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THE RESPONSIBILITY OF A CRIMINAL DEFENSE ATTORNEY

*Dan K. Webb**

I take great comfort in the title of this Symposium by the Loyola of Los Angeles Law School: *Responsibilities of the Criminal Defense Attorney*. I read and hear much discussion about criminal defense attorneys, but too often it seems focused on our battles at trial, our fees, the publicity that accompanies our cases, or gossip about personal lifestyles.

Criminal defense attorneys, indeed all participants in the criminal justice system, live in an era of heightened scrutiny, particularly as a result of increased access to courtrooms by the electronic media. A phenomenon like Court TV was barely imaginable when I began my career as an attorney, but television cameras in the courtroom are now an accepted part of our judicial landscape. I suspect that one by-product of this increased media access to the judicial system is that people are changing their attitudes about the personnel who make the court system function. Judges, witnesses, and especially attorneys are now the subject of “on the spot” analysis of a kind formerly reserved for stage actors or professional athletes. As is true of actors and athletes, those who are less competent freely criticize the efforts of those on the public stage.

Public attention to the legal system, of course, is not all bad. To the contrary, this country has a constitutional heritage of public scrutiny for its judicial proceedings, especially when issues of personal liberty are at stake. However, I feel strongly that the media has shown an increasing tendency to sensationalize the work done by criminal defense attorneys, to remove it from the ambit of “responsibility,” and to treat our efforts as though we practiced a

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new form of entertainment. The drama and intrigue inherent in a criminal trial are natural attractions to the media, just as they are often the feature that attract young lawyers to serve as criminal defense counsel. The challenge we face, however, is to remain mindful of the responsibilities that attend this job of being counsel for the accused.

This job can be difficult to do in the glare of public attention, particularly when the media issues daily reviews of our trial efforts. Arguments and examinations are assessed in terms formerly reserved for movie or restaurant reviews. "Grades" are awarded for our efforts. Predictions are made about whether a particular tactic will succeed. Hours of intense trial examination are condensed into sound-bite snippets designed for the evening news. The public is asked to draw ultimate conclusions of guilt or innocence based on fractional portions of the evidence actually received at trial. Increasingly, people who report on criminal litigation are more concerned with style than substance, more conditioned to seek "a new angle" than to seek both sides of a story.

All of this, I fear, subtly teaches us the wrong lesson. When a criminal case receives substantial media attention, it is probably because the nature of the crime or the identity of the defendant make for a "good story." Perhaps unavoidably, the media seeks to portray the story as a confrontation between good and evil, between truth and lies, between justice and lawlessness. As the coverage intensifies, the lawyers are placed on opposing sides of the drama: one lawyer is good, a seeker of truth, a champion of justice. Inevitably, the opposing counsel must be cast in the role of the dark side, the obfuscator, the trickster, the champion of loopholes and technicalities. Usually—but not always—the media assigns these roles in a traditional way, such that the prosecutor is "good" and the defense attorney is "bad." In an era when increased media attention has failed to produce an increased appreciation for the roles played by a prosecutor and a defense attorney, such polarized caricatures abound.

It has been my good fortune to serve as a prosecutor during my legal career, first as an assistant United States attorney, and later as United States attorney in Chicago. I know what it means to accept the burden of proof when presenting a criminal case to a jury. I know that prosecutors must constantly be vigilant against the notion that, by virtue of their office, they are entitled to do whatever it takes to win. I understand the pressures to win that

prosecutors may encounter, whether from zealous law enforcement agents, aggrieved victims, or from media attention to their case.

Likewise, a decade of experience as a criminal defense attorney has taught me the pressures that bear on criminal defense counsel. The challenge I face, that all criminal defense counsel face, is to separate the pressures that matter from those that must be irrelevant if we are to correctly do our job. The pressure brought about by public scrutiny should not matter. The pressure brought about by "instant analysis" of our efforts must be ignored. The pressure to live up to the roles assigned by the media must be resisted.

