



May 2012 Self Study Examination

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That 3:00 a.m. Phone Call

By David Michael Bigeleisen

It's three o'clock in the morning. Your wife nudges you. "Michael, the phone is ringing." You listen. You hear the answering machine pick up and a voice make a recording. The recording ends. Then the phone rings again. Again there is a voice on the answering machine. This time you put on your slippers, go downstairs, and pick up the receiver, just before the message is about to end.

It's your client Harry. You have helped him many times over the years. You helped him to purchase his first restaurant, you helped him with his lease, with his liquor license, and with some employment and tax problems. You and your wife have eaten at his restaurant many many times. You were a guest at his oldest daughter's wedding. You know the whole family. "It's my son Bill," says Harry. "He's in jail. I think he's in a lot of trouble. You have to help."

You are a commercial and real estate lawyer. You help people put deals together, and you do a little bit of litigation for them. You haven't looked at a criminal case since law school. You know you have to act quickly.

Pour yourself a cup of yesterday's leftover coffee, splash some water on your face and put on your shirt and trousers. I'll walk you through it.

INITIAL INFORMATION

Harry is speaking very quickly, he's upset and he isn't speaking clearly. Stay calm and you will calm Harry down. Get the exact name of the person who is calling and a phone number where he can be reached at any time. Then get the exact name of the accused. In this case, Bill may not be the young man's legal name. Many people come to this country as immigrants in their mothers' arms. They adopt assimilated names, and use them every day. But the legal name, which will be on the police blotter and the Court documents will be different. Be sure to get both. You will need both.

Find out what Harry thinks has happened, how he found out, and where Bill was when he was arrested. Ask Harry if he knows what the charges are and how much the bail is. Find out where Bill is right now. Give Harry your land line and your cell phone numbers.

If Bill calls Harry again, instruct Harry to give Bill your phone numbers.

This next part is really REALLY IMPORTANT. Tell Harry to tell Bill not to talk to the police or anyone else about his case. Bill is not to talk to anyone about the facts of the case over the phone. Those calls are recorded by the police. You will be coming to see him as soon as possible.

Now you need to find Bill. If Harry was able to tell you where Bill was calling from, that's a good place to start. Call the police station or the jail and find out if Bill is still there. The correct spelling of Bill's name, and his date of birth will be critical. You will have to be patient and persistent. Ask what the charges are, what the bail amount is, and whether they plan to move Bill in the next six hours. If so, find out where to, and when. You may have to use educated trial and error to track Bill down, but keep at it.

Ask to speak with the watch commander or the watch captain at the station or jail. Tell him that you are Bill's lawyer. You will be coming to see him. Tell the watch captain that no one is to interview or question Bill until you arrive. This doesn't always work, but you have to make your case.

Now you figure Bill may be trying to reach you on the phone. Good. The accused is entitled to complete two telephone calls to his lawyer. Calls from prisoners are almost always monitored and recorded. Tell Bill not to say anything about the case over the phone. Ask him if he knows the charges and what the bail is. Of course, find out where he is, and whether they plan to move him.

Find out if Bill is hurt or needs medical attention. If that is the case, speak with the watch captain and get things started. I had one client who went into labor as soon as she was arrested. Her daughter was born under sheriff's guard at General Hospital. Fortunately, both mother and daughter are doing well.

Again, this is REALLY IMPORTANT. Tell Bill not to talk to anyone about his case. You are coming to see him right away. Tell him if anyone tries to question him, he has only one answer: "I don't want to talk to you. I want my lawyer, right now." Have Bill repeat this to you several times.

SEE THE CLIENT IN JAIL

Now it's time to go to see Bill. In civil practice, everything can wait until 9:00 the next morning. Not when your client has just been arrested.

Most jails have facilities to talk with your client by telephone, with a thick piece of glass between the two of you, and facilities for contact visits. You want a contact visit if you can get it. Call ahead to the jail to try to make arrangements. Regardless of the response, go right now. You will need your driving license and your bar card. Leave your cell phone, your Swiss army knife and your cigarette lighter in the car.

The jailer will not let you in if you have those things.

Bill is going to be upset, agitated and distracted. He may speak incoherently. Be patient. This is just the first interview.

You are going to want to get some basic information, and establish a basis for trust.

On TV, the lawyer will begin by asking the client "Did you kill the guy?" This is a bad way to start. One better way goes something like this, "Your Dad sent me to see you. Everything you tell me is confidential. It's a secret. I'm not allowed to tell anyone anything you tell me without your permission, not even your Dad. Are you ok with that?" Pause. "Now, tell me what happened." I usually write nothing, or almost nothing on the first go through. I let the client talk.

You need to caution the client once again. You simply cannot be too thorough about this. The police are extremely skillful at squeezing confessions out of people. These include false confessions.

The cop may tell your client that the co-defendant is in the next room. The prisoner who confesses first and points to his co-defendant will be treated with leniency, but the one who holds out will be dealt with harshly. This is called the prisoner's dilemma. The famous mathematician, John von Neumann, wrote essays about this.

The cops may try to question your client for a few hours, leave him alone, and then keep bringing him back. They may deprive him of sleep. They may invoke sympathy for the client's family or for the victims of the crime.

The cops may say "Well if this is a really bad crime, such as a murder, you could get life, or even the death penalty. But if it was an accident, then you are innocent." They will push the client up and down this roller coaster until he gives in and says it was an accident. It won't help. All the cops really wanted was to have your client place the knife in his own hand. This is called the Reid method.

