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A Plan to Preserve an Endangered Species: The Zealous Criminal Defense Lawyer

Raymond M. Brown

A PLAN TO PRESERVE AN ENDANGERED SPECIES: THE ZEALOUS CRIMINAL DEFENSE LAWYER

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The snail darter, the northern spotted owl, the wood bison, and even the wild turkey have coteries of dedicated supporters and protectors. No comparable conservation corps concerns itself with the plight of another endangered species, a pariah and bottom feeder on the legal food chain: the criminal defense lawyer.

The pressures on this group grow daily. It is disdained, mocked, and unappreciated in both the popular and the legal culture. The day will come when the last criminal defenders will quietly take down their shingles and stroll unmourned and unnoticed into the night.

To avoid the possible extinction of this species, the Emergency Committee to Preserve the Criminal Defense Lawyer was formed. I am circulating a summary[1] of the committee's work: a *Draft Proposal for the Preservation of the "Zealous Criminal Defense Lawyer."* The plan described in this document is necessary because the defense lawyer's predicament grows more perilous each year.[2]

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1. As rapporteur for the Emergency Committee, I have been authorized to contribute this précis to this Symposium.

2. Some observers suggest that if left to the tender mercies of "natural selection," the criminal defense bar is doomed. The nation's battle with crime, and particularly its "war on drugs," has been waged at the expense of important liberties, including the right to counsel. Dissenting in a 1989 criminal forfeiture case, Supreme Court Justices Blackmun, Brennan, Marshall, and Stevens chided the Court's majority for allowing the government to "beggar those it prosecutes in order to disable their defense at trial." Caplin & Drysdale v. United States, 491 U.S. 617, 635 (1989) (Blackmun, J., dissenting). Justice Blackmun charged that the Court's options in these cases ignored "grave 'constitutional and ethical problems.'" *Id.* at 636 (citing United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985)). He also warned that such a ruling "'could devastate the defense bar.'" *Id.* at 647 (quoting

In its final form, the *Proposal* will recommend ways to increase the numbers of zealous criminal defense lawyers and nurture an environment more receptive to their efforts. Suggestions for the *Draft Proposal*'s improvement and implementation are welcomed.

I. PHASE 1: THE ETERNAL "QUESTION" AS LITMUS

The initial stages of any preservation effort require the capture, tagging, and release of mature specimens into depopulated areas. In this case, locating and testing zealous criminal defense lawyers will not be easy since they are seldom found in captivity.

The *Draft Proposal* provides guidelines for the search. "Trackers" must attend cocktail parties, rubber chicken dinners, political functions, church socials, wedding receptions, etc. (perhaps ad nauseum.) While surveilling the alcoves and crannies at these events, these trackers will find lawyers cornered by curious citizens earnestly asking a certain "question." "Investigators" infiltrating family dinners at Thanksgiving and other holidays will learn that even in the criminal defense lawyers' own lairs they are likely to be besieged by "Aunt Martha" insisting on an answer to the question.

What is this question? It is the riddle proffered by a confused and frightened public to any criminal defense lawyer:

"How do you represent people if you know they are guilty?"[3]

The answer to this question is a litmus test separating the experienced defense counsel from both fledgling attorneys and impostors.

When confronted with the question, apprentices invariably discourse on the wonders of the Bill of Rights, the glories of the

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Bruce J. Winick, *Forfeiture of Attorneys' Fees Under Rico and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 781 (1989)). *See also* Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power—Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477 (1990) (arguing that courts' use of contempt charges can hinder defense attorneys' ability to vigorously defend their clients); Louis S. Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743 (1990) (arguing that contempt charges should be imposed only when an attorney's action has obstructed justice).

3. An alternative formulation of this question is, "How do you represent *those people*?" In this version the questioner assumes that the defense lawyer *knows* that "those people" are "thieving, lying, cutthroat, ugly, riffraff" who become criminal defendants.

system, and the symmetry of due process. These soliloquies cause civilian questioners' eyes to glaze over like Sunday donuts. The lawyers giving this answer are greenhorns in need of seasoning and are of no further use in this plan.

The "keepers," the grizzled veterans, will respond to the question with a knowing smile familiar to fans of old Errol Flynn movies. These are the films in which Flynn, surrounded by pirates, draws his cutlass, and says—with panache—"What, only 600 of you?"[4] The daredevil smile playing about the mouth is what we want our "scouts" to remember. It signifies specimens suitable for further study.

