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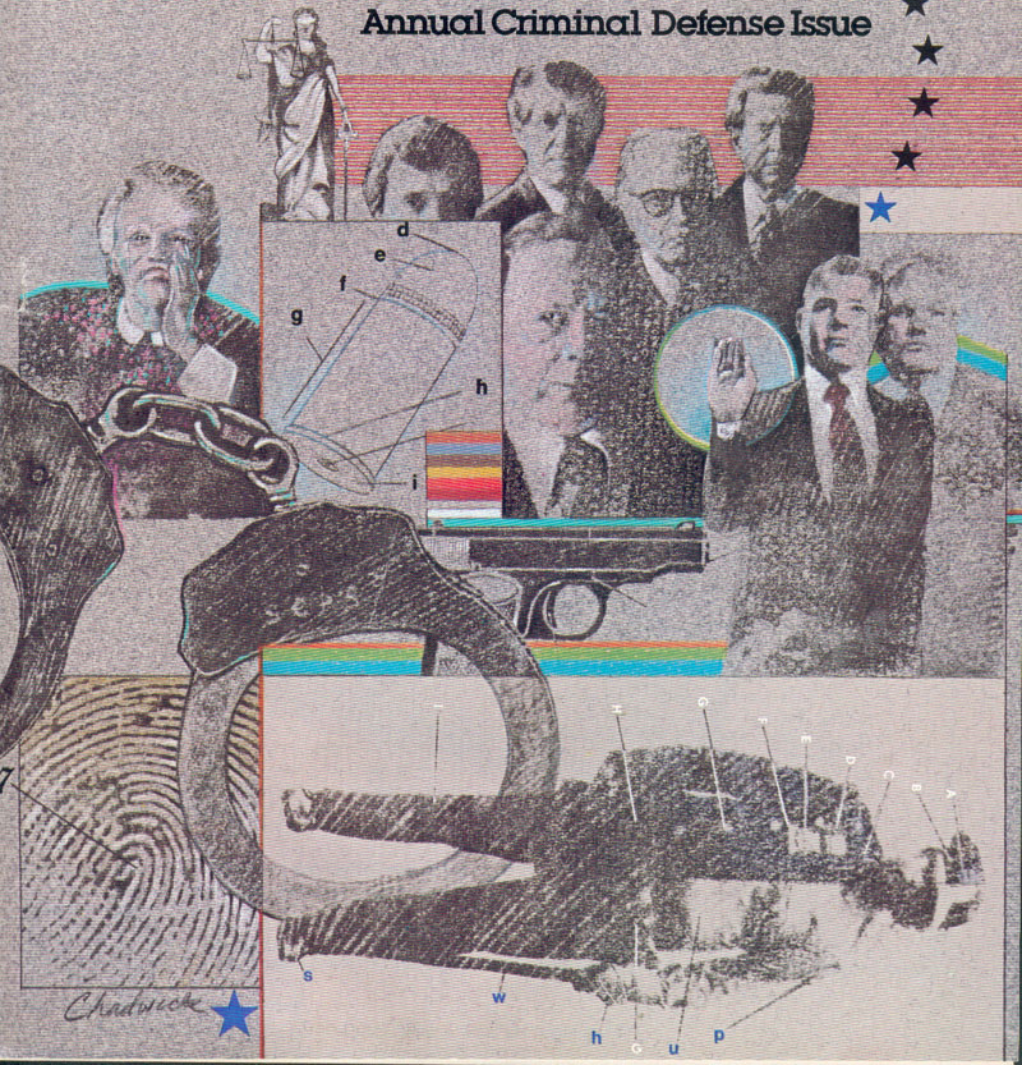

by Jack B. Zimmermann

Resisting The Crown: Analyzing The Role Of The Criminal Defense Lawyer

Defending individuals accused of crime can be an emotionally draining and all-consuming endeavor when performed over a period of time. Sometimes we lose sight of our role in the criminal justice system. The following thoughts are those of one lawyer, and there will be no footnotes for the reader to examine.

In my judgment, there are four loyalties owed by the defense lawyer, and I set them out without regard to the relative priority of one to another. They are all important in reviewing our role.

