



A nationwide criminal defense practice focusing on representing people with mental disabilities

A black and white photograph of a globe with a ruler. The ruler is curved and positioned along the top edge of the globe, showing markings from 1 to 5. The globe is tilted, and the ruler is held in place by a small metal clip. The text 'Families' Guide to Working with a Criminal Defense Lawyer' is overlaid on the right side of the image in a white serif font.

# Families' Guide to Working with a Criminal Defense Lawyer

When your family member with a mental disability has been arrested or charged with a crime, it can be a confusing and challenging experience that leaves you unsure of where to turn for answers. Hiring an experienced criminal defense attorney goes a long way toward obtaining the best outcome for your family member. Defense attorneys and family members should be able to work together as a team to the benefit of the client. Families and defense lawyers each have an essential role to play, and when they understand their respective roles, they can be a formidable force for protecting the client. There are some key things families can do to help the defense attorney.

## **Provide the Lawyer with All Necessary Information**

Family members of mentally disabled defendants are usually in the best position to provide information about the defendant. The family knows about the person's history and has the best information about their social and academic history and home life. Be sure to provide the lawyer with as much information as possible as it can all be helpful to your family member's case. Family members can be valuable allies to the defense lawyer in the process of obtaining information throughout an investigation. Useful information can include:

- Medical records
- Names and contact information of medical providers
- Any mental health evaluations or records
- Information about the receipt of any community services
- List of schools they have attended
- Places of employment
- Housing situations
- Contact information of prior attorneys and locations where the loved one has been involved in the Criminal Justice System
- Past interactions with the criminal justice system including prior victimization
- It can also be helpful to provide any required releases promptly. Often the lawyer needs signed releases for things like medical and school records.

Provide as much information as possible and let the lawyer decide what is essential. The lawyer would rather have too much information than not enough.

By all means, share with your attorney what you may have heard or read about in other cases. We always are interested in creative solutions and broadening our knowledge. But know that for a variety of different reasons, including different jurisdictions and different trial postures of the cases, these may be inapplicable.

## Remember That the Family is Not the Client

It is important to remember that even though the family may be paying the lawyer's fee, the family is not the client. Your loved one is the client and everything the lawyer does concerns the best interest of the client. Ethically, a lawyer cannot allow the person who is paying the lawyer's fee to interfere with the lawyer's independent professional judgment on behalf of the client. At times there may be a conflict between what the family wants and what the client wants. The lawyer has an ethical duty to work for your loved one alone, regardless of what the family thinks is the best course of action. While, with your loved one's consent, the family can be part of the conversation, it is still the client who makes decisions on their own behalf.

Keep in mind that your attorney's priority is the client, and the individual client's future in that case. You may have broader goals such as "educating" the court or prosecutor, passing new laws, or inspiring social change. But that is beyond the scope of your attorney's responsibility.

## Respect Attorney-Client Privilege and Confidentiality

The lawyer also has an ethical duty to uphold attorney-client privilege and confidentiality. It is important to understand and respect this duty in order to effectively work with the lawyer.

Attorney-client privilege is a rule that preserves the confidentiality of communications between a lawyer and their client. The purpose of the attorney-client privilege is to encourage clients to communicate with their attorneys in an open and honest manner so that an attorney can provide the best representation possible. The lawyer cannot share any written or oral communications they have with their client without the client's consent.

Lawyers also have a duty of confidentiality. This duty means that they cannot, even informally, discuss information about their client's case regardless of whether the information came from the client. The lawyer must keep private all information regarding representation in the case absent the client's consent.



Your loved one may consent to allow family members to receive information about the case but this should be done in writing, and the release should be very specific about the types of information your loved one is willing to share. The lawyer can share with the family any public, non-privileged information such as court dates and how particular court proceedings work. It is very helpful to designate a point person if there are multiple family members interested in the case. This step will simplify the communication process as the lawyer can give the point person information and that person can relay it to the rest of the family.

## Dealing with the Media

It may be tempting to communicate with the media, especially if you feel that your loved one has been wronged in some way. Resist the temptation and do not talk to the press without the consent of the lawyer. If you do communicate with the media, you should make sure to have the lawyer present at all times.

Although your loved one's case may be outrageous, short of extraordinary circumstances, the media may not care. If the press does cover a case, it may not be sympathetic coverage. This fact is especially true if your loved one is charged with a sexually-oriented crime.

