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# THE EMERGING ROLE AND FUNCTION OF THE CRIMINAL DEFENSE LAWYER

SAMUEL DASH\*

## INTRODUCTION: THE CHANGING IMAGE OF THE CRIMINAL LAWYER

In the past few years a dramatic change has occurred in the public and professional image of the defense lawyer in criminal cases. It has become nearly as respectable for a lawyer to represent a man charged with burglary as it is for him to handle the tax problems of a corporate client.<sup>1</sup> The top law students graduating from the best law schools, who used to flock to the giant commercial firms of Wall Street, are now frequently found as applicants for staff positions in a public defender agency. If they do accept a position with a corporate law firm, they often exact a promise that they will be permitted to represent criminal defendants by appointment from the courts.

This change has permeated all the activities of the legal profession. Law school faculties, which not long ago all but ignored the criminal

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<sup>1</sup> There is no empirical data to show this change in image. For that matter, the earlier poor image of the defense lawyer was never empirically demonstrated, yet every lawyer at the bar knew about it. There are a number of barometers that presently reflect this change in image. There has been a virtual explosion in law schools throughout the country of additional course offerings, research and clinical programs in the criminal law field. Law professors everywhere report that more senior law students now express a desire to get into criminal law practice. The increased participation of the members of the bar in criminal defense work, mostly by court appointment, has made it profitable for the Bureau of National Affairs to publish the new CRIMINAL LAW REPORTER on a weekly basis.

But perhaps the best indication of the change in image is the new attitudes expressed by defense lawyers, both in private practice and on the staffs of defender agencies. Through the National Association of Defense Lawyers in Criminal Cases, the author, a founder and past president of the Association, has been in continuous contact with hundreds of defense lawyers throughout the country. The Association was originally organized in 1958 partly to meet the need for improving the image of the criminal defense lawyer and to upgrade the practice of criminal law. Earlier annual meetings of the Association reflected the spirit of rejection the members felt as they practiced in the criminal courts. Recently the tone and atmosphere of these meetings have changed, and the discussions at the formal programs and during the informal social gatherings reflect that these defense lawyers now believe they are recognized as engaged in important legal work and are considered essential and respected participants in the system of criminal justice.

law and frequently discouraged students from including the criminal law in their career plans, have greatly expanded their criminal law educational and research programs.

In recent years the American Bar Association has made a major effort at criminal law reform;<sup>2</sup> its Criminal Law Section has moved from a dormant and neglected position to that of a forward and active component of the organized Bar's national program.

Continuing legal education programs for practicing lawyers on criminal law subjects—in the form of seminars, lectures or panel discussions, sponsored by the ABA, or under other auspices—now draw hundreds and even thousands of lawyers when once only a handful would gather in a small room to listen.

I dwell on the change, for only several years back it was all so different. The defense lawyer was stigmatized and isolated from the rest of the bar.<sup>3</sup> Despite the romantic image and the legend of a Clarence Darrow or a Daniel Webster, the real world of professional and public opinion identified the criminal defense lawyer with the criminal defendant he represented, either as a misguided radical at best, or as an actual gangster at worst. The story book or T.V. defense lawyers only represented innocent people; this could be accepted in the noble tradition

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<sup>2</sup> The work of the Special Committee on Minimum Standards for the Administration of Criminal Justice, appointed by the President of the American Bar Association, is a striking example of this effort.

<sup>3</sup> The unpopularity of the practice of criminal law was noted as early as 1922. The Cleveland Foundation, after conducting a survey among attorneys, reported: As everybody knew before this survey was attempted, and as nearly everybody knows in every American city, except when regular clients are involved or an exceptionally large fee is in sight, most of the better grade of lawyers deliberately stay away from the criminal courts. As a result, with some notable and praiseworthy exceptions, the practice in these courts is left to the lawyers of lesser sensitiveness regarding professional practices. The answers to the questionnaire formed an interesting verification of this fact. The criminal branch of the administration of justice, dealing as it does with the protection of the community against crime, the promotion of peace, safety and morals of the inhabitants, the lives and liberties of men, and, therefore, from any intelligent point of view, the more important branch of the administration of the law, has become a sort of outlaw field which many a lawyer avoids as he avoids the slums of the city.

CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND 219 (1922).