Loyalty to the System of Justice

Many Americans have fought to preserve our system of government, including many who are reading this article. The keystone of that system is that no one's liberty will be taken without due process of law. While each of us can guarantee that we will not commit a crime, none of us can guarantee that someone will not falsely accuse us of committing one. The concepts of the burden of proof being placed on the prosecution, proof beyond a reasonable doubt, and the presumption of innocence, are not designed to protect the guilty but are for the protection of the wrongly accused. In defending those accused of crime, this message must be related to the jury. The role of the defense lawyer is to challenge the prosecutor to comport with the requirements of due process. Counsel must do this in every case—not just in the "close" cases. The

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judge cannot make the prosecutor do this; the defendant cannot; the jury cannot; only the defense counsel can.

Loyalty to the Client

Many lawyers would place this as the first loyalty that the defense lawyer owes. I have no quarrel with that priority. When reviewing the loyalty that the lawyer owes to his or her client, one must consider the differing degrees of resources available to the parties in the lawsuit. The resources ordinarily available to the government when compared to those available to the individual cause one to see why it is that the defense lawyer must maintain an allegiance to the client at all times. Often, perhaps all the time, the defense lawyer is the only shield between the abuse of power on the part of the government and the freedom of the seemingly insignificant individual citizen. Every step that the lawyer takes must further the interests of the client. When dealing with a new client at the initial interview, this concept must be explained and the new client must come away knowing that his or her lawyer will be exerting every effort possible within the limits of the law and professional responsibility.

Loyalty to the Profession

Defense lawyers must be trusted by judges and prosecutors in order to be effective advocates for their clients. When a lawyer stands before a judge and takes a position that the law calls for a certain ruling, or that the interpretation of a statute calls for a certain result, or that a particular case stands for the proposition advocated by the defense lawyer, he or she had better be accurate. The defense lawyer who, from the initial contact with the court, establishes credibility as to the quality of legal research done prior to the trial, will find that the judge will listen to that lawyer and place some credence in whatever he or she says for the balance of the trial. The lawyer who misleads the court, intentionally or unintentionally, by design or through sloppy research, will find that on a close call in the heat of battle two weeks down the road he or she will lose because the judge will not trust the defense lawyer.

An example I like to use is that of the federal district judge in Oklahoma City who would look at me after a legal point had been argued, and the ruling had been adverse to the defense position, and ask whether I really felt that the cases had said what I had told him they said. He then would either take a recess or a lunch break, go back into the library and re-read the cases and study the brief or the memorandum submitted by the defense. Then he would come back and call us to the bench to announce that he had changed his ruling.

Another example is the state district judge trying a murder case who, when counsel for the defense objected repeatedly to a particular procedure that was occurring, would call a recess, go back into the library, research the points we had raised, and then call counsel together to announce that he believed that the defensive position was correct and that the area of inquiry would no longer be permitted.

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These occurrences would not have happened if credibility had not been developed at the very outset of the trials involved. The defense lawyer who acknowledges the professionalism of the prosecutor who is doing the job in the proper way will find that he or she can represent the client in a more thorough fashion than the lawyer who immediately assumes that every prosecutor is an evil person and cannot be trusted merely because of his or her position. If counsel for the defense is trusted by the prosecution much in the same way as the proposition that has been discussed above with regard to the judges, then often cases that otherwise would have to be tried can be disposed of in more favorable ways. The prosecutor who has been told by the credible defense counsel that a search was illegal may reinvestigate the facts and determine that indeed the defense position is correct, and dismiss a case or change the recommendation as to the disposition.

Defense lawyers always must strike hard blows, but not foul ones. Being fair in the courtroom does not detract from representation of the client; indeed, it enhances it because the court will know that counsel is attempting to act in a manner consistent with fundamental fairness. If the prosecutor is sick and asks for a recess, unless there is some overriding reason to enter an objection, counsel ordinarily should join in the prosecutor's motion on the theory that if the defense lawyer were sick, he or she would not want to have to proceed with trial that day. Another example involves a case in which, during individual *voir dire*, the court inadvertently asked for a challenge for cause without excusing the juror from the room. The prosecutor had to challenge for cause in the juror's presence, and when that motion was denied because the juror was rehabilitated by the defense, the prosecutor at the next recess asked the court for some relief because he would have to use a peremptory challenge to excuse the prospective juror who now knew that the prosecution had challenged her for being unable to be a fair juror. A solution reached by agreement was that counsel for the state should not have been put in that position, and therefore was entitled to an extra peremptory challenge. Of course, out of a sense of fairness we asked for and received an additional peremptory challenge also, so that both sides received the same number.