Some jurisdictions have strict rules regarding a lawyer's ability to communicate with the media. Be sure to ask the lawyer about this. Not following the lawyer's advice when it comes to the press may compel him or her to withdraw from the case.

## Understanding the Applicable Standards

When your loved one has a mental disability, you may hear the terms "competency" and "not guilty by reason of insanity" and wonder if they can apply in your family member's case. It is important to understand these standards and how they may or may not apply in your loved one's case.



The standard for competency to proceed is low in most jurisdictions. Even if your loved one has an intellectual disability, developmental disability or mental illness and cannot understand the complexity of the criminal justice system, they may not meet the standard of incompetent to stand trial. Competency to proceed is:

- Decided by a judge
- Means the person cannot currently aid in their own defense or understand the proceedings against them
- Requires evaluations by psychologists and psychiatrists
- Is a very low standard to meet

If you believe your loved one's mental illness or I/DD prevents them from understanding the crime they are accused of, this more likely falls into the definition of not guilty by reason of insanity. This standard:

- Decided by a judge or jury
- Means the person did not understand the nature of their crime at the time it was committed (the specific definitions vary by state)
- Requires evaluations by psychologists and psychiatrists
- Is a very high standard to meet

## Understanding Plea Deals

There may be a time when the lawyer discusses a possible plea agreement. This fact does not mean that the lawyer does not believe your loved one. The lawyer has an ethical obligation to convey any plea offer to the client. When the lawyer recommends that a plea deal be accepted, it is often based on his or her (often disappointing) previous experiences and knowledge of the criminal justice system. If possible, ask the lawyer to go over the plea deal point by point and explain to the lawyer which aspects will be difficult to comply with and why. Take particular note of the requirements surrounding registration as a sex offender.

You may have some valuable input into the terms of any plea agreement or sentence. You've been working with your loved one for years and may have important knowledge about programs, treatment, and services available in the area that can help in crafting a plea deal or in assisting a court in putting together an appropriate sentence. As the family, you may be instrumental in ensuring that your loved one complies with the terms of any plea deal so your input will be important information for the lawyer to have.

The unfortunate truth is that the criminal justice system isn't always fair when it comes to individuals with mental disabilities. Keep in mind that, depending on the nature of the charges, a conviction may carry a mandatory minimum sentence that a judge cannot deviate from even if he or she may want to. This is another factor to consider when looking at plea agreements presented by the lawyer. The lawyer is looking to get your loved one the best possible outcome in their case and is usually in the best position to know what that entails.

## Remember: The Legal System Largely Constrains Your Lawyer

Remember that your attorney is not a miracle worker. If, for example, a plea was negotiated with a prior attorney and there is now a probation violation, barring unusual circumstances, the attorney can't undo the original agreement, no matter how unfair or even ill-advised it seems. Getting charges dismissed is similarly difficult.

Remember to give the attorney the time and space to do his or her job. In other words, don't constantly call, text or email. The attorney needs time to work the case as well as take care of other clients. Certainly, you have the right to be informed. But if you are constantly contacting the attorney, he or she may eventually tune you out, and will be unavailable that time when it is an actual emergency.

Often, by the time a family meets with a defense attorney, they have endured years—possibly decades—of misunderstanding from neighbors, schools, employers, and others who do not understand the nature of their loved one's disability and were unwilling to make accommodations. Resist the urge to make the defense attorney the focus of anger and resentment. The criminal charges may be unfair, but if there is an indictment, the lawyer must deal with the facts and control collateral damage. Your role is to arm the lawyer with much-needed facts and insight. A family can be a valuable resource so try and be the helpful family as much as possible.



## Information for Your Lawyer

If your attorney is unfamiliar with the challenges related to intellectual/developmental disability, contact the National Center on Criminal Justice & Disability (NCCJD) at [NCCJDinfo@thearc.org](mailto:NCCJDinfo@thearc.org). If your lawyer needs information about representing people with mental illness, contact NAMI ([www.nami.org](http://www.nami.org)) and the Treatment Advocacy Center ([www.treatmentadvocacycenter.org](http://www.treatmentadvocacycenter.org)). Another very helpful resource is my book *Representing People with Mental Disabilities: A Practical Guide for Criminal Defense Lawyers* which can be [purchased](#) through the American Bar Association.