

Tuesday, October 2, 2007

### **Will I win or lose?**

Image from Marine Corps' website. Fellow criminal defense blogger Shawn Matlock recently blogged about handling potential clients' and actual clients' inquiries about whether they will win. Here is my comment on the matter: My short answer is to be honest with the potential client, and the actual client, about your ability and drive to go to the mat for the client, but inability to have a crystal ball, and why. Sometimes I tell the potential client that I'd be dishonest and in violation of my ethical obligations as a lawyer to paint a rosier picture than available. The most difficult questioners about chances of winning often are from the non-client paying parties (who do not have the benefit of the full confidential case and strategy analysis I give to potential clients after they give me the confidential information about their case) and from potential clients between a real rock and hard place (e.g., having lost at a misdemeanor bench trial with another lawyer, they now want a guarantee that the new lawyer will win at their de novo trial on appeal). When the latter type of conversation goes nowhere, I decline representation. The main dynamics involved in such a conversation are the potential client and the client's fears, the reality of the case, the dynamics of the lawyer, and the interaction between the lawyer and the potential client. Some clients want a rock bottom fee to just go and plead guilty; I decline such representation. Some want assurance that the lawyer will treat the client with the same attention, drive and passion as if it were the lawyer's closest friend or relative. One example of the attention I give my clients is that a few weeks ago, a probation agent told me that this was the first time in her two-decade career that she saw a lawyer join his or her client to an interview for preparing a presentence investigation report (of course, I work hard to try to avoid needing a presentence investigation report in the first place). The initial meeting with a potential client also is an opportunity for the lawyer to determine whether to cut losses early on and not accept the potential client. It is curious that I rarely feel inclined to decline service to any potential criminal defense client who is paying himself or herself. On infrequent occasion, intense upset comes from the non-client paying party, whom I list in the contract as having no more rights as to the contract than if the paying party had not paid at all (although I use more gentle language than that). Not to stay on this tangent very long, part of building trust with the client is reading how much of an interference the paying party will be. Ordinarily, I require the paying party to sign an addendum to the client contract saying: "The only client is \_\_\_\_\_. My status in helping to pay the client's fees and expenses is no different than if the client anonymously had been given the funds to hand directly to counsel. Counsel has full rights to enforce any insufficient funds check and any credit card payment that is reversed or otherwise not honored." I welcome potential clients' detailed questions about what I can do for them. By covering those questions in depth at the outset, we are better freed to focus on fighting together for success for my client from thereon in. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00