

ETHICAL ISSUES IN CRIMINAL DEFENSE: THE UNITED STATES EXPERIENCE

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My task is to discuss ethical issues in the work of the criminal defense attorney in the United States today.¹

In order to understand the many ethical issues involved in the work of criminal defense attorneys, it is necessary first briefly to discuss the work that criminal defense attorneys actually do in the United States.

In the American system, the prosecutor presents the case against the defendant, and the defense attorney's job is to challenge and test the evidence. The judge is an important figure, but is more like the umpire in a baseball game than like the pitcher or the batter. The judge is not responsible for organizing and presenting the evidence, does not decide which witnesses will be called, and generally does not ask any questions of the witnesses. The jury decides over guilt or innocence.

The defense attorney is not a minor figure. The criminal defense attorney is an absolutely critical participant in the process. The defense attorney investigates the case and advises the defendant as to whether to plead guilty or not. If the defendant pleads not guilty, the defense attorney plays an important role in selecting the jury, makes objections if the prosecution seeks to use impermissible evidence and cross-examines the prosecution witnesses. The defense attorney then calls the witnesses for the defense and conducts the direct examination of these witnesses. The defense attorney makes opening and closing statements to the jury, discusses countless questions of substantive law and procedure with the judge and the prosecutor, and plays a very important role in the sentencing process as well. Even if the defendant pleads guilty, the defense attorney usually negotiates the plea and must ensure that the proper procedures are followed.

The central role that defense counsel plays in the adversary system creates many ethical problems. In a case some years ago, a defendant in a murder case told his lawyers that he had previously killed two other persons. The defendant also told his lawyers where he had hidden the bodies of his two victims. The lawyers went to that place, found the bodies, and took pictures of the bodies. They did not, however, tell the police or the court that they had found the bodies or where the bodies were located. Were the actions of defense counsel in this case proper? Did defense counsel act illegally?

Professor Monroe Freedman, a highly respected professor of legal ethics at Hofstra University in New York, argues that the central ethical problem faced by every criminal defense attorney is that he or she is required to obey three basic principles that are in conflict

¹ I would like to thank the organizers and this historic University for allowing me the honor of participating in this important Conference.

with each other:

- The first principle is that the criminal defense lawyer is required to know everything about the client's case,
- The second principle is that the criminal defense attorney is required to maintain that knowledge in the strictest confidence,
- And the third principle is that the criminal defense attorney must always be candid and honest with the court.²

The way in which these principles conflict is illustrated by the murder case just mentioned. In this case the defense lawyers took pictures of the bodies of their client's earlier victims but did not tell the police or the court where the bodies were. Arguing that the lawyers were officers of the court, the local prosecutor tried to file charges against the lawyers for failing to reveal knowledge of a crime. In effect he claimed that the lawyers had violated the third duty, that of being candid and honest with the court.

Professor Freedman argues that the lawyers did the right thing by not telling anyone about the bodies. Not only did the two lawyers behave properly, according to Professor Freedman, but if they had divulged the information, he thinks that "they would have committed a serious breach of professional responsibility."³

Although the trial in the adversary system is a search for truth, the defense attorney's job is not to present the truth but to defend his client. By defending his client, the defense counsel protects two important values. First and foremost, he protects the dignity of the individual and upholds the character of a democratic state. And secondly, by presenting the evidence and arguments favoring his client, the defense counsel helps the search for truth.

Professor Freedman's first principle is that defense counsel should know everything about his client's case. The reason for this principle seems obvious, for it is only by investigating the case and learning all the underlying facts that defense counsel can formulate an appropriate line of defense for the case. The defense counsel's duty to investigate is spelled out in the American Bar Association's Standards for Criminal Justice. These standards say:

"Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty."⁴

These standards do not have the force of law, but they are highly respected in the profession and the Supreme Court of the United States has indicated that they provide an important guide to what defense attorneys are expected to do.⁵

The second principle is that the criminal defense attorney is required to maintain knowledge that he gains from the defendant and in the course of preparing the defense in the

² Monroe Freedman, *Lawyers' Ethics in an Adversary System* (New York: Bobbs-Merrill, 1975), pp.27-42.

³ *Id.* at p.2.