Loyalty to Oneself

The defense of criminal cases requires a special type of person. A tremendous emotional strain comes with the knowledge that other persons' liberty or perhaps their very lives are in a lawyer's hands. Decisions that literally can mean life or death must be made by the lawyer, and not by the client. They require someone who can think quickly under a great deal of pressure, and who can go on and live with the decisions and make the best of them for the balance of the trial. For example, an extremely difficult decision in a major high profile murder case was whether to waive a jury and go to a bench trial when, after two weeks of trial, it was discovered that one of the jurors had not been totally truthful in answering some questions on *voir dire*, and had in fact announced that she would find the defendant guilty. The decision was made to waive the jury and have the court decide guilt or innocence. The decision turned out to be correct because the court acquitted the client of murder after twenty minutes of deliberation, but the evening spent between waiving the jury and the announcement of the verdict caused

many gray hairs to develop on the lawyers' heads.

Lawyers new to the practice of criminal law should be aware that some clients care not how a result is reached, so long as the result is the one sought. No case is worth an entire career. We do not tell a witness what to say, and we refuse to put on a witness who is lying. Counsel should be certain not to confuse instruction in the technique of testifying with what I have just said. Clearly, it is the duty of the defense lawyer to work with the client and witnesses on how to project one's voice in the courtroom, how to think under pressure, how to dress, and how to react under cross-examination. I would not advise counsel to be concerned with whether a particular act was committed, but instead to discover the state's theory and begin to map strategy as to how best to require the prosecution to prove its case.

The defense lawyer must never quit, must never stop pumping during a trial. The defense lawyer must be able to rebound constantly. For example, in one case a client's daughter stated in a taped interview conducted just before trial began—and on two other occasions while under oath in reported depositions—that she had never seen her mother point a rifle at her stepfather. She then testified at trial that not only did she witness her mother point the rifle, but she also heard her threaten to shoot him. The defense lawyer must recover from such incidents and effectively cross-examine the witness, demonstrating that such would have been a physical impossibility, or in some other way countering the effect of that type of surprise testimony.

In one recent alleged mercy killing case, the decedent was in a comatose condition in a nursing facility when his son shot him in the brain. The defense lawyer had prepared to cross-examine the assistant medical examiner who had performed the autopsy, but who unexpectedly became ill at the time of trial. The lawyer then was faced with taking on the chief medical examiner, a 30-year, courtroom-wise veteran who was not only a physician, but also an attorney.

The witness testifed without hesitation that the cause of death was a gunshot wound to the brain; the defense counsel had to take this unyielding testimony and demonstrate that the true cause of death, was in fact, congestive heart failure and not the gunshot wound.

The Role During Specific Stages of Trial

When analyzing the role of the criminal defense lawyer one can review the overall picture as we have just done. One also can look at specific stages of representation of the accused person, and offer some advice as to the role of the lawyer in each of those respective stages.

At the initial interview the first thing the attorney should do is explain concisely the attorney-client privilege and the role of the defense lawyer, so that the client understands that the lawyer is in fact on his or her side. In addition, I suggest that all fee discussions be completed at that initial interview so that money does not come between attorney and client. If the client is in jail, the defense lawyer should immediately seek release through appropriate legal action, unless it is not in the client's best interest. Ordinarily that will be a rare situation, but circumstances have existed where, because of possible drug use or other similar factors, it was in the client's best interest to permit the accused to remain in jail and not deplete either the minimum amount of time remaining for preparation for trial on bond hearings, or the limited financial resources of the client on excessive bonds. Next, discovery should be obtained either through informal meetings with the prosecutor, or, if necessary, through formal motions filed with the court. The discovery then would occur as a result of an order by the court.