As recently as 1966 and 1967, groups studying the problems of criminal justice and the need for increased manpower on the defense side reported a bleak picture. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 57 (1967) [hereinafter cited as TASK FORCE REPORT: THE COURTS]; *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 411-12 (1966) [hereinafter cited as *Airlie House Report*].

of the champion of the rightful cause. But there was little understanding of how a lawyer could represent a guilty criminal without having gone over to the underworld himself.

Various interpretations of events that have occurred in the past several years have been advanced to explain the new aura of acceptance by the profession and, to a large extent, by the public of the defense lawyer in criminal cases. It is easy to try to credit this new status of the criminal defense lawyer to the rash of United States Supreme Court cases that have strengthened the defendant's position in state and federal criminal proceedings through interpretation of the fourth, fifth, sixth and fourteenth amendments to the United States Constitution. Though these cases have made the criminal defense lawyer practically indispensable at almost every stage of a criminal proceeding and have sparked the legal literature and professional interest in the criminal law area to a new life, their impact could just as readily have produced further hostility and distrust of the defense lawyer's position. For he appeared to be serving as an even greater obstacle to the efforts of law enforcement agencies to protect society from the criminal. At a time of reportedly rising crime rates and citizens' fears of violent crimes in the streets, lawyers who served as the implementors of improved criminal defendants' rights could not ordinarily expect to receive a better image publicly—or even professionally, since most of their colleagues at the bar had no contact with the criminal law and reacted to crime and the criminal process with the emotions of laymen.

Perhaps the real truth lies in the underlying premise of these Supreme Court decisions, buttressed by the contemporaneous revolutionary movements sweeping the country in the 1960's—the Negro civil rights movement and the poverty program. Most of the Supreme Court decisions reflected a clear recognition by the Court that the motto over its entrance, "Equal Justice Under Law," was not true in the land, and that the criminal justice system dealt primarily with poor people, spawned from minority groups, for whom the adversary system in its traditional form did not work at all.<sup>4</sup>

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<sup>4</sup> The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel. While authorities are not required to relieve the accused

Once it was recognized that the people usually arrested for crime were the oppressed and isolated of the blighted ghettos, who had been denied equal opportunity for education, housing, employment, etc., the defense of their cause became a noble venture worthy of the efforts of an honorable lawyer.<sup>5</sup>

There is nothing new about the fact that the criminal justice system deals primarily with the poor and disadvantaged residents of the ghetto. The earlier crime studies in this country made this point.<sup>6</sup> The Supreme Court of the United States knew this in 1943 when it decided in *Betts v. Brady*<sup>7</sup> that a poor man could be constitutionally tried and convicted of a serious felony in a state, non-capital case without the assistance of a lawyer, even though he had requested the help of a lawyer and had been denied it by the trial judge. There was no more a sense of urgency at that time to provide equality of justice for the poor than there was to remedy any of the other inequities and handicaps suffered by the ghetto slum dwellers.

What has been new—and relevant to the improved role and image of the defense lawyer in criminal cases—is the urgency that has been demonstrated by the Supreme Court in the past several years in its efforts to erase the usual consequences of the poverty of a defendant in a criminal prosecution.

These efforts of the Court, which began with the inevitable decision of *Gideon v. Wainwright*<sup>8</sup> in 1963 extending the sixth amendment right to counsel to all serious state criminal cases, coincided with the first waves of the Negro-led equal rights movement that broke in cities all over the country after the successes of the courageous protest campaigns in the Deep South during the 1950's. Historically, the Court's response in *Gideon*, overruling *Betts*, was in tune with the mood of the nation.

But the response also represented a restatement of the essential and

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of his poverty, they have an obligation not to take advantage of his indigence in the administration of justice.

*Miranda v. Arizona*, 384 U.S. 436, 472 (1966).

<sup>5</sup> The development of the Neighborhood Law Offices under the Legal Services Program of the Office of Economic Opportunity and the surge of interest on the part of law students and young lawyers in providing legal assistance to the urban poor have meshed spontaneously with the expanding programs, initially sponsored by the Ford Foundation, providing defense lawyers in criminal cases involving the urban poor.

<sup>6</sup> NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (WICKERSHAM COMMISSION), REPORT ON THE CAUSES OF CRIME 94-96, 252-53 (1931).

<sup>7</sup> 316 U.S. 455 (1941).