⁴ American Bar Association, *Standards for Criminal Justice Standard 4-4.1 (a)* (3d ed., 1993).

⁵ See, e.g., *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

strictest confidence. This principle does have the force of law. In order to encourage defendants to give lawyers the information needed to prepare a proper defense and to give good legal advice, every state requires attorneys to keep this information confidential and every state makes it impossible for the police, the prosecution and the courts to order its disclosure.⁶

The third principle is that the criminal defense attorney must always be candid and honest with the court. This principle also has the force of law. The attorney is in every state an officer of the court. In addition, every state has a set of professional rules that attorneys must obey and each of these sets of professional rules requires attorneys to be honest and candid with the court. The state professional rules are generally adaptations from two sets of professional rules developed by the American Bar Association: the Model Code of Professional Responsibility completed in 1969, and the Model Rules of Professional Conduct adopted in 1983. These national standards, and a new set of rules now being developed by the American Law Institute⁷, do not have the force of law but are used by the states in developing and interpreting their own laws. These national standards apply to all lawyers. They are not limited to criminal defense attorneys.

Professor Freedman argues that the lawyers in the New York murder case did the right thing because the bodies they discovered were found as part of their investigation (Principle 1) and they were prohibited from disclosing their discovery by their duty to keep confidential things that they were told by their client. (Principle 2)⁸

Even Professor Freedman admits that his principles are not absolute and that the defense attorney must sometimes disclose things that have been told to him in confidence. If the defendant, for example, tells his attorney that he is going to kill someone, the attorney is permitted, and some states require the attorney, to give this information to the appropriate authorities so as to prevent a serious crime from taking place.

When criminal defense attorneys speak candidly about their work, they are quick to say that they face important ethical questions almost every day in their practice. As it is not possible in a short talk to discuss all the many kinds of problems faced, I would like to focus on three particular questions that have been much debated during the past 30 years. When first posed in a speech in 1966, these questions were called the three hardest questions that a defense counsel must face.⁹ The questions are:

- (1) Should defense counsel put a defendant on the stand when the defense counsel knows that the defendant is going to commit perjury?
- (2) Should defense counsel cross-examine a prosecution witness whom the defense counsel knows to be accurate and truthful, in order to make the witness appear to be mistaken or lying?
- (3) Should defense counsel give his client advice about the law when the defense counsel knows the advice may induce his client to commit perjury?

Professor Freedman says that defense counsel should put a defendant on the stand even

⁶ Christopher Mueller and Laird Kirkpatrick, *Modern Evidence: Doctrine and Practice* (Little Brown, 1995), pp. 459–602.

⁷ American Law Institute, *Restatement of the Law Governing Lawyers* (Tentative Draft No. 8, 1997).

⁸ Freedman, note 2 *supra*, at pp. 6–8.

⁹ *Id.* at p. viii. Numerous other questions are discussed in Rodney Uphoff, ed., *Ethical Problems Facing the Criminal Defense Lawyer* (American Bar Association, 1995).

if the defense counsel knows that the defendant is going to commit perjury in his testimony.

An example. An innocent person is accused of a snatching a purse. The first prosecution witness mistakenly says that she saw the defendant commit the crime. The only other prosecution witness says that she saw the defendant one block away from the crime just before the snatching occurred. The defendant admits that the second witness is telling the truth. He was there even though he did not commit the crime. The defendant says that he wants to take the stand and testify truthfully that he is innocent but that he also wants to lie and say that he was nowhere near the place where the second witness says that he was. He fears that if he tells the truth about where he was that he is sure to be convicted.

Professor Freedman says that defense counsel should try to persuade the defendant not to commit perjury, but that if the defendant insists on taking the stand and telling the untruthful story, defense counsel should go along with the defendant's wishes. Not to do so would, in Professor Freedman's view, violate the defense counsel's duty to keep confidential what his client has told him and would discourage defendants from telling the truth to their lawyers.¹⁰

Law professors and others have written a whole library of articles trying to answer Professor Freedman, and have proposed numerous other solutions. One solution for the defense counsel would be to withdraw from the case. This is generally considered to be a poor solution because another lawyer would have to be appointed as defense counsel. If the defendant tells this new lawyer the truth, this lawyer would have the same problem as the original lawyer. If the defendant does not tell this new lawyer the truth, the perjury simply occurs without the lawyer's knowledge.

