation to the Dane County Criminal Defense Lawyers Association, Feb. 12, 2013. Please note that although the statistics cited were gathered by Judge McNamara, the commentary on what those statistics mean, and the analogy to the Harlem Globetrotters, are mine alone.

³ Veronique Hyland, “Lessons About Money from Biggie’s ‘Ten Crack Commandments,’” www.thebillfold.com.

⁴ David Herbert Donald, *Lincoln* (1995) at 151. See also John Skilton, “Abraham Lincoln: A Lawyer for the Ages,” State Bar of Wisconsin CLE outline, at 18-19.

⁵ John Adams, quoted in David McCullough, *John Adams* (2001) at 68.