II. PHASE II: A DEEPER INQUIRY

The next phase entails a more searching interrogation of our specimens. That smile may be the hallmark of one who has grasped the secrets of criminal defense. On the other hand, it may be the natural expression of a simpleton or the beguiling mark of the poseur. The *Draft Proposal* recommends that we vet this smiling crop for specimens possessing "zeal" and "skill." The perfect time to initiate such examinations are Thursdays near the end of a month when our subjects are preoccupied with meeting their bloated payrolls and overdue rent payments.

Each specimen who has passed the smile test should be approached by a specially recruited undercover "client."[5] Our client must combine a plea for help with a small glimpse of currency[6] to put the specimen's mind at ease about the pressing problems of the exchequer. The client should then arrange an interview.

Our initial test only required operatives who could recognize that telltale smile of the potential subject. However, the personnel for Phase II must be more facile. We must obtain from "Central

4. I don't know if Flynn actually said these lines, but the smile symbolizes an attitude somewhere between confidence and hubris.

5. The committee unanimously rejected a consultant's recommendation that the client wear a recording device so that the subject's responses could be more accurately monitored. The committee believed that the species' instinctive dislike of "wires" could trigger violence or a flight response, thereby invalidating its work.

6. The committee gave serious thought to having the client offer the subject more than $10,000 in cash to see if the subject complies with the requirements of 26 U.S.C. § 6050I by filing an IRS Form 8300 disclosing the transaction. 26 U.S.C. § 6050I (1994). To a minority of the committee, such a test seemed sensible since some prosecutors have utilized this statute to reduce the species' numbers. However, the majority decided it would be impractical to determine whether noncompliance reflected ignorance of the statute, evasion of the law, or principled opposition.

Casting" a group capable of displaying certain common "client characteristics."[7]

At the first meeting with the specimen, the client must radiate need while telling the most outrageous, self-serving lies. When caught in these lies, the client must emit a "sucker's holler" insisting that he would never prevaricate. These ersatz protests must be followed by contrition, apology, and then another lie bigger than the first. This cycle should be repeated as often as possible.[8] The specimen should be capable of deftly parsing the client's lies without rupturing the relationship.

Particularly resilient specimens must be exposed to multiple interviews in which the client squabbles over money, consumes the specimen's time with irrelevant questions, insists that *every* phone call be returned promptly, and offers a smorgasbord of suborned perjury to use in the defense—more on that later.

During the investigation and motion phases of the case, the client must place obstacles too numerous to describe here in the subject's path.[9] The client must never stop complaining, whining, and lying to the subject.

A significant number of specimens will be removed from our pool during this period. Shouting matches and frequent battles are expected. However, those who file motions to be relieved, attempt to coerce the client into undesirable pleas, or violently assault the client cannot advance the purposes of our plan.

III. PHASE III: CROSSING THE RUBICON

The specimen who survives this campaign of harassment while maintaining humor, compassion, and unflagging commitment to the client's cause is ready for the rigors of the final ordeal: "Trial by Trial."

Many obstacles will have been placed in the specimen's path. Nevertheless, by the time the client and subject approach the courthouse on the day of trial, the subject must have a "theory" of

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7. These traits will be found in Appendix A of the *Draft Proposal*, "Client Characteristics Matrix."

8. This process can be further complicated by having a client's "spouse" say things like "Clem, this lawyer's just trying to help you. Why don't you tell the truth?!" However, such intervention should be kept to a minimum.

9. Appendix A to the *Final Proposal* will contain detailed descriptions of these proposed obstacles. The *Draft Proposal* does not suggest that every client demonstrate each characteristic. However, during the course of a career every criminal defense lawyer can expect to encounter every characteristic eventually.

defense which explains the inculpatory facts that cannot be denied.

As trial commences the client must continue to "dog" the subject. This pressure must permeate the client's relationship with the subject as he or she battles an unsympathetic judge, a hostile prosecutor, and jurors who have decided the client's fate during the preliminary briefing in jury control.

Every trial, every client, every strategic problem, and every skilled counsel is different. However, the *Draft Proposal* contains detailed criteria for measuring the "zeal" and "skill" of counsel during trial. It is not possible to outline all of those criteria in this summary. The principle, however, can be demonstrated with a few examples from the section "On Opening Statements" and the section "On the So-Called 'Problem' of Client Perjury."