Another solution is for the attorney to put the defendant on the stand, but not to ask any questions. The defendant would then be required to tell his own story without the lawyer's help. One important professional group adopted this as its official solution in 1969, but changed its mind in 1979, finding that this solution violated both the attorney's duty to disclose false evidence and the attorney's duty not to disclose what he had been told by his client.

A third solution is contained in the 1969 Model Code of Professional Responsibility. This Code said flatly that "a lawyer shall not ... [k]nowingly use perjured testimony or false evidence." The 1983 Model Rules go even further. They not only forbid the knowing use of false evidence, but say that if the defendant offers evidence that the lawyer later learns is false, the lawyer is required to tell the court that the evidence is false.¹¹

All of these solutions are more cosmetic than real. They sound good but do not work well in the everyday world. They require defense counsel to breach his duty of confidentiality and some commentators believe that they violate the defendant's privilege against self-incrimination and the defense counsel's duty to defend his client.

Many working defense attorneys do not agree with these unrealistic rules. Some solve the ethical problem by no longer inquiring about their client's guilt or about any facts that might indicate guilt. These attorneys engage in what the commentators call "selective ignorance." This solution does not prevent perjury, but it does allow the defense attorney to be honest with the court and keep secret those things that he has been told by the defendant. It means also, however, that defense counsel has not fully investigated the case, and that facts that might be useful in the defense go undiscovered.

¹⁰ Id. at p. 31.

¹¹ Monroe Freedman, *Understanding Lawyers' Ethics* (New York: Matthew Bender, 1990), pp. 109-141.

The second question is whether it is proper for defense counsel to cross-examine a witness who has given accurate and truthful testimony in order to make the witness appear to be mistaken or lying. Professor Freedman's answer is that it is proper for defense counsel to do this. The 1969 Model Code, the 1983 Model Rules, and most commentators agree.¹²

The third question is whether defense counsel should give his client advice about the law when the defense counsel knows the advice may induce his client to commit perjury or violate the law.

Example. The defendant has been convicted and is awaiting sentencing. He asks his defense counsel for a list of all the countries in South American that do not have extradition treaties with the United States. Should the defense attorney give the client the list?

The 1969 Model Code gave an ambiguous answer to this question. The 1983 Model Rules are much clearer. They say that an attorney shall not advise a client to engage in criminal conduct or assist a client in carrying out criminal conduct. The lawyer may, however, "discuss the legal consequences of any proposed course of conduct with a client." Under the Model Rules, it would presumably therefore be all right for the attorney to give his client the list of countries with no extradition treaties.

This leaves many questions unanswered, however. In the example the defendant asked for the list of countries with no extradition treaties. Would it also be all right for the attorney to offer to supply such a list? Suppose the question that the client wanted answered was whether the penalty for robbery was higher with an automatic pistol than with an ordinary pistol?

Example No. 2. The defendant, who is charged with murder, tells his story to defense counsel. The defense counsel says:

"If the facts are as you have stated them, you have no legal defense, and you will probably be given the death penalty. On the other hand, if you acted in a blind rage, there is a possibility of saving your life. Think it over, and we'll talk about it tomorrow."

The 1969 Model Code forbids the lawyer from participating in the creation of evidence when he "knows or it is obvious" that the evidence is false. Under this standard, the lawyer's advice is questionable, but an argument can be made that the lawyer does not actually "know" that his client is guilty. Under the 1983 Model Rules, however, it is much clearer that this kind of advice is prohibited.¹³

In the United States good lawyers do what is called "preparing" or "prepping" their witnesses for trial. This means that they sit down with the witness and go over the witness's testimony in advance of trial. Sometimes the lawyers will even organize make believe trials in which the witness will testify before a group of people who have been instructed to pretend that they are the jury. The lawyers will then discuss the witness' testimony with the witness to make sure that the witness has not forgotten any favorable fact, to ensure that the witness is dressed properly, is respectful of the judge and the opposing attorney, and that the witness maintains eye contact with the jury.