<sup>8</sup> 372 U.S. 335 (1963).

integral role of the defense lawyer in the administration of criminal justice. Dispelling the nonsense that the representation of an accused is a disreputable service akin to obstructing justice, the Court held such representation to be an indispensable part of a criminal prosecution and stated unequivocally that "any person haled into court, who is too poor to hire a lawyer, *cannot be assured a fair trial* unless counsel is provided for him."<sup>9</sup>

Further adding to the professional status and prestige of the defense lawyer, and in essence equating him to the prosecutor as an officer of criminal justice, the Court said:

That government hires lawyers to prosecute and defendants who have money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws had laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>10</sup>

It is astonishing only that the Court waited until 1963 to pronounce these fundamental truths about the role of the defense lawyer and the need of a poor man to be represented by a lawyer to assure the fairness of his trial. The Court explained that it had laid down these guidelines earlier and that *Betts* had misapplied them. But despite much noble language in earlier cases on the need for defense counsel, as is found in *Powell v. Alabama*,<sup>11</sup> the court had limited its rulings in the past, and, under these limitations, poor men were tried and convicted of serious felonies and sent to prison without ever having had the advice or assistance of a lawyer.

#### THE IMPORTANCE OF COUNSEL TO A FAIR TRIAL

The inevitability of the *Gideon* ruling results from the very nature of the American system of criminal justice which is accusatory rather than inquisitorial. The defendant is presumed to be innocent and the

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<sup>9</sup> *Id.* at 344 (emphasis added).

<sup>10</sup> *Id.*

<sup>11</sup> 287 U.S. 45 (1932).

state has the burden of proving his guilt beyond a reasonable doubt.<sup>12</sup> The whole process, which is an adversary one, depends for its validity on the accused's ability to challenge the state, thus putting it to its burden of proof, which in turn requires the prosecution to scrutinize its procedures and its evidence to determine whether it has a proper case that it can establish according to the law.

This challenge by the defendant can obviously be made only by a lawyer representing him. And, as we shall see, it mostly occurs not in the context of an adversary trial, but through pretrial negotiations between the defense lawyer and the prosecutor. Without the assistance of counsel, the defendant is practically powerless to challenge the prosecution.<sup>13</sup> It is the lesson of human experience that, even in the case of the most well-intentioned prosecutors, the absence of such a challenge can result in carelessness and failure to review the evidence and properly prepare the case, which makes it easier to convict the innocent.<sup>14</sup>

The value for a free society of the adversary, accusatory system of justice, which requires that the government be vigorously challenged when it seeks to deprive a citizen of his liberty, was emphasized in the report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, appointed by Attorney General Robert Kennedy in 1961. The Committee's report was published shortly before the Supreme Court came down with its decision in *Gideon*. The Report stated:

In the modern era it is not always fully understood that the adversary system performs a vital social function and is the product of long historical experience. The state trials in sixteenth and seventeenth century England demonstrated that a system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state's security and to the larger interest of the community. . . . The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense functions is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. . . . It follows that insofar as the financial status

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<sup>12</sup> See 22A C.J.S. *Criminal Law* §§ 566-78 (1961).

<sup>13</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>14</sup> TASK FORCE REPORT: THE COURTS 52-53.

of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system.<sup>15</sup>

The Report noted that many defendants are unable to afford lawyers or meet even modest bail requirements and thus are unable to make effective challenges to the proceedings against them. Again the Attorney General's Committee in its report linked this handicap of individual defendants to the community interest:

The loss to the interests of the accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that the conditions produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community.<sup>16</sup>

The Supreme Court's decision in *Gideon* was, of course, only the beginning of the Court's efforts to provide a system of equal justice for the poor. In *Gideon* itself, the Court left the states where it had left the federal courts in 1938 after *Johnson v. Zerbst*.<sup>17</sup> In that case the Supreme Court held that in federal criminal cases the sixth amendment prohibited courts from depriving an accused of life or liberty unless he had the assistance of a lawyer. Yet despite this requirement of counsel in federal criminal cases, no systematic method of providing counsel had been defined by statute. Rule 44 of the Federal Rules of Criminal Procedure simply required the court to assign counsel for the accused without counsel. But the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice found that the practice under this rule was to place the burden of representation of accused persons on appointed counsel, who received neither compensation nor expenses to support investigation or preparation of the case. The Committee found that this system worked poorly and concluded in its report:

It is a matter for legitimate concern, therefore, to discover that, except for legislation restricted in its application to the District of Columbia, Congress has as yet done little to implement the Constitutional com-

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<sup>15</sup> REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 11 (1963) [hereinafter cited as ATTORNEY GENERAL'S REPORT].