A. On Opening Statements

The *Draft Proposal* deliberately takes no position on the controversy between the "dry opening" school and those who advocate advancing a theory in the opening statement. However, subjects must demonstrate an understanding of both approaches and how each is affected by the local discovery rules and the nature of the case. This section of the *Draft Proposal* lists certain statements, which if made during the opening, will result in the immediate removal of the offending specimen from the pool.

Specimens who indicate that what they say is *not evidence* or say that it is their *"duty"* to represent their client have committed a per se violation. The *Draft Proposal* recommends a similar draconian response to any statement that a subject's opening is like an "outline," "road map," a "jigsaw puzzle," an "index," or a "table of contents." Comparable metaphors or examples of legal babble unknown to us now, but utilized in front of a jury, will also be considered "per se" violations and cause the removal of the offending specimen from the pool.

B. On the So-Called "Problem" of Client Perjury

The committee concluded that the success of the *Draft Proposal* could hinge on its approach to the controversial client perjury "problem." A three week plenary session, attended by all committee members, consultants, experts, and staff was held to debate the client perjury section of the *Draft Proposal.*

An early consensus was reached about the nature of the problem. It was agreed that every experienced defense counsel

notices frequent differences between the first discussion of the "facts" of a case with a client and the client's testimony at trial.

It was also agreed that the authorities and opinion-makers in the legal community had permitted,[10] and even required,[11] attorneys to reveal anticipated client perjury without effectively resolving two questions:

(1) When does a lawyer *know*[12] that his client intends to commit perjury; and

(2) What are the implications for the lawyer-client relationship when this undefined "knowledge" triggers an obligation to disclose client confidences?

The consensus collapsed when the committee discussed the standards by which the *Draft Proposal* should measure a subject's response to this phenomenon. A plurality of the committee adopted the ironic sobriquet "Harbingers."[13] This group maintained that the change in a client's explanation was often a natural result of increased attention, refreshed recollection, and enhanced understanding of applicable legal principles.

The Harbingers felt strongly that vigorous cross-examination by counsel in "prep" sessions, followed by a prosecutor's cross-examination under the close scrutiny of a judge and jury, were adequate safeguards against client perjury. Eventually the Har-

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10. Nix v. Whiteside, 475 U.S. 157, 174 (1986).

11. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1994) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *Id.* Rule 1.6(a) ("A lawyer shall not reveal information relating to [the] representation of a client. . . ."); *Id.* Rule 3.3(a)(2) ("A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."); *Id.* Rule 3.3(b) ("The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.").

12. A good starting point for understanding the "knowing" aspect of the client perjury problem is Donald Liskov, *Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution and the Truth*, 28 NEW ENG. L. REV. 881, 893-907 (1994).

13. This name is derived from Justice Stevens' concurring opinion in *Nix* in which he noted:

> A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel . . . . [B]eneath the surface of this case there are areas of uncertainty that cannot be resolved today. A lawyer's certainty that a change in his client's recollection is a *harbinger* of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. *Nix*, 475 U.S. at 191 (Stevens, J., concurring) (emphasis added).

bingers prevailed and the *Draft Proposal* now requires the client to provide the following certifications:

(1) that the subject has spent sufficient time preparing the client to testify;

(2) that the subject is familiar with Dean Wigmore's maxim that cross-examination is the "greatest legal engine ever invented for the discovery of truth;"[14] and

(3) that the subject understands that the "authorities" are in complete disarray on the solutions to these problems and that the lawyer who fails to anticipate the "correct" solution[15] in his jurisdiction[16] does so at his "ethical peril."[17]

IV. A HOUSE IS NOT A HOME

Survivors of the tests outlined in the *Draft Proposal* are ready for release into the general population. Such subjects should be tagged and monitored for special intervention. The *Draft Proposal* does not recommend a specific tagging methodology. However, a special subcommittee is considering an indelible, nontoxic tag to be affixed to a specimen's ego. Several experts have suggested that members of the criminal defense species invariably have large egos impervious to bruising.[18]

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14. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (1974).

15. The section on client perjury is only a tentative draft and is subject to further debate at an upcoming meeting. The Harbingers have indicated that they will produce a pedagogical skit called "Dicta from the Land of Oz" satirizing the proposed solutions of "withdrawal of counsel," "remonstrating with client," and "narrative testimony." These "solutions" can be found in the comments to *Model Code* Rule 3.3 and in the codes of certain jurisdictions. *See* MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1994); D.C. CT. R. ANN. Rule 3.3(b) (1995); FLA. STAT. ANN. Rule 4-3.3(a)(4) (West 1994).