Once these initial items have been accomplished, the lawyer then must begin to prepare for trial. Preparation for trial begins with a preparation of the jury charge. Jury charges are researched, typed, and in the file before trial in every criminal case that we try. To determine what the defense theory is and what instructions on the law defense counsel wants the jury to receive, he or she must be able to focus the investigation so that there is factual support for a requested jury charge. Judges will not grant requested jury instructions not supported by the evidence. Therefore, one does not just go in and begin a shotgun investigation; the investigation has been narrowed to those items that are needed for various alternative theories of the defense.

Then motions must be filed. Counsel should not file specious or unnecessary motions. Counsel sets the tone with the judge by the nature, content, and appearance of the pretrial motions. They

should be professionally researched, professionally stated, and professionally typed. When the trial actually begins, counsel must appear as an advocate from the very beginning. The jury must know during *voir dire* that counsel is representing his or her client and that it will be a hotly contested matter. Often counsel can set the stage prior to *voir dire*. For example, during a high profile murder case in which the deceased's father was an ex-governor of the state, the jurors were being questioned with regard to their knowledge and impressions and thoughts about this prominent family. Present during that time was the ex-governor who sat in the courtroom taking notes of the answers of the prospective jurors. We felt that that chilled the jurors' answers and interfered with our client's right to a fair trial. We moved to have the former governor excluded from the courtroom, and, through various motions, that was accomplished. However, the point is that the state and the court and, more importantly, the client knew from the very beginning of the trial proceedings that counsel for the defense was going to be an advocate for the client.

At *voir dire*, counsel's role is to explain the theory of the defense through questioning. A good example is when the accomplice witness rule will be a key factor in the case; the jurors must understand the meaning of that rule. If a battered wife theory is going to be a factor, counsel must have the jury understand the psychological ramifications of that phenomenon. If the defense will center on concepts not commonly encountered, such as brain death, he or she must determine the feelings of the jurors with regard to those subjects, as well as what they think they know about them.

When the trial actually begins and counsel gets to the crucial area of cross-examination, his or her role is to be thorough, prepared, polite, but skeptical. One need not attempt to go to the jugular vein of every witness. When cross-examining a detective who had been on the scene of a murder case, and who was obviously very ill at the trial (the detective had a serious kidney problem), the tactic was to elicit all the information necessary in a very polite and respectful manner. The information could be destroyed later by the testimony of other witnesses. Sometimes a particular witness must be questioned in a different manner; experience will teach when to change the method used to examine different witnesses. The point of cross-examination is to put the witnesses to the test of the truth: counsel should stay alert, be courteous, and be firm. In general, at trial counsel must know the law—both the law of evidence and the substantive law involved in the case.

Counsel should put on a vigorous defense if it is called for, but not be faint of heart if the situation calls for resting behind the prosecution. In another high-profile case involving allegations of sale of tanks to Iran and simultaneous sale of anti-tank missiles to Iraq, the government put on some two weeks of evidence, which my partners and I felt had been effectively blunted by cross-examination. The theory of the prosecution had been rebutted, while the theory of the defense had been clearly brought home. Any risk of destroying that favorable situation by subjecting defense witnesses to cross-examination was eliminated by the decision to rest behind the government. After four days of jury deliberation, the client was acquitted, and we came to learn that the vote had been 11 to one for acquittal for some two and a half days, and the court's modified Allen instruction, which we had so vigorously opposed, resulted in a "not guilty" verdict six minutes after that instruction was delivered. Defense attorneys must remember that their role includes protecting the record at trial for possible appeal. That means that objections are made on the proper basis; if the objection is overruled counsel must state an alternate basis until it is clear that he or she has protected the record.

When defending a criminal case where a client insists that he or she is not guilty, or where no reasonable offer is made by the other side and the circumstances mandate trial, counsel must be prepared to go to war.

If at trial the verdict is not guilty, counsel must remain humble in victory; if the other verdict is returned counsel's role is to formulate plans immediately for a motion for new trial or an appeal.

Conclusion

As a former judge and a former prosecutor, it is clear to me that the roles of judge and prosecutor are easy compared to the task faced by the criminal defense lawyer. To be successful in the role of defense lawyer, one must be dedicated to the system and enjoy a challenge. You win when you do your utmost to represent your client, regardless of the verdict. You *win* when you outlawyer the other side.

I try to win the every case. I charge you to do the same. T