<sup>16</sup> *Id.*

<sup>17</sup> 304 U.S. 458 (1938).



mands by placing the defense of financially disadvantaged persons on a systematic and satisfactory basis and that the federal statutes leave us little closer to the solutions of these basic problems today than was true a quarter-century ago when *Johnson v. Zerbst* was decided.<sup>18</sup>

How the states were to meet the burden of providing counsel for poor defendants and at what stage in the criminal proceeding counsel was necessary, were questions also left unsettled by *Gideon*.

But in a succeeding line of cases, the Court, while frequently sharply divided, held: (1) that an accused in police custody could not be legally interrogated under the fifth amendment without an appropriate warning of his right to remain silent and of his right to the assistance of counsel, and without being provided counsel if he elected representation and could not afford a lawyer;<sup>19</sup> (2) that a poor accused had a right to have counsel appointed to be present at his line-up,<sup>20</sup> at his preliminary hearing where critical issues were involved,<sup>21</sup> on appeal,<sup>22</sup> and in juvenile court proceedings.<sup>23</sup>

In many other recent Supreme Court cases not dealing directly with the right to counsel, the Court's expanding application of constitutional protections for the accused has nevertheless reinforced the right. For it is evident that these protections will remain unimplemented without the presence of a lawyer to raise and present them on behalf of a defendant in an appropriate case. This is true, for example, in the Court's application of the exclusionary rule of evidence to the states in *Mapp v. Ohio*,<sup>24</sup> the Court's requirements for the contents of affidavits for search and seizure warrants in *Aguilar v. Texas*<sup>25</sup> and recently *Spinelli v. United States*,<sup>26</sup> and the new application of the fourth amendment by the Court to electronic eavesdropping in *Berger v. New York*<sup>27</sup> and *Katz v. United States*.<sup>28</sup>

All of these Court decisions, especially those commanding the provision of the assistance of a lawyer for an accused person who cannot

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<sup>18</sup> ATTORNEY GENERAL'S REPORT 14.

<sup>19</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>20</sup> *United States v. Wade*, 388 U.S. 218 (1967).

<sup>21</sup> *White v. Maryland*, 373 U.S. 59 (1963).

<sup>22</sup> *Douglas v. California*, 372 U.S. 353 (1963).

<sup>23</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>24</sup> 367 U.S. 643 (1961).

<sup>25</sup> 378 U.S. 108 (1964).

<sup>26</sup> 37 U.S.L.W. 4110 (U.S. Jan. 27, 1969).

<sup>27</sup> 388 U.S. 41 (1967).

<sup>28</sup> 389 U.S. 347 (1967).

afford one, have presented a challenge to the bar it had never really faced up to before—the need to provide the manpower, competent lawyers, to represent poor defendants who constitute at least fifty percent of those arrested in most of our large cities today.<sup>29</sup>

#### LEGAL ASSISTANCE BEFORE GIDEON

A few states had begun to develop systems for providing counsel for the poor in criminal cases before the Supreme Court decided *Gideon* in 1963. Many jurisdictions had developed one form or another of appointing counsel for an indigent defendant. Oklahoma in 1911 and Los Angeles in 1914 pioneered in setting up the first public defender offices.<sup>30</sup>

But in most jurisdictions where any plan existed, it was based on the breadbasket concept of charity and not on the basic right of an accused to be represented in a criminal adversary proceeding begun against him by the government. Most often the method consisted of assigning uncompensated counsel on an ad hoc basis from the general bar—usually lawyers inexperienced in criminal cases or even in trial work.<sup>31</sup> Even when trial lawyers were appointed, too frequently it was on the spot in the courtroom while they were waiting for their own cases to be called, without adequate time for preparation of the case.

Studies of the defense services for the poor in this country made before *Gideon* concluded that as a rule such services were inadequate<sup>32</sup> or non-existent.<sup>33</sup> There were exceptions, of course, such as the Voluntary Defenders Office in Philadelphia, the Legal Aid Society in New York City, the Public Defender's Office in Los Angeles, the Legal Aid Agency in the District of Columbia, and others spotted throughout the country. But even these agencies were limited in the services they could offer because of their inadequate budgets, small staffs, belated entrance in the case, and lack of auxiliary services.<sup>34</sup>

Further, a great many defendants who in fact could not afford to retain competent counsel were excluded from receiving the services of

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<sup>29</sup> *Airlie House Report* 397.