The only pressure that I care about is the pressure to accept, acknowledge, and discharge my responsibilities as a criminal defense attorney. First is the responsibility I bear to my clients. Clients face enormous challenges. Clients may feel that their lives are shattered and that there is no hope for future happiness. Clients may feel abandoned by friends and shunned by the community. If clients are convinced of their innocence they often feel victimized by a system they formerly respected; if they acknowledge guilt, they often suffer tremendous shame for the disgrace they feel they have brought upon their family. Virtually no one seems to offer a reason to hope for the future.

My responsibility to my clients is clear. I must restore my clients' willingness to go forward and endure what is to come. I must allow them the opportunity to express concerns and frustrations. I must listen to their side of the story and work to assure them that there is at least one person who does not intend to pass judgment. Most of all, I must give my clients confidence that if their case goes to trial, I will do everything within the law to convince the jury or judge that the prosecutor has failed to establish guilt beyond a reasonable doubt.

I cannot be a client's psychiatrist or emotional counselor, but I must be a fixed point of reference for that client. I must work to assure that the client understands the situation, understands the nature of the charges, and makes pivotal decisions in a rational and informed manner.

Next is my responsibility to the criminal justice system. In this regard, I view my role in rather simple terms. The system works best when I do my best. As a prosecutor, I never hoped for a lazy or incompetent defense attorney as my opponent. I was never

comfortable if my opponent was not doing a competent job because I fully appreciated the awesome power I exercised as a prosecutor, and I knew well the ability I had to deprive criminal defendants of their liberty. If I won a conviction, I wanted the assurance that justice was done. That assurance comes only after the adversarial system has been put to the test by an aggressive and energetic defense attorney that challenges the prosecution in meeting their burden of proof.

Last, but certainly equal to the first two, is my responsibility to myself. I am a trial lawyer by choice; whatever other skills or gifts I may have, I know that being a trial lawyer is the only way I wish to make a living. Because I have been fortunate enough to attain success in my career, I am sometimes asked the secret of that success. Perhaps the questioner expects a lecture about the fundamentals of cross-examination or a discussion of effective trial strategies, but those elements are secondary. The reason I have achieved a level of success is simple; trial work is what I want to do. I am motivated to succeed, which means that I am motivated to work hard. I am like a great many defense counsel; I have won some and I have lost a few. But, I am able to assure myself that in each and every case I worked as hard as I could, I used all my professional skills to the best of my ability, and I gave my client thorough and effective representation. Ultimately, in our adversarial system, I cannot control the outcome of a verdict. I can, however, control the amount of effort and care I devote to a criminal defendant's case.

These three responsibilities—to the client, to the system, and to one's self—are familiar territory for law students and lawyers. In an abstract world, there can be no controversy associated with accepting and discharging these responsibilities. But we do not live in an abstract world, and the public attention devoted to our efforts as criminal defense attorneys tends to distort our views of these responsibilities. These three responsibilities are like the legs of a stool; if one leg is too short or too long, none of them can perform their intended function. If criminal defense counsel overemphasizes or underemphasizes any one of these responsibilities, they run a significant risk of failing to do an effective job.

Simply put, criminal defense counsel must have the courage and fortitude to discharge their responsibilities as they see fit, not as the "instant experts" of the media see fit. Not every criminal defense effort calls for extensive and flashy trial work; sometimes

the best strategy is to lay low throughout trial—particularly in multidefendant cases. Although some cases require an aggressive public posture and direct interaction with the media, other cases call for a lower profile and require defense attorneys to circumscribe public comments. On a more fundamental level, some cases call for a negotiated plea because that best serves the clients' legitimate interests, while others mandate trial even in the face of seemingly insurmountable odds. Defense counsel must have the ability to constantly reinvent themselves, to adapt to the unique circumstances presented by each case, and to react according to the needs of a specific case and not according to what worked in another case at another time.