The lawyer is not allowed to provide the defendant with a better story. The lawyer can properly give the defendant relevant legal advice, however, and can ask leading questions that

¹² Id. at pp. 161-171.

¹³ Id. at pp. 143-160.

might help to draw out useful information that the client, consciously or unconsciously, might be withholding. This procedure creates a risk that the defendant will falsify evidence, but it is necessary to draw out truthful information that the client might have overlooked or might consciously or unconsciously be withholding.¹⁴

One important issue that runs through the ethical problems already discussed and many others that have not been discussed is the question as to who is entitled to make the decisions involved: does the lawyer decide what is to be done or is that a decision for the defendant to make.¹⁵

In the past this issue was largely ignored. Today, however, it is no longer possible to ignore the issue. The decisions of the United States Supreme Court make it clear that some issues belong to the defendant. The decision as to whether to waive counsel, the decision to plead guilty, the decision to waive a jury trial, the decision as to whether to testify, and the decision whether to appeal are all clearly decisions that can be made only by the defendant. The defense counsel may advise the defendant about these matters, but the defendant makes the decision.

Beyond these fundamental rights that are clearly vested in the defendant, the Supreme Court views the day to day conduct of the defense as being the province of the attorney. The 1969 Model Code adds very little to the Supreme Court's formulation. The 1983 Model Rules, however, attempt to provide some practical advice. They indicate that the attorney makes decisions about the technical legal strategy and tactics but that the defendant makes decisions about purposes and objectives, such as how much money to spend or whether to involve third persons who might be needed. A different set of respected standards is even more specific, indicating that decisions over what witnesses to call, what jurors to accept, what trial motions to make, and what evidence to introduce is to be decided by the defense counsel after discussion with the defendant.

The defense attorney who follows these rules is acting lawfully and violates no ethical rules. Many excellent defense counsel, however, think that these rules do not give the defendant enough say over his own case. They think that all major decisions should be explained to the defendant and that the defendant himself or herself should make the decision. Of course, if the defendant is insane or borderline in intelligence, they act differently. Their approach to the problem is called a "client centered approach." It illustrates the principle that there is often more than one right answer to the ethical problems that defense counsel confront.¹⁶

In the last several years in the United States a new challenge for defense attorneys has arisen. This new challenge arises out of the O.J. Simpson case. It is hard to overstate the significance of this case to American life. O.J. Simpson was one of the best football players America has ever had. To see Simpson run with the football was like watching poetry in motion, and Simpson was deeply loved by the American people, both black and white. People liked his smiling face and easy manner, and they loved the clever TV ads he made for a car rental company. There was almost total shock therefore when the American public learned that Simpson was suspected of killing Nicole Brown Simpson, a white woman who was his

¹⁴ Richard Wydick, "The Ethics of Witness Coaching," 17 *Cardozo Law Review* 1 (1995).

¹⁵ Freedman, note 11 *supra*, at pp. 43-64.

¹⁶ George Bisharat, "Pursuing a Questionable Suppression Motion," in Rodney Uphoff, ed., *Ethical Problems Facing the Criminal Defense Lawyer* (American Bar Association, 1995), pp. 63-75.

former wife and the mother of two of his children. The situation was something like having the Aum crimes committed by the most popular sports figure in Japan.

The Simpson criminal trial lasted eight months and was watched daily by millions of people. Around 150 million people watched the final verdict. During the trial there were at least 6 to 8 hours of commentary about the trial on television every night. Even today there is still a lot of television commentary and several Simpson books are on the best seller list.

The initial shock and disbelief that a popular hero like Simpson could be involved in a brutal murder was almost universal. After the trial began, however, and the evidence began to pile up against Simpson, the majority of Americans concluded that Simpson was guilty. When the jury, after only four hours of deliberation, came back with a not guilty verdict, many of those who had been watching the case on television and who believed that Simpson was guilty were shocked and angered.

Much of their anger focused on the role of the defense attorney. How could an honorable person, the public asked, defend a monster such as Simpson? Was it not a perversion of justice to allow defense counsel to attack the police on a massive scale and to suggest that the evidence in the case was planted by police officers filled with racial hatred? To an angry and disgusted public, the defense attorneys seemed far more interested in confusing the witnesses and prolonging the trial than in discovering the truth.