<sup>30</sup> ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & NAT'L LEGAL AID & DEFENDER ASS'N, *EQUAL JUSTICE FOR THE ACCUSED* 44 (1959) [hereinafter cited as *EQUAL JUSTICE FOR THE ACCUSED*].

<sup>31</sup> ATTORNEY GENERAL'S REPORT 30; *EQUAL JUSTICE FOR THE ACCUSED* 64-66; Note, *Representation of Indigents*, 76 HARV. L. REV. 579, 596 (1963).

<sup>32</sup> ATTORNEY GENERAL'S REPORT 30; *EQUAL JUSTICE FOR THE ACCUSED* 64-66.

<sup>33</sup> Callagy, *Legal Aid in Criminal Cases*, 42 J. CRIM. L.C. & P.S. 589, 594 (1952).

<sup>34</sup> ATTORNEY GENERAL'S REPORT 27-35.

these agencies because they were permitted to represent only *indigent* defendants, and indigency was defined as abject poverty.<sup>35</sup> In fact, the Philadelphia Voluntary Defenders Office could represent only defendants in jail who could not afford bail, on the assumption that a defendant who could get out on bail, which might mean the ability to pay a fifty dollar bail-bond premium, could afford counsel. The indigency standard was a product of political necessity. None of the defender agencies could have been established if the qualification standards for obtaining the agency's services threatened to deprive any lawyer of a fee.

But whatever the past methods of providing defense services have been, under the recent decisions of the Supreme Court every defendant in a criminal case, state or federal, has a right to be represented by a lawyer, and if he is too poor to afford a lawyer, the court must appoint a lawyer for him. Since we have recognized that at least half of all criminal defendants are in the category of those who cannot afford a lawyer, this means under present arrest figures that hundreds of thousands of defendants now need appointed lawyers throughout the country.<sup>36</sup>

There are two qualifying considerations. A poor defendant under the decisions may "knowingly and intelligently" waive representation by a lawyer,<sup>37</sup> and the Supreme Court has not specifically, by its language, included all criminal offenses, such as petty misdemeanors, within its *Gideon* rule.<sup>38</sup> There seem to be, however, no exceptions as to type of offense in *Miranda*, *Wade*, *Douglas*, and clearly *Gault*.

Concerning waiver of counsel, the language of *Miranda* dealing with custodial interrogation appears to make waivers highly suspect by the Court and as a rule unacceptable.<sup>39</sup> However, two empirical studies of the response of accused persons to police warnings under *Miranda* prior to interrogation reveal an extremely high percentage of rejections by poor accused persons of offers by police to provide lawyers for them.<sup>40</sup> These studies do not provide a basis to make a judgment whether the individual

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<sup>35</sup> *Id.* at 7-9; ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 53-54 (Tent. Draft 1967) [hereinafter cited as ABA PROJECT].

<sup>36</sup> L. SILVERSTEIN, DEFENSE OF THE POOR 7 (1965).

<sup>37</sup> *Miranda v. Arizona*, 384 U.S. 346, 475 (1966).

<sup>38</sup> *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) (concurring opinion by Harlan, J.).

<sup>39</sup> 384 U.S. 346, 375-76 (1966).

<sup>40</sup> Medalie, Zeitz, & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

warnings and rejections of counsel meet the strict waiver standards set out by the Court. It would appear that the Court will apply a no less restrictive standard of waiver at other stages of the criminal proceedings, especially at arraignment, at the time the plea is entered, and at trial. Therefore, it is unlikely that waiver of counsel will significantly decrease the need for lawyers in criminal cases.

Concerning the application of *Gideon* to minor offenses, it seems clear that some courts are not excluding these offenses,<sup>41</sup> and that policy considerations should require the assistance of a lawyer for a poor man whatever the criminal charge, so long as he faces a sentence that could deprive him of his liberty. This is the position taken by the ABA Project on Minimum Standards for Criminal Justice in its Standards Relating to Providing Defense Services,<sup>42</sup> which have been approved by the House of Delegates of the ABA.

#### MEANS OF PROVIDING ADEQUATE LEGAL ASSISTANCE

With such an obviously overwhelming need for legal services in criminal cases, how will the bar meet this need, what form will the services take and what career opportunities in criminal law practice will exist? Fortunately, there has been considerable advance planning and study, which should provide some answers to these questions.

