

REPRESENTING THE ACCUSED

A Practical Guide to
Criminal Defense



Jill Paperno

Representing the Accused

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ASPATORE

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CONTENTS

Introduction.....	9
Chapter 1: Types of Representation	13
Chapter 2: Organization: Files and Technology	25
Chapter 3: General Advice to Improve Your Practice	43
Chapter 4: The Life of a Case	61
Chapter 5: The First Interview	67
Chapter 6: Arrest, Arraignment, and Bail Procedures	91
Chapter 7: The Defense Theory of the Case.....	107
Chapter 8: Felony Practice: Probable Cause or Preliminary Hearings and Grand Jury	113
Chapter 9: Giving and Getting Information Part I: Discovery, Requests for Bills of Particulars, and <i>Brady</i>	129
Chapter 10: Giving and Getting Information Part II: Investigation	145
Chapter 11: Subpoenas	163
Chapter 12: Motions.....	179
Chapter 13: Hearings.....	191
Chapter 14: Pleas and Dispositions	209
Chapter 15: Trials.....	233
Chapter 16: Sentencing.....	263
Chapter 17: Conclusion.....	275
About the Author	277

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Dedication and Acknowledgments

Dedication

This book is dedicated to the past and present members of the Monroe County Public Defender's Office, who have always strived to provide high-quality representation under the challenging circumstances inherent in public defense work, and to public defenders everywhere.

Acknowledgments

I would like to acknowledge the love and support of my family—my husband, Les Scinta, my son, Alex Scinta, and my stepchildren, Nick and Beth Scinta. I cannot begin to express my appreciation for the help of my friend, mentor, and one of the finest lawyers and people I know, Brian Shiffrin, who was generous in time and suggestions for this book, and the Shiffrin family, who have become my family. And I want to thank the past and present members of the Monroe County Public Defender's Office who have always provided each other with support, training, and encouragement and made the office a great place to come home to at the end of the day.

I would like to also thank Ed Nowak, the former Monroe County Public Defender, for hiring me and developing an office in which skill, training, and knowledge are valued, and Tim Donaher, the current Monroe County Public Defender, for continuing and expanding on the tradition of striving for excellence in our office and finding new and creative ways to enhance our practice. I would like to thank the members of Easton, Thompson, Kasperek, Shiffrin who exemplify the finest qualities of those who practice criminal law; Bill Easton, former supervising attorney of the Capital Defender's Office in Monroe County, whose level of practice is one that many of us can only dream of, Don Thompson, my personal hero, who has successfully achieved exonerations for several of his clients, Larry Kasperek, whose fearless representation of his clients is the personification of the phrase "question authority," and Brian Shiffrin, appellate attorney extraordinaire. Each one is always ready, willing and able to share their knowledge, experience and advice, and it is always valuable.

Finally, I would like to thank every criminal defense lawyer, whether public defender or private attorney, who makes the effort to ensure that our clients are treated with dignity and provided high-quality representation and that our colleagues receive support and guidance throughout their careers.

CONTENTS

Introduction.....	9
Chapter 1: Types of Representation	13
Chapter 2: Organization: Files and Technology	25
Chapter 3: General Advice to Improve Your Practice	43
Chapter 4: The Life of a Case	61
Chapter 5: The First Interview	67
Chapter 6: Arrest, Arraignment, and Bail Procedures	91
Chapter 7: The Defense Theory of the Case.....	107
Chapter 8: Felony Practice: Probable Cause or Preliminary Hearings and Grand Jury	113
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Chapter 10: Giving and Getting Information Part II: Investigation	145
Chapter 11: Subpoenas	163
Chapter 12: Motions.....	179
Chapter 13: Hearings.....	191
Chapter 14: Pleas and Dispositions	209
Chapter 15: Trials.....	233
Chapter 16: Sentencing.....	263
Chapter 17: Conclusion.....	275
About the Author	277

Introduction

I became an assistant public defender in 1987, before DNA was a tool used in criminal prosecutions, before computers were standard law office equipment, and well before the existence of cell phones, triangulation and pinging. Although the practice of criminal law has changed radically in many ways over the years, much of it is the same as when Clarence Darrow defended Leopold and Loeb. The science and technology may have changed, but the approach to handling cases is timeless.