16. Thirty-seven states have embraced one form or another of the *Model Code.* However, to confuse matters further, some *Model Code* states like Tennessee *appear* to have gone further than the *Model Code* in complicating lawyer obligations in the area of client perjury. *See* Ernest F. Lidge III, *Client Perjury in Tennessee: A Misguided Ethics Opinion, An Amended Rule, and a Call for Further Action by the Tennessee Supreme Court* 63 TENN. L. REV. 1, 29 (1995).

17. The best theoretical model for analyzing the perjury problem is Monroe Freedman's "Trilemma." *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 109-41 (1990). Freedman artfully describes the conflict between the lawyer's duty to protect a client's confidential communications, to know as much as possible about a client's case, and to be candid with the tribunal. *Id.* at 111.

18. Those not subject to the special protections accorded this species can still contribute to the legal system in the dungeons of white shoe firms by drafting wills, submitting hourly billings, "milking the cow," and authoring learned exegesis on the nuances of the Uniform Commercial Code.

The *Draft Proposal* focuses primarily on identifying and tagging "zealous" counsel. However, the committee is also concerned with the hostile environment into which counsel will be released. The bar and the larger community do not appreciate the role of the criminal defense lawyer in the legal ecosystem. Consequently, regulatory schemes devised for the system as a whole frequently fail to take into account the peculiar functions and needs of this species. This is most dramatically demonstrated in the ethical quagmire surrounding the problem of client perjury.

Ironically those same ethical schemes that ignore the realities of criminal defense make exaggerated[19] and grandiose[20] claims of moral rectitude. They have masqueraded as codifications of moral verities when in fact they are often little more than contentious dialogues.[21]

A powerful symbol of the insensitivity of these schemes to criminal defense realities has been the retreat from the hortatory call of the *Model Code*, urging every lawyer to represent clients

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19. Either hyperbole or an unappreciated self-deprecatory sense of humor led the drafter of the first ABA code in 1908 to use the label "Canon," a term which was preserved in the *Model Code*. ABA CANONS OF PROFESSIONAL ETHICS (1908).

20. One respected jurist quipped during a speech about ethics, "[A]lmost everything that passes for virtue in the adult population is either lack of temptation or poor health." William J. Bauer, Chief Judge, U.S. Court of Appeals for the Seventh Circuit, The Image and Ethics of Lawyering Speech Before the American College of Trial Lawyers (Spring 1991), *in* ACTL WINTER BULLETIN, Winter 1992, at 1.

21. While the Kutak Commission was drafting its proposed *Model Rules*, the Association of Trial Lawyers of America (ATLA) was preparing the *American Lawyers Code of Conduct*. In its preface Theodore Koskoff, chairman of the ATLA's Commission on Professional Responsibility, reflected on some of the internecine struggle within the bar on the question of ethical reform.

> This Code was prepared under the auspices of the Roscoe Pound-American Trial Lawyers Foundation....
>
> This Code is quite frankly presented as an alternative to the old Code of Professional Responsibility previously promulgated by the American Bar Association (ABA) *and* to the new Rules of Professional Conduct that the ABA is apparently about to *hawk* as the latest thing in legal ethics. It was dissatisfaction with both of these ABA products that both got us going on this Code, and kept us going....
>
> ... Many of us deeply resent the take-it-or-leave-it attitude of the ABA which seems to be switching codes on us for no better reason than that it has spent so much money on the Kutak rules that rejecting them would cause it to lose face.
>
> This is not just a squabble over form. It is a serious disagreement over substance."

Theodore I. Koskoff, PREFACE to AMERICAN LAWYER'S CODE OF CONDUCT (Revised Draft, May 1982) (emphasis added) (on file with *Loyola of Los Angeles Law Review*).

"[z]ealously within the Bounds of the Law."[22] The *Model Rules* instead adopted the legalistic and uninspiring language of "reasonable diligence and promptness."[23] In the context of criminal defense, this is the metaphorical equivalent of firing Rumpole and retaining Ms. Grundy.[24]

Some respected thinkers suggest that this departure from the "zeal" standard is a temporary aberration.[25] However, the committee views this apostasy as symptomatic of a larger trend[26] threatening the basic habitat of the criminal defense lawyer. In fact, this retreat from first principles has polluted the popular, as well as the legal, culture.