For example, through the pioneering and farsighted efforts of the Ford Foundation, experimentation and demonstration in providing defense services in criminal cases have been carried on in this country for a number of years. Few people know that these efforts of the Foundation preceded *Gideon*, the federal poverty program, and even the development of federal and local policy in response to Negro demands for first class citizenship. Grants totaling 6.1 million dollars were ultimately made to the National Legal Aid and Defender Association to carry on the Defender Project, which has produced some models for implementing *Gideon* and the cases that followed.<sup>43</sup> The grants resulted from studies made by the staff and consultants of the Foundation in the late 1950's and in 1961 and 1962, which convinced the officers and trustees of the Foun-

<sup>41</sup> *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965); *Bolkovak v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); *State v. Blank*, 241 Ore. 627, 405 P.2d 373 (1965); *City of Tacoma v. Heater*, 67 Wash. 2d 733, 409 P.2d 867 (1966).

<sup>42</sup> ABA PROJECT 37.

<sup>43</sup> See *National Defender Project—An Introduction*, 26 LEGAL AID BRIEFCASE 97 (1968).

dation that legal representation for poor defendants in criminal cases was inadequate in most communities throughout the nation.

It is significant that this early effort of the Ford Foundation in providing legal services for poor criminal defendants became a model for the creation of law offices for the poor in civil cases in the later developed Ford Foundation Gray Areas Community Development Program in a number of cities, and even later, as a model for the Neighborhood Law Offices program sponsored under the Economic Opportunity Act.

There have been a number of studies leading to guidelines on what is required to provide effective assistance of counsel. The report of the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association in 1959 presented standards that were forward looking in terms of then-existing practices and were about as far as the committee thought it could go before *Gideon*.<sup>44</sup> These standards were adopted by the House of Delegates of the ABA in 1960.<sup>45</sup> Later, after *Gideon*, the National Legal Aid and Defender Association in 1965, and the House of Delegates of the ABA in 1966, adopted much more comprehensive standards, which if implemented in any jurisdiction would meet the requirements of effective assistance of counsel.<sup>46</sup>

In 1963 the Attorney General's Committee on Poverty and the Administration of Justice published its report on providing defense services in the federal courts and recommended "criteria of a system of adequate representation in the federal courts."<sup>47</sup> These recommendations led to the passage of the Criminal Justice Act of 1964,<sup>48</sup> which is presently in operation in all federal courts.

The latest standards approved by the House of Delegates of the ABA are the Standards Relating to Providing Defense Services of the ABA Project on Minimum Standards for Criminal Justice. In many respects these standards are the most far-reaching and should have a greater impact on the programs providing defense services for the poor in criminal cases throughout the country than any others before them.

Basically all of these sets of standards point in the same direction, the professionalization of legal services for poor defendants at a level equal to the competent and skilled legal services received by a defendant

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<sup>44</sup> EQUAL JUSTICE FOR THE ACCUSED 26.

<sup>45</sup> ABA PROJECT 67.

<sup>46</sup> *Id.* at 68.

<sup>47</sup> ATTORNEY GENERAL'S REPORT 39.

<sup>48</sup> 18 U.S.C. § 3006A (1964).

who is financially able to employ his own lawyer. They are a response to the clear statement of principle by the Court in *Griffin v. Illinois*: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>49</sup>

The standards are also applicable to any of the organizational models through which legal services are offered. The usual options for a community concerning the organizational structure of legal services are a defender agency, the assignment of private lawyers, or a mixed system of defender agency and assignment of private lawyers. The strategy for selecting a particular organizational model will differ among communities, but the basic standards governing the providing of effective services must apply regardless of the system adopted.

The standards developed by the ABA Project on Minimum Standards for Criminal Justice provide a reliable guide to the scope of future practices throughout the country. They represent the product of a major effort over a number of years involving many judges, prosecutors, law professors and practicing lawyers and combine the best features of prior standards with the latest commitment of the organized bar to complete defense services for poor defendants. I will refer to a few of these standards that have a direct relevance to the expanding role of the defense lawyer.