Posing questions like this to a citizenry already concerned about high rates of crime is like throwing red meat to hungry lions. Public esteem for the defense attorney, which has never been terribly high, took a nose dive.

Even in a democracy strongly committed to individual rights, that is an important matter. It is important to have the right to have the assistance of counsel in the Constitution. It is even more important, however, to have this right in the hearts of the people. The words of the Constitution can stand against temporary winds. That is their purpose. They cannot stand, however, against long, sustained attacks that cause the citizenry to turn permanently against the right itself.

The Simpson case has already resulted in a number of changes in the law. In California, for example, we have changes in the rules concerning character evidence and the hearsay rule.¹⁷ The Simpson case has also resulted in much more radical proposals for change. Some persons would eliminate or greatly change the jury system. Many persons would prohibit television in the courtroom.¹⁸ Still others would place strict limits on the kinds of arguments that defense counsel is allowed to make. Some would even go so far as to prohibit defense counsel from making arguments based on race.¹⁹

When I was a law student 35 years ago, there was little discussion of legal ethics in law schools, and the literature available was not terribly helpful. So far as I know, my law school offered no course in ethics and I had the impression that ethics rules existed primarily to protect lawyers against competition from other professions.

We have come a long way since then in recognizing the importance of legal ethics. Today

¹⁷ Character evidence concerning a criminal defendant's prior acts of domestic violence and hearsay threats of injury are now admissible. Cal. Evidence Code §§ 1370, 1109 (West Supp. 1997).

¹⁸ See, e.g., Stuart Taylor, Jr., "A Parody of Justice," *American Lawyer Media*, December 4, 1995, p.8.

¹⁹ See, e.g., Peter Arenella, "Foreword: O.J. Lessons," 69 *Southern California Law Review* 1233 (1996); Ronald Allen, "The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets," 67 *University of Colorado Law Review* 989 (1996).

every law school has a required ethics course and the literature is at least fifty times greater.²⁰ The highest paid law professor is the nation's leading expert on legal ethics, Professor Geoffrey Hazard from the Yale Law School. We have not solved all the problems, but we have made an important beginning.

Before we congratulate ourselves too much, however, we need to remind ourselves that there have been and continue to be powerful forces that are more interested in keeping things as they are than in confronting the real problems that exist.

There are two things about the speech that was made 30 years ago about the three hardest questions that defense counsel face that I still find interesting today. The first is that the issues that the speaker, our friend Professor Freedman, raised were not ones that he thought up while sitting in his office thinking about the problem. They were issues that he became aware of by spending a lot of time talking to defense attorneys about what they were doing and the kind of problems they were facing.²¹

The second point is that when Professor Freedman made his speech, a powerful federal judge, who later became Chief Justice of the United States, sought to have Professor Freedman dismissed from his post at the University and disbarred from the practice of law. Formal disciplinary charges were filed against Professor Freedman, but he was not intimidated and has gone on to have a very productive and highly distinguished career.²² Not every professor and not every lawyer would have had the courage, however, to stand up to this kind of attack.

In attempting to solve the ethical problems that face defense counsel in criminal cases, we need to pay much more attention to the problems that defense counsel actually face each day in their practice. We need to bring the things that honest defense counsel actually do, and the pressures and thoughts that actually go through their minds, into the sunlight of public knowledge, and we need to be free to discuss every conceivable solution to the ethical issues posed without fear or threat of retaliation. We have made some progress in the United States since 1966 toward achieving these goals. The outcry after the Simpson case, however, indicates that the battle is not won, and if we are honest, we will admit to ourselves that it will in fact never be completely and finally won. Each generation must in truth fight its own battle to win liberty and to protect justice.

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²⁰ Much of the change was brought about by the Watergate scandal of the 1970s. President Nixon was forced to resign and many top governmental lawyers, including Attorney General Mitchell, were convicted of criminal offenses.

²¹ Professor Freedman's research was similar to that conducted by Professor Goto Akira in the Federal Defender's Office in Sacramento. See, Goto Akira "Sacramentode Atta Kousetsubengonintachi," *KikanKeijibengo*, No.1 Spring 1995, p.69.

²² Freedman, note 1 *supra*, at p. viii.