I have been incredibly fortunate in having had the opportunity to spend my career in the Monroe County Public Defender's Office, a wonderful public defender's office, where training is valued and promoted. I was lucky enough to learn from an amazing group of defense practitioners who devoted their careers to representing the indigent, and ensuring that each person they represented received the same, or better defense than those who could afford to pay to retain counsel. As I became more experienced, I helped to develop our office's training program, teaching younger attorneys in my office and in my community. Over time I have learned that teaching skills not taught in law school, such as how to work with clients, organize files and handle a caseload, is often as important, or more important, than rules of evidence and trial technique. Evidence and trial technique are skills we use periodically; case management and client skills are necessary every day.

In the following pages I hope to provide the beginning practitioner with information and advice often given by experienced defense attorneys to newer practitioners. In sharing this information, I hope to help less experienced attorneys, as well as law students practicing in criminal defense clinics, learn techniques and methods in handling criminal cases, and avoid the errors I made along the way (and sometimes still make). Most importantly, I hope to contribute to the improvement of the quality of defense services provided to those who do not have the opportunity to choose who represents them.

Although criminal practice differs from state to state, and between state and federal courts, there are many areas in which practice in all of these areas is

similar. I will be attempting to provide you with general advice concerning criminal practice, as well as some specific examples of issues that arise in criminal cases.

After you are assigned or retained on a case, you will find most cases follow a similar course. Although handling of cases varies from jurisdiction to jurisdiction, generally a case will start with an arraignment in which the client is told of the charges he faces and assigned counsel or given the opportunity to retain counsel. Generally, depending on the type of charge, a case may remain in a lower level court or move to a higher court, sometimes following presentation to the grand jury. There may be discovery procedures and motions filed. Some cases may be dismissed along the way. Eventually, in most cases, a client will have to decide whether to take a plea or go to trial.

The quality of a plea offer, whether a case will be dismissed, and the outcome at trial will often depend on the representation you provide to the client. Whether the client and his family and friends understand the process and reach a decision they can accept will also often depend on the representation you provide.

There are many ways that you can enhance the quality of your representation. You will develop some of these methods through experience. But there are some things you can learn immediately, such as how to handle the first meeting with a client, how to organize your files, and how to approach plea negotiations, which will improve the quality of your representation, your client's experience, and your own.

Remember, this is general advice to help you develop and improve your practice, and is not based on a specific review of the statutes that apply to criminal law in your jurisdiction. This book is not intended to be specific legal advice for you to provide your clients.

Whether you accept all of the suggestions in the following pages, some, or none, you should be mindful of the decisions you are making as you handle your cases. Find systems and a style that work for you, and consider the choices available to you as you advance in your practice. Always remember that the person you are representing is facing frightening possibilities and a

difficult process, and you are the person he is depending on to help him through it. If this work only causes you stress and frustration, consider finding something else that makes you happier. If you find joy in this work, it can be the greatest career you can ever choose, and you will likely be the kind of attorney who cares about your clients and ensures that they are well represented. And that is what I wish for you and your clients.

Finally, the alternating use of the pronouns “he” and “she” are used in an effort to gain some gender neutrality.

Types of Representation

Why Criminal Defense?

There are many reasons that attorneys become criminal defense lawyers. Some choose criminal defense because they believe their work protects the rights granted to all by the Constitution. Some want to help those less fortunate. Some find the work exciting or want to gain experience in trial work. Others seek to fight governmental and police intrusion into citizens' lives. There are those who enjoy the personal challenges and rewards of research, writing, courtroom work, negotiations, and the connections with clients. Some do it for many or all of these reasons, and some have their own. Whatever your reason, you will have to decide how you may choose to enter the field.

Decisions, Decisions

There are several ways an attorney can practice criminal defense. If you are a law student, you may be considering which of these ways might be best for you. If you are an attorney entering the field, you may also have these questions. Each form of criminal practice provides benefits and drawbacks. As you think about how you want to enter the field, you should give some thought to these pros and cons, as well as which type of practice best suits you.

Generally, attorneys practice criminal defense by joining a public defender's or Legal Aid office, by picking up assigned counsel cases, or by handling cases in which they are retained by individuals in the course of their private practice. Attorneys in some jurisdictions may be part-time public defenders