The first essential standard for effective assistance of counsel is reasonable compensation for the lawyer representing the defendants. With regard to appointed private counsel, the ABA standard states that "the objective should be to provide reasonable compensation in accordance with prevailing standards."<sup>50</sup> Concerning salaried lawyers in a defender agency the ABA standard states: "The defender and staff should be compensated at a rate commensurate with their experience and skill, sufficient to attract career personnel, and comparable to that provided for their counterparts in prosecutorial offices."<sup>51</sup>

The importance of this standard of reasonable compensation cannot be overstated. The practice of many years, which still exists in a number of states, of assigning uncompensated counsel to represent poor defendants has produced a dismal record of inadequate representation, despite examples of individual lawyers who have conscientiously spent many hours and their own money on an appointed case. The Attorney General's

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<sup>49</sup> 351 U.S. 12, 19 (1965).

<sup>50</sup> ABA PROJECT 30.

<sup>51</sup> *Id.* at 34.

Committee on Poverty and the Administration of Justice stressed this point:

The proper functioning of the adversary system of justice, in which the nation as a whole has an important stake, demands that the defense of accused persons proceed at a level of zeal and effectiveness equivalent to that manifested in their prosecution. The notion that the defense of accused persons can fairly or safely be left to uncompensated attorneys reveals the fundamental misconception that the representation of financially deprived defendants is essentially a charitable concern. On the contrary, it is a public concern of high importance. A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance.<sup>52</sup>

This too was the conclusion of the President's Commission on Law Enforcement and Administration of Justice:

The criminal process is seriously disabled by procedures which rely upon uncompensated or inadequately paid assigned counsel or upon undersalaried defenders for representation of the poor. . . .

All systems for representation of defendants should provide adequate compensation for counsel. Defender offices should be sufficiently financed so that enough lawyers may be hired to give thorough preparation to all cases. The salary paid to the defender should be commensurate with that paid to a lawyer of comparable experience in the prosecutor's office.

Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services. Most presently proposed standards for compensation of assigned counsel call for a fee which is less than could be commanded in private practice. It has been argued that these standards are sufficient because it is part of a lawyer's obligation as a member of the bar to contribute his services to the defense of the poor. But these standards unavoidably impose a stigma of inferiority on the defense of the accused. If the status of the defense bar is to be upgraded and if able lawyers are to be attracted into criminal practice, it is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount.<sup>53</sup>

The implementation of the standard of reasonable compensation will produce the legal manpower needed for the defense of the poor and will provide many career opportunities for young lawyers in criminal law practice.

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<sup>52</sup> ATTORNEY GENERAL'S REPORT, 48.

<sup>53</sup> TASK FORCE REPORT: THE COURTS 60-61.

Another important standard states that "counsel should be provided to the accused as soon as is feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest." In the past, lawyers were appointed for poor defendants late in the proceedings, usually at trial. The commentary to the ABA standard explains:

There is strong consensus among judges, prosecutors and defense counsel that appointment of counsel at the earliest possible stage is a critical aspect of providing representation that is truly valuable and effective. . . . Representation at the earliest opportunity is essential to forestall the institution of unfounded proceedings through effective use of the preliminary examination and other screening devices. . . . Moreover, since the question of release pending trial is decided at these early stages, both the immediate liberty of the accused and his opportunity to assist in the preparation of his defense are at stake; providing counsel at the earliest opportunity increases the prospects of effective defense investigation.<sup>54</sup>

Both the report of the Attorney General's Committee and the report of the President's Crime Commission emphasized the need for early appointment of counsel to enable him to properly investigate the case while the facts were fresh and in many other ways to protect more effectively the defendant's interests.<sup>55</sup> The Supreme Court's decisions in *Miranda* and *Wade* require station house representation if the police seek to interrogate the accused or put him in a lineup.

It has come generally to be recognized that effective assistance of counsel in a criminal case means more than the appointment of a lawyer. It means providing the lawyer with all of the assistance he needs to properly represent his client. The ABA standard provides substantial assistance for defense counsel in its provision for supporting services:

The plan should provide for investigatory, expert and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process, including determinations on pretrial release, competency to stand trial and disposition following conviction.<sup>56</sup>

The Attorney General's Committee concluded that a system lacking such resources "cannot fairly be characterized as a system of adequate repre-

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<sup>54</sup> ABA PROJECT 45.

<sup>55</sup> ATTORNEY GENERAL'S REPORT 44; TASK FORCE REPORT: THE COURTS 53.

