

Aftermath of a Shooting – Finding and hiring Counsel¹

By Lisa J. Steele

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The previous essay started with the assumption that you've used your lawfully owned and carried firearm in self-defense. The aggressor was wounded, perhaps dying. You have never needed an attorney's help before, but you think now would be a good time to hire someone. How do you find an attorney?

What to Look for in an Attorney

At minimum, you need someone familiar with criminal defense, and preferably familiar with the specific trial courts and prosecutors who may become involved with your case. That does not narrow things down significantly.

Fundamentally, you need someone whose judgment you trust. If you are arrested and you decide to take the case to trial, you may be working with this person for several years. Your attorney will have to make a number of decisions on your behalf, sometimes very quickly. Your legal rights can be significantly affected by those decisions. At other times, you are going to have to make very important decisions based on that attorney's advice --- again, your future can be very significantly affected by those decisions. You need to understand how those decisions will be made, which can and will be discussed with you, and how disagreements between yourself and your attorney will be resolved.

You also will need someone who can communicate well with you. You may prefer to talk on the telephone, or meet periodically, or write and receive letters --- you will want to hire someone who will promptly respond to your calls or letters in a way that answers your questions and helps you make important decisions about your case. When you meet with an attorney, think about whether you feel comfortable that the attorney listened to you and answered your questions. (If the attorney is part of a firm, you should find out whether the person you speak with will be the person actually doing the work on your case. If not, you may want to meet with those who you will be dealing with most often.)

You may want to ask the attorney specifically about his or her experience with self-defense cases, experience with firearms, and feelings on the rights of citizens to defend themselves. If the attorney is not specifically familiar with firearms or with self-defense, don't despair. A self-defense case can involve dozens of technical topics, from psychology of witnesses and persons under stress to the mechanics of firearms operation to various forensic specialties like crime scene reconstruction, blood spatter analysis,

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gunshot residue testing, and firearms identification testimony. You are unlikely to find an attorney who is personally an expert in all of those areas and you may not know which fields will be most important early in the investigation. If the attorney you hire is open to learning about appropriate areas, willing to consult with appropriate experts and learn what he or she needs to know about the specific issues in your case, then you may be in good hands. Ask questions as the case progresses to ensure your confidence in your attorney's understanding of the legal and technical issues in your case. You can also offer to lend books, articles, and other materials to your attorney to help him or her understand the specific firearms, ammunition, and tactics involved in your case.

You may be tempted to ask the attorney about his or her win/loss record. The answer may not be helpful. Every case is unique – more so when it comes to the idiosyncrasies of judges and juries. And what do you mean by win? No experienced prosecutor has likely had convictions in every case he or she has tried; nor has any criminal defense attorney likely had an acquittal on all charges in every case he or she has handled. A win may mean a plea agreement that is more favorable to the client than the probable result at trial or a conviction for a less serious charge than the prosecutor sought. “Win” is very much in the eye of the beholder. Are those wins comparable to your case? A streak of wins in misdemeanor cases may not be as significant if you are charged with a homicide. In general, the attorney's record is far less important than whether he or she is dedicated, conscientious, and will work hard on your case.

You may want to talk to the attorney about what happens if you later find that you are unhappy with the attorney's services and want to hire someone else. Ask about what happens to any unused portion of a retainer. Ask about how your file will be transferred. Ask about fee dispute resolution services like mediation or arbitration. Ask about whether the attorney has had any complaints against him or her with any disciplinary office.

That, of course, brings you to the very real issue of attorney's fees. Legal representation isn't cheap. A criminal trial may cost more than your car, or even more than your house. But it is your life, your reputation, and your freedom at stake. On the other hand, the most expensive attorney may not be the best attorney to represent you. You may need to look at a variety of attorneys, not just the most expensive attorney in town.

When you call an attorney, find out whether he or she will charge you for an initial visit or telephone call. Think carefully about whether you want to spend money to decide whether this attorney is a good fit for your case.

During the meeting, if you and the attorney decide that he or she will represent you, the attorney will likely ask you to sign a fee agreement and make a substantial deposit. Read the agreement carefully – it will spell out your attorney's obligations to you, and any limitations on his or her work for you. It will also explain if, and how, you can recover any unspent retainer fees if you and your attorney disagree and you want to hire someone else.

If someone else is helping you pay for your legal representation, you and your attorney need to talk about to what extent your attorney can or should talk to that third person about the status of the case. Ultimately, you are the client, regardless of who is paying the bills and the attorney's duty of loyalty is to you. Similarly, you may want to talk with the attorney about whether he or she can or should disclose information about the case to your spouse or concerned members of your family.

Finding a Lawyer

Now that you have some idea what you are looking for, how do you find someone?

You can start with the telephone book. If you had to defend yourself away from your home, but still in your home state, look for attorneys in the telephone book of the area where the incident occurred as well as in your local telephone book. If you had to defend yourself in another state, you will need to find an attorney licensed to practice in that state. The telephone book may have listings of attorneys by areas of practice, so you can narrow down the list to attorneys familiar with criminal defense.

