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## Why defense counsel should be engaged before an arrest

**Early defense counsel engagement can protect clients' reputations and legal interests before formal charges materialize.**

By Sharon Appelbaum

People generally believe that the role of defense counsel begins at the moment of arrest. However, in white-collar, regulatory, corporate and high-profile criminal investigations, the moment of arrest is often too late to control the narrative, protect reputational interests or influence charging decisions. Attorneys representing high-stakes clients, such as professionals, executives, corporations and well-known individuals must view early defense engagement, not post-arrest defense, as a critical component of risk mitigation.

### Early retention as a form of crisis management

Professionals, companies and individuals often first learn that they are under investigation through a subpoena, a knock at the door, an "informal" call or email, or a request to meet from law enforcement.

Why hire counsel when there is nothing to hide, many think. The urge to share documents, information and to explain yourself and your motivations is very human but is often the opposite of helpful. Law enforcement questioning may involve coercive or misleading questioning, twisting innocuous statements into evidence of wrongdoing and wrongful intent or causing omissions that can be distorted as purposeful evasion.

Clients are often unaware that voluntary statements made prior to arrest are admissible in court without Miranda warnings if they are not the product of a custodial interrogation. Competent defense counsel at this stage can provide



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essential guidance on how to respond to law enforcement or whether to respond at all.

The defense attorney can:

- Communicate directly with investigators, reducing the risk of self-incrimination.
- Control the flow of information and avoid misstatements that could later be used against the client.
- Coordinate with in-house counsel or corporate officers to protect privilege and manage exposure.

### Pre-arrest representation as strategic influence

While being under investigation does not mean charges will necessarily

be filed, it presents an opportunity for an experienced defense attorney to speak with law enforcement and to shape prosecutorial decisions before formal charges are filed. A proactive defense may include:

- Presentation of exculpatory evidence or mitigation materials.
- Proposing non-criminal resolutions, such as civil settlements or regulatory remedies.
- Negotiating voluntary surrender, reducing the chance of a public arrest and spectacle.

At the start of these complex financial, regulatory and corporate investigations, law enforcement investigators may not fully understand or have evidence of the acts and intent at issue. It is this strategic win-

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dow that can determine whether an issue escalates into a public crisis or is privately resolved.

Prosecutors can exercise discretion based on how early they are contacted by knowledgeable and credible defense counsel. For instance, the Department of Justice's Justice Manual encourages prosecutors to consider pre-indictment cooperation and remediation, especially in corporate investigations.

### **Reputational and business interests preserved**

An arrest, whether it leads to charges or not, can cause harmful reputational consequences for professionals and public personalities' market standing, stakeholder trust, and brand. For licensed professionals such as doctors, lawyers and securities brokers, an arrest, even one where charges are not filed, may trigger self-reporting and disciplinary review. Hiring an attorney prior to arrest allows the lawyer to play a critical role in:

- Coordinating with crisis public relations teams or internal communications to guide public messaging.
- Ensuring compliance with disclosure obligations to licensing boards, partners or regulators.
- Handling internal investigations discreetly.
- Preventing reactive decisions by the client that may expose them to further liability.

### **Preserving evidence and spearheading a parallel investigation**

By waiting to see if law enforcement officials are going to make an arrest, the client potentially loses valuable time while allowing the government to increase their lead time and head start. Commencing an active internal investigation enables defense counsel to:

- Develop a comprehensive legal strategy.
- Preserve documents and digital evidence before they are lost or seized.

- Interview witnesses while memories are fresh and lock them into statements.

- Retain experts who can begin a parallel evaluation and review or conduct forensic analysis.

This information enhances counsel's ability to dispute the existence of wrongful intent, preserve exculpatory or favorable evidence, or develop mitigation materials which may not be available after an arrest.

### **From reactive to proactive advocacy**

Early defense investigations should be viewed as a strategic opportunity. When individuals and corporate entities wait until an arrest, they approach from a reactive position: responding to discovery, bail hearings, media attention and damage control. Proactive advocacy, allows the attorneys to:

- Reframe the client's role in the investigation and prepare the client for possible outcomes.

- Place the attorney as a barrier between the client and law enforcement.

- Control timelines, access and the flow of information.

This proactive method is not only a best practice, but it empowers clients and reaffirms the defense attorney's role not just as a protector of rights but as an advisor in risk containment.

### **Conclusion: Counsel at the gate, not after the storm**

For attorneys who advise professionals, corporations and individuals in the public eye, waiting until an arrest to bring in defense counsel is a miscalculation. Pre-arrest investigation can determine whether a matter explodes or quietly fades away. Early engagement of skilled defense counsel brings a level of awareness and measured action for clients facing government investigations and allows counsel to effectively establish and lead a legal strategy from the beginning.