<sup>56</sup> ABA PROJECT 22.



sentation,"<sup>57</sup> since "[o]ne of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to the conduct of a proper defense."<sup>58</sup>

Two of the ABA standards demolish the old "indigency" standard and realistically provide free legal services to any person whose circumstances prevent him from being in a position to employ counsel.<sup>59</sup> Taking a leaf out of the English legal aid system, they provide for defense services to a defendant who can afford to pay part of the fee, but not all of it.<sup>60</sup> The client in such a case would contribute the portion he could afford to the defender system that provides him with counsel.

The ABA standards on eligibility for defense services were greatly influenced by the report of the Attorney General's Committee, which expressed the view that statutory language referring to defendants eligible to have lawyers appointed to defend them ought not to suggest that the measure is one of public charity. The Committee Report stated:

We believe, accordingly, that the terms "indigent defendant" or "indigency" are inappropriate for these purposes. These terms, derived from the poor-laws, tend to reinforce a popular impression that the objectives of legislation designed to establish a system of adequate representation are essentially similar to laws enacted for relief of the poor. Moreover, they are inaccurate and imprecise since they suggest, not financial inability to obtain some essential defense service, but a total absence of financial resources. The Committee believes that the defendant eligible for appointment of counsel or other necessary defense services should be identified as a person "financially unable to obtain adequate representation."<sup>61</sup>

Congress, in passing the Criminal Justice Act of 1964,<sup>62</sup> adopted this recommendation. However, the basic problem with this act, which provides for compensation for lawyers appointed in federal criminal cases, is that the fees allowable under the Act are minimal and hardly provide reasonable compensation for the lawyer's services.

The ABA standard on eligibility for obtaining appointed legal representation is expected to have a substantial impact on the private practice of criminal law. The few lawyers in the country who have developed national or local reputations as outstanding criminal trial lawyers and

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<sup>57</sup> ATTORNEY GENERAL'S REPORT 46.

<sup>58</sup> *Id.*

<sup>59</sup> ABA PROJECT 53.

<sup>60</sup> *Id.* at 55.

<sup>61</sup> ATTORNEY GENERAL'S REPORT 47.

<sup>62</sup> 18 U.S.C. § 3006A (1964).

who are retained by criminal defendants who can afford to pay large fees certainly will not be affected. But most of the lawyers who make all or part of their living as defense lawyers in criminal cases receive only small fees and count on a brisk turnover to earn a decent income. Many of these lawyers have always been resentful of the defender agency, if one existed in their community, because they always suspected that it represented defendants who, if left on their own, would have been paying clients. For the client, this would usually mean selling everything he owned and borrowing from friends and family. Some of the lawyers who represent this class of client firmly believe that there are very few truly indigent criminal defendants. They count on the frightened condition of the defendant to provide the impetus to "scare up" an acceptable fee from sources available even to a poor man facing the loss of his freedom.

Thus, the new relaxed standards of eligibility, which have been recommended and which are being applied by some defender agencies, have caused great alarm to these private practicing defense lawyers. They believe they are being squeezed out by the Neighborhood Law Offices of the poverty program and by the defender agencies. Yet this group of lawyers, and the young men who join their ranks every year, remains an important part of the administration of criminal justice.

In a real sense these are the men who in the past have borne the stigma of criminal defense practice. It is true that some of them by their conduct have provided a basis for that stigma. But as a group, they represent the old line criminal bar who were defending the cause of individual rights and liberties in unpopular and shabby cases practically alone, and in the face of what can be described, in its most generous terms, as the cold indifference of the rest of the bar.

These fears of extinction are well founded if the community in which they practice elects to adopt a defender agency as the exclusive or principal system of providing defense services under the requirements of the Supreme Court decisions. For economic reasons a defender office with salaried lawyers is preferable. A staff of salaried lawyers carrying a sizeable case load can operate under a budget substantially lower than one that would be needed to pay individual lawyers reasonable compensation on a case-by-case basis.

Yet the vitality of the practice of criminal law and the health of the system of criminal justice requires that there be a substantial involvement of the private bar in the handling of criminal cases. In addition to the lawyers who have practiced as regulars for years, there is a need to provide

career opportunities for young lawyers who wish to practice criminal law privately, and not in a defender office. These young lawyers can find this opportunity only if they become part of an assignment system that provides reasonable compensation for their work.

The Attorney General's Committee singled out this problem for special comment in discussing optional plans that should be available to federal districts. Placing great stress on