The police often place informants into the cell with the client. These are desperate people with a huge amount to lose. If you meet one of them, and he tells you it's Wednesday, look at a calendar.

A jailhouse informant will try to get mundane personal information from your client. He will then weave this into a fabricated confession to give this fairy tail the appearance of authenticity.

The police tactics which you see in old gangster movies pale in comparison to reality.

Caution your client not to talk to ANYONE about his case. This is REALLY IMPORTANT.

If you can't have a contact visit with your client, you will have to take a different approach. The authorities often listen in on the intercom, even though this is forbidden. Explain to the client. Tell him you will be coming back.

RELEASE FROM JAIL

One can be released from jail on bail, or on his own recognizance. Own recognizance is sometimes simply called O.R.

The words and process in Federal Court are slightly different, but the substance is the same. Bail can be posted by cash bail, or by a bail bond. With cash bail, the accused or a relative deposits a check or cash in the full amount of the bail with the Court. When the case is over, the person who made the deposit gets all of his money back. This can also be done by depositing securities or real estate, but this is cumbersome and time consuming.

In most cases, the family cannot afford the full amount of cash on short notice. So your next step is to a bail bondsman. The bondsman will file an undertaking, written against the credit of an insurance company. The bondsman charges a fee, usually ten percent of the amount of the bail if the accused is unrepresented, but eight percent of the amount of the bail if the accused has engaged a lawyer.

A good bondsman can be very helpful. The bondsman will know the people at the jail and at the bail window. He will know the local lore. Experienced criminal defense lawyers have a regular relationship with a bondsman. The best bondsmen have been around for a long time. Be careful of the bondsmen who extend credit. If your client misses a payment or two, they may throw him back in jail.

The initial bail amount is called station house bail. This amount is based on the charges that the police write down when the accused is booked into jail. The actual amount of bail can go up or down when the accused appears for the first time in Court. For example, many criminal cases can be charged either as a felony or as a misdemeanor. The police usually start out with felony charges. But if the injuries are minor, then the district attorney may charge the case as a misdemeanor. The amount of bail will go down.

The bail may also go up. By the time the case gets to Court, the circumstances may look a lot worse to the Judge and the prosecutor than they did at first.

Every county has a schedule of bail for specified offenses. You can find this on the Court's website.

Many people are released on their own recognizance. This simply means that they make a promise to appear for their Court matters. The Court may impose conditions on release, such as reporting in to the O.R. project, staying away from the accusing witness, not leaving the county or State, or surrendering a passport.

The chief issues in setting bail are public safety, and the likelihood that the accused will flee. Ask Bill where he grew up, does he have a local job, and for how long. Does Bill have family in the area, does he own property in the area.

The Court usually arranges to have the accused interviewed by the O.R. project. The O.R. project will report to the Court. The interview with the O.R. project is an exception to the don't talk to anyone rule.

NON-CITIZENS

Harry and his wife, Sheila were born in Vietnam. Harry's given name when he immigrated was Nguen Ha, and that's how it appears on all of this official documents. But he uses Harry Wu in everyday discourse. The whole family came over from Vietnam together. They are lawful permanent residents, but none of them has become a citizen. So what, you say, Bill is here legally, not to worry. Wrong.

8 U.S.C. §1101 describes an aggravated felony. Anyone convicted of an aggravated felony is subject to deportation and exclusion from the United States. Beware, the term aggravated felony includes many crimes which are described as misdemeanors. When someone is arrested, the immigration and customs enforcement people search the jail records for people who are not citizens. If such is the case, they will place a hold on him. It will be almost impossible to get Bill out of jail if this happens.

If Bill is not a citizen, tell Bill and Harry that Bill should not talk to the immigration people. Have Harry pay the bondsman her fee on the

spot. Get Bill out of jail right away.

FIRST COURT APPEARANCE

The first Court appearance is called arraignment. It will happen very quickly. Under *County of Riverside v. McLaughlin* (1991) 500 U.S. 44 the accused must be brought before a magistrate without undue delay, and in no event in more than 48 hours. In San Francisco, you will find Bill's case number on the calendar posted opposite the clerk's office on the ground floor at 850 Bryant Street. In other Bay Area counties, there will be an illuminated blue electronic screen to tell you which courtroom to go to.

Give the clerk your card, and speak with the prosecutor. Ask for a copy of the complaint and the police report. When you come to Court, you will notice a difference between those who are still in custody and those who have been released. There is also a difference between those who are dressed in street clothes and those who wear a suit or the equivalent. The difference is palpable.

Be sure to have the client's family, friends, co-workers, boss and clergyman with you when you appear in Court. Do this every time. When the Judge calls the case, introduce yourself and Bill. Then turn around and gesture to the family and have them stand up. Introduce them to the Judge.

Judges are middle class. When they see that the accused has family and friends who love him and care for him, he will identify with the accused; he is like my son.

By contrast, if the accused appears alone, the Judge will think that he has no one to love him and care for him. You don't want this.

If Bill is still in jail, you want to try to get him out. Try for O.R. or for a reduced bail. The judge will ask if you will be making a general appearance, and if Bill is going to enter a plea. It is very seldom a good idea to plead guilty at arraignment. If you wish, you can have a continuance before entering a plea.

You also need to get paid. It is very appropriate to ask for a continuance so that the accused and his family can make financial arrangements. The judge will give you a new court date.

Now go home and take a nap.

Examination Questions (True/False) and Instructions

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