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RESPONSIBILITIES OF A CRIMINAL DEFENSE ATTORNEY

*Plato Cacheris**

The reasons one chooses to join the legal profession are as varied as the many disciplines within the profession. Criminal defense, however, is the one field that deals with the life and liberty of individuals. While torts, securities, wills, estates, probate, tax, environmental law, and regulatory practices of every imaginable description are of utmost importance to clients, they lack the impact on individuals unique to criminal defense practice. Criminal law's focus upon the individual's liberty is what has driven me to this profession.

As a federal prosecutor many years ago, I found myself concerned even then about the consequences of prosecution upon the defendant, the defendant's family, and the defendant's life. I served in a court where the judges discouraged sentencing recommendations from the prosecutor. This was, of course, in an era before sentencing guidelines. Accordingly, in my eight years as a prosecutor, I made very few sentencing recommendations to judges.

The passage of sentencing guidelines has dramatically changed the practice of criminal law. At one time, defense lawyers could appeal to judges for leniency on various grounds, such as social status, ethnic background, family, health, education, and hardship.¹ Such sympathetic appeals to judges have now been

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1. Prior to adoption of the Federal Sentencing Guidelines, the Supreme Court stated that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972); *see also*, Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 557

aborted in favor of a sentencing grid that does not account for human factors. In my experience and opinion, these guidelines have made the criminal justice system appear merciless.

The guidelines have removed the sentencing function from the judge. Prosecutors now dictate the sentence. The guidelines have relegated most judges to the ministerial act of imposing a sentence within a prescribed grid.² Indictments can be structured to insure incarceration. Many of these cases, during the pre-guidelines period, could have resulted in probation. Judges are virtually powerless, as the sentencing guidelines have withdrawn their discretion to impose or not impose punishment.³ The sentencing guidelines were implemented because of the popular concept that lenient judges are to be blamed for the deficiencies in our criminal justice system. Whatever faults the criminal system endures, judges should not be considered the root cause of our dissatisfaction. As a former prosecutor, I do not believe prosecutors should have this much influence over sentences.

The sentencing guidelines have obstructed effective representation by criminal defense lawyers of clients in the area most crucial to clients—their liberty. It is no longer effective or relevant for a criminal defense lawyer to display eloquence in appealing to a sentencing judge for forgiveness, compassion, understanding, rehabilitation, or lenience. Even in a case where the client has decided to cooperate and assist in the prosecution of other persons, a defense lawyer's appeal to the sentencing judge for leniency will be rejected. It is the sole and exclusive province of the prosecutor to decide when a defendant has rendered "substantial assistance."⁴ Thus, the primary motion for reduction of sentence or departure from the guidelines on this ground emanates solely from the prosecutor. The defense lawyer, while able to request departures on other grounds, cannot file a motion for a reduced sentence for cooperation.⁵ Many judges would credit defendants for their cooperation as a measure of their contrition and impose more lenient sentences. It is an intolerable, unjust consequence of the sentencing guidelines that only the prosecutor can influence the court to reduce a sentence because of a defendant's assistance.

(discussing the importance of offenders personal characteristics in sentencing).

2. See U.S. SENTENCING GUIDELINES MANUAL § 5 (1994) [hereinafter SENTENCING GUIDELINES].

3. See 18 U.S.C. § 3553(b) (1994).

4. See SENTENCING GUIDELINES, *supra* note 2, § 5K1.1.

5. *Id.*

Responsibility for the passage and implementation of the Federal Sentencing Guidelines did not rest upon criminal defense lawyers. We are not legislators, nor are we government officials. However, through various organizations, legal periodicals, lectures, and petitions to Congress, the criminal defense lawyer should mount a concerted effort to modify the sentencing guidelines. The sentencing function should be restored to judges, as prosecutors cannot be expected to be objective in matters of punishment.

Some concepts of the sentencing guidelines are commendable and contain some features that are worthy. In particular, I cite the fact that imposed sentences are served except for modest good-time credit.⁶ Too often the public reads about the imposition of a life sentence for a crime with the footnote that the perpetrator may be released within fifteen years or less. So life did not mean life, but life does come close to its meaning and intent under the sentencing guidelines. This development has resulted in the ultimate abolition of the United States Parole Commission because its functions have been discarded. Thus, the sentencing guidelines' contribution of truth in sentencing is a benefit to the criminal justice system by making it more credible.

Other contributors to this worthy Symposium will discuss many issues affecting the representation of persons charged with criminal offenses. As dean of the law school, Gerald McLaughlin stated in his solicitation of contributors, authors may touch upon any aspect of the admittedly broad topic of the responsibilities of the criminal defense lawyer. I expect and hope to read comments on conflict of interests, zealous advocacy, and ethical considerations of every type and description, including the issue of whether a defendant should testify and the corollary question of whose decision it is—the client's or the lawyer's.

In light of the sentencing guidelines, decisions of strategy are a constant problem in the defense of persons charged with criminal offenses. In this setting, a client and lawyer must decide whether to structure a pre-indictment plea of guilty or to contest the government's inevitable indictment.

If a factual and legal basis for a plea of guilty is present, and the client wishes to receive the benefit of acceptance of responsi-

6. *Id.* § 5C1.1. The abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately 15% for good behavior. *Id.* § 1(A)(3).

bility under the sentencing guidelines, counsel should not forbid this decision.

If counsel believes that the case against his or her client has legal deficiencies, but the client persists for a myriad of legitimate reasons in pleading guilty, counsel need not remove herself or himself from the case. There is no simple answer, as each case must be decided on its own unique facts.

Prior to the sentencing guidelines, a defendant could take a calculated risk and try the case to a judge or jury. If the defendant lost, there was still the opportunity to persuade the court that the sentence should not be harsh. As a result of the sentencing guidelines, the client can be informed of the range of sentence that may be imposed should contesting the case result in a conviction. Thus, the guidelines have dramatically impacted the defendant's up-front decision of whether or not to contest the case.

While serving as court-appointed counsel in a recent case, I advised my client to challenge his indictment on search and seizure grounds believing that some evidence would be excluded, but I could not promise an acquittal. The client's wife was a codefendant in the case but separately represented. The client requested that all energies be directed toward the wife and, in exchange for more favorable treatment of her, he declined to challenge the legality of the government's evidence and entered a guilty plea. I considered withdrawing as counsel. I rejected that action because I could not guarantee that the legal challenge to the evidentiary aspects of the case would result in an acquittal. Since the client was fully advised of his rights, his decision to plead guilty was an informed one.

If I had felt that an acquittal was a virtual certainty, my decision may have been different. Thus, again the sentencing guidelines play a significant role in such decisions because a plea of guilty can earn credits towards a reduced sentence,⁷ while an unsuccessful trial invariably results in a harsher sentence. Thus, the client is confronted with the choice of taking a chance at trial for a complete exoneration versus a guilty plea with a reduced sentence. This is uniquely the client's decision and counsel can only counsel.

I chose this profession because it is not stagnant, and it commands one's continuing vigilance. The responsibility of the criminal defense lawyer does not begin and end in the courthouse. It is

7. SENTENCING GUIDELINES, *supra* note 2, § 3E1.1 & cmt. 3.

also appropriate that criminal defense lawyers influence the administration of justice and oppose concepts that are unworthy and antithetical to fair justice in this country.

The successful practice of criminal defense law should not be measured in financial terms or in won/lost records. The question should be whether the defense lawyer did a professional job representing his or her client—regardless of the outcome.