The telephone list is very general. If you want to narrow down your search, you could look for attorneys who are members of your state bar associations' criminal defense section, or members of your state's association of criminal defense lawyers (MACDL in Massachusetts). Membership in these groups tells you that the attorney is interested in criminal defense issues, but do not mean that the attorney has a specific level of training, experience, or proficiency.

Some firearms training and advocacy organizations have lists of attorneys. Again, these lists may only mean that the attorney is interested in self-defense or firearms law matters and has asked the organization to refer clients to him or her, not that he or she has specific training, experience, or proficiency in firearms or self-defense cases.

If you have had formal firearms or self-defense training, you can ask your trainer if he or she has been involved in any self-defense cases and/or knows any attorneys who have been involved in such cases.

You may want to try the newspaper archives for attorneys who have recently tried self-defense cases or defended police officers in officer-involved shooting cases. Most newspaper websites allow you to search their archives. Unfortunately, not all stories name the defendant's attorney. You may also want to keep an eye on your local paper whenever a self-defense case comes up, and note the name of the attorney(s) involved, particularly if the defendant was acquitted.

Whatever method you use, you probably want to speak to several attorneys to get a feel for different styles of communication, experience, and that nebulous sense of trust. Again, you are going to be working with this person for months, and perhaps for years; make sure you are comfortable with him or with her.

Public Defenders

If you qualify for public defender services, you will be assigned an attorney at your first court appearance (typically the arraignment). Public defenders tend to be very experienced at criminal litigation and tend to know the local prosecutors, judges, and police officers well. On the other hand, they also tend to have large caseloads, which may leave them little time for long conversations about your case. Thus public defenders will tend to want to use their time with you very efficiently, and may come across as brusque. You will not get a choice of counsel, and it is not easy to replace your attorney if you come to disagree about your case.

Representing Yourself

You do have a federal constitutional right to represent yourself in a criminal case. This is not a good idea – some judges compare this to trying to do your own heart surgery. You will be dealing with a prosecutor who is trained and experienced with the law. He or she has no obligation to help you with your paperwork or give you advice; although he or she cannot take advantage of your inexperience to violate the procedural or evidentiary rules. He or she will treat you as if you were a trained member of the bar. Similarly, the judge can, and often will, treat you as if you were an attorney and expect you to behave appropriately.

If you are incarcerated, you will be at an even greater disadvantage. Your ability to meet with or telephone experts and witnesses will be limited. Your communications may be recorded or inspected – you will not have the same privileges as an attorney protecting legal mail and work-product. You do not have a right of access to legal materials --- legal materials maintained by Corrections may be out-of-date, incomplete, or not available.

Hiring an Attorney in Advance of a Self-Defense Situation

Some self-defense trainers will recommend that you hire an attorney on retainer as part of having a license to carry. When the author has asked other attorneys about referrals, she has often been met with blank stares --- this is an unusual situation for a criminal defense attorney. Under the Massachusetts Rules of Professional Conduct, Rule 1.2(c), a lawyer cannot “counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.” A lawyer can help a client understand the scope, meaning, and application of, for example; self-defense law, however, in talking to some defense attorneys about a prospective consultation, the author has heard concerns that legal advice about the then-current state of self-defense might be misconstrued, or about whether they would have an ongoing duty to keep a client advised about changes in the law. Others were concerned that a client seeking that sort of advice might have bad intentions and be looking for a way to legally kill someone. (Working in criminal defense tends to make one a bit cynical.) Certainly, you can research appropriate attorneys and contact one prior to any incident, particularly if you have questions about your state’s laws and want someone to research the answers for you. Just don’t be surprised if the attorney seems puzzled by your request. Also, be aware that if the attorney gives you advice; you rely on that advice; and you intend to introduce evidence of your reliance on that advice at trial, then he or she may be a possible trial witness and unable to represent you. (Lawyers are not generally allowed to be witnesses and counsel in the same trial.)

Working with Counsel

Every state has an ethics code which an attorney is expected to heed. The code broadly defines the attorney’s duties to clients, courts, and opposing counsel. Your responsibility is to communicate clearly with your attorney – make certain that he or she understands the facts of your case, your concerns and questions, and your priorities for your defense. Many lawyers bill on an hourly basis, so you should prepare for telephone calls or meetings so that you can use your time efficiently. Your attorney’s responsibility

is to zealously represent you within the bounds of the law. This includes communicating with you promptly and efficiently.

Certain decisions in a criminal case are yours, and yours alone. Your attorney can give you advice, but only you can decide, for example, whether to take a plea offered by the prosecution, whether to go to trial, whether to be tried by a judge or a jury, and whether to take the stand and testify. See Massachusetts Rules of Professional Conduct, Rule 1.2(a). Many other decisions --- which witnesses to call, how to examine or cross-examine a witness, when and how to object, and so on --- are tactical decisions your attorney will make, having consulted with you about general tactics. You should talk with your attorney about your goals for, and concerns about your case, and make sure that you understand the attorney's intentions.