Most significantly, defense counsel must remain true to the craft they practice, to the profession they pursue. Trial lawyers must have self-confidence and a public presence, which are often mistaken for an overdeveloped ego. They must constantly strive to assure that they find gratification from their work. This must be found, not by measuring how the public—and especially the media—evaluate their work, but by measuring whether they are secure in their own belief that their efforts furthered the cause of justice. Our responsibility is not to ensure that we receive good reviews from the world at large. Our responsibility is to serve first our clients, second the system in which we participate, and third ourselves as practitioners of an honorable profession.

This takes courage. It takes courage to stand beside a person who is the object of public scorn and insist that this person, like every person, is entitled to a presumption of innocence. It takes courage to pass a phalanx of cameras and reporters and to walk away from free publicity because that is in the client's best interest. It takes courage to aggressively confront a prosecutor's office and insist that they meet their burden of proof in a highly publicized case, knowing that you will later need to approach those same prosecutors on behalf of other clients. More than anything, it takes courage to demand that justice be done in a case already decided in the court of public opinion. Further, it takes courage to remind the public that issues of personal liberty are too precious to be decided outside of a courtroom.

That is why I admire criminal defense attorneys, why I am proud to count myself among their number. Contrary to popular opinion, good defense lawyers do not really think they are the only good lawyers on earth. Rather, I suspect that most quality defense

attorneys are like me; they enjoy watching other professionals do a good job and take pleasure in the successes of their colleagues. I admire good defense attorneys because they appreciate that this job, this profession, is not about fame or notoriety. This job, this profession, is about participating in an important and valued aspect of American life. Few other professionals must be so immune to the whims of public opinion. Few other professionals must be so willing to absorb hostility on behalf of another. Few other professionals are as susceptible to the Monday-morning quarterback mentality that measures effort according to the result instead of according to skill displayed.

Most of all, few professions pose the irony of criminal defense work. When we win, when our efforts bear fruit in an acquittal, too often the public is informed that we have thwarted justice. As criminal defense counsel, we of course understand that by putting the prosecutor to the constitutional burden of proof, we in fact assure that justice has been achieved. However, the media may report that we have harmed the interests of justice, that we have pulled a fast one on the system. The unhappy irony is that we who revere the system are portrayed as its enemies; we who assure justice are labeled as impediments to the justice to which we subscribe.

As criminal defense counsel, our responsibility is to our clients, the system, and to ourselves as professionals. Layered atop each of these responsibilities is our responsibility to each other as participants in this noble effort, to offer each other encouragement and support. If we cannot expect public acclaim for our efforts, if we must endure flawed logic by those who review our work, we can at least assure that within our own number, we maintain the integrity of our craft. We must reject the temptation to adapt our techniques to what we see praised on television. We must resist the tendency to seek public approval for demanding justice on behalf of unpopular clients. We must remember that a reporter's critical analysis of our efforts can be very wrong, and it is made worse by virtue of the fact that it is repeated in the media and disseminated across the country.

Each of us, on an individual basis, must work to maintain our professionalism and integrity. We are heirs to a tradition that dates back to Lincoln, that invokes names like Darrow, and that is carried out in every city of America by public defenders who toil for low wages, motivated only by their sheer dedication to cher-

ished principles. We can be proud of the work we do, because of the way in which we do that work and the benefit it brings to our entire society. Thousands of years ago, the author of the *Book of Proverbs* wrote words that apply with equal force today: "When justice is done, it brings joy to the righteous but brings terror to evildoers."¹ No better job description exists than to say, "they bring justice." No profession can provide a more honorable responsibility. Let us resolve that our acceptance of this responsibility will not be diminished by the voice of popular opinion, but will instead be encouraged by the belief that we do justice when we remain true to our own unique role in the adversarial system.

1. NEW INTERNATIONAL VERSION DISCIPLE'S STUDY BIBLE 774 (Holman Bible Publishers 1988).