The literary and cinematic worlds have recently been inundated with fiction set in legal surroundings. One of the leading "lawyer" movies[27] of the last decade was the Scorcese thriller *Cape Fear*.[28] It is the story of a villain who upon release from prison terrorizes his former lawyer and the lawyer's family. He assaults the lawyer and his mistress and murders counsel's investigator and his family dog.

Why all this mayhem? While serving time the client learned that the lawyer had "buried" evidence of prior admissible sexual misconduct by his alleged rape victim. This lawyer misconduct earned the client a bad plea bargain and a long jail sentence.

Wearying of stalking the lawyer, the villain poises to extract revenge. He conducts a gun point trial of his former counsel on a houseboat as it careens rudderless down rock strewn rapids.

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22. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1995).

24. Even more shocking is the *Model Rules'* comment to Rule 1.3 which advises, "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client." *Id.* Rule 1.3 cmt.

25. In *Understanding Lawyers' Ethics*, Professor Freedman ends his discussion of the *Model Rules'* apparent depreciation of zeal by concluding, "It appears . . . that the inadequacies in the drafting of the *Model Rules* will be repaired by interpretation." FREEDMAN, *supra* note 17, at 73.

26. For a brief comment on one of the political factors affecting this climate see Raymond M. Brown, *Adieu Nixon, A Dark Day Is Done!*, THE CHAMPION, (National Ass'n of Criminal Defense Lawyers, Washington, D.C.), Aug. 1994, at 1 (on file with *Loyola of Los Angeles Law Review*).

27. I have discussed some other relevant lawyer movies in *Hollywood v. The Trial Bar*, HUDSON HEADNOTES (Hudson County Bar Association, Jersey City, N.J.), Fall 1994, at 1 (on file with *Loyola of Los Angeles Law Review*).

28. This 1991 MCA/Universal Film was based on the 1957 novel by John D. MacDonald originally entitled *The Executioners.*

At this moment of denouement, in this violent setting, *the villain asks the lawyer to recite Canon 7 of the Model Code.* When the lawyer omits the word "zealously" the villain says it for him, emphasizing the point with a blow to the lawyer's head with a .38.

It is strange to see a popular film climax with a debate about legal ethics. It is stranger still that for dramatic effect the filmmakers had to use the language of "zeal," which had been discarded in most of the states where the movie was to play.[29]

Ironically, the lawyer-protagonist-hero is effectively lauded for betraying his scurrilous, murdering, immoral client. In a broader culture that rewards loyalty, criminal defense lawyers can become heroes when they betray their *guilty* clients.

This perspective is no surprise to the Emergency Committee. It is the premise underlying the "Litmus Test" of Phase I of the *Draft Proposal.*[30] The ordinary citizen finds it almost impossible to conceive of commitment to a client who actually *did it.*

The Committee intends that its *Final Proposal* will contain recommendations for a public education campaign to correct this misperception. However, in the short-run it suggests that defense lawyers interested in day-to-day survival practice legal jujitsu to convince each juror of counsels' belief in their clients' nonguilt.[31]

When jurors see skillful cross-examination, evidence of counsel's trip to the scene at four in the morning, and proof that counsel has prepared more thoroughly than an adversary, they will invoke this mantra: "This lawyer believes in that so-in-so.[32] Maybe I should pay attention to the evidence. Maybe the defendant is not guilty."

It will be some time before the *Draft Proposal* ripens into final form. Meanwhile, every time a zealous defense is offered for a seemingly guilty client, an adjournment is won against the day when the last zealous criminal defender will mount the parapets with a "Beau Gest" smile on her lips and the answer to a certain

29. Neither MacDonald's novel nor the 1961 MCA film version contain this "ethics" discussion.

30. The Committee acknowledges that when speaking to one another, experienced lawyers do experiment with a variety of answers to the "question." *See* Terence F. MacCarthy & Kathy Morris Mejia, *The Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and a Hard Place,* 75 J. CRIM. L. & CRIMINOLOGY 1197, 1197 n.1 (1984).

31. Of course this requires craftsmanship lest counsel run afoul of the "vouching" rule. *See* United States v. Young, 470 U.S. 1, 8-9 (1985).

32. "thieving, lying, cutthroat, ugly, riffraff."

"question" in her heart.