One note: you need to tell your lawyer the truth about your case. He or she needs to know all the bad facts about you and the incident as soon as possible. There's little worse for your case than when your attorney is blindsided by the prosecutor because you didn't mention something important.

If you have witnesses or experts that your attorney should talk with, let him or her know as soon as possible. If your attorney is reluctant to call a witness that you think would help you, talk to your attorney about why he or she thinks that doing so is a bad tactical idea.

If you disagree with your attorney's advice or tactics, you need to discuss the problem with him or her as soon as possible. Document your disagreement in a letter if you feel strongly about it. You are the one risking jail, not your attorney, you need to feel comfortable with the defense of your case.

Who Can You Talk To?

Anything you say to your attorney is privileged. For the most part, your attorney cannot disclose it to others, nor can the prosecutor use it against you. Similarly, conversations between your attorney and experts he or she hires are generally protected as attorney work-product. By statute, your spouse and minor children cannot be compelled to testify against you in most situations and cannot disclose most family communications. General Laws ch. 233, § 20. Similarly, conversations with a psychotherapist when seeking diagnosis or counseling and with a member of the clergy when seeking counseling are, for the most part, privileged by statute. See General Laws ch. 233, § 20A (priest-penitent), ch. 233, § 20B (psychotherapist-patient). Your medical records are protected under the common law doctor-patient privilege, but this is a complex area because of the various decisions creating and interpreting the privilege. If you have questions about the scope of these privileges, you should talk to your attorney.

There are some important exceptions here – if you tell someone that you are about to commit a crime, or they think you are a danger to yourself or to others, they may be able to report that fact to police, prosecutors or others. Similarly, your attorney is not allowed to participate in perjury, destroying evidence, or presenting false evidence – your attorney would be forced to withdraw from the case before allowing that to occur.

Note also, that if the aggressor survives and is being prosecuted, there are circumstances in which his attorney can seek disclosure of your psychiatric and medical records. Of course, in that situation it is highly unlikely that the prosecutor would be also prosecuting you for using force to defend yourself against the aggressor.

If you talk about the case to anyone else, there is a risk that they might voluntarily disclose the contents of your conversation to the prosecutors or that they might be subpoenaed by the prosecutor. The author represented a client in an appellate case who had become involved in an altercation to defend his then-girlfriend and killed the aggressor. During the lengthy pre-trial proceedings, he had a falling out with her. She voluntarily turned over all of his heartfelt letters to her, some describing the incident, to the prosecutor and testified as a prosecution witness.

While you will need to tell your friends and family members something about what happened, be aware that you could place them in an awkward situation if you tell them too much about the incident. Again, talk with your attorney if you have specific questions.

If you are incarcerated, your mail and phone calls can be copied/recorded and monitored. Counsel was involved in another appeal in which an incarcerated client's letter to his mother while waiting for trial was intercepted by the prison authorities and used against him at trial. Your legal mail is privileged, but if you keep it in your cell it might be vulnerable to a cell search. Be very discreet about what you say to others, including to other inmates.

Further Reading:

[Advice on Finding a Lawyer](#)

[Advice on Hiring a Criminal Defense Lawyer](#)

[More Advice on Hiring a Criminal Defense Lawyer](#)

[Twelve Questions to Ask Your Lawyer](#)

[Essay on Attorneys Fees](#)

[Essay on Lawyer and Client's Duties](#)

[Working with a Criminal Defense Attorney](#)

[Essay on Win/Loss Records](#)

[NACDL Member Directory](#) (national lookup)

[MACDL Member Directory](#) (Massachusetts)

Massachusetts Bar Association Lawyer Referral Service -- (866) MASS-LRS

[Board of Bar Overseers \(MA\) Attorney Lookup](#)

[Mass. Rules of Professional Conduct](#)

[CCDLA Member Directory](#) (Connecticut)

[Connecticut Bar Association Member Directory](#)

[Connecticut Grievance Committee](#)

[Mass. Statutory Research:](#)

General Laws ch. 233, § 20 (spousal and minor children privilege)

General Laws ch. 233, § 20A (priest-penitent privilege)

General Laws ch. 233, § 20B (psychotherapist-patient privilege)

[Conn. Statutory Research:](#)

Conn. Gen. Stat. § 52-146 (spousal privilege)
Conn. Gen. Stat. § 52-146b (priest-penitent privilege)
Conn. Gen. Stat. § 52-146c (psychotherapist-patient privilege)
Conn. Gen. Stat. § 52-146k (sexual assault/battering counselor privilege)
Conn. Gen. Stat. § 52-146o (physician-patient privilege)
Conn. Gen. Stat. § 46p (marriage counselor privilege)
Conn. Gen. Stat. § 52-146q (social worker-patient privilege)
Conn. Gen. Stat. § 52-146s (licensed professional counselor-patient privilege)

[Exceptions to Attorney-Client Privilege for Evidence of Crimes](#)

(dated and Colorado-based, but good overview of the issues)

Exception to medical/therapist privilege in rape cases discussed:

[Mass Lawyers' Weekly Article](#)

[Mass Health Information Management Ass'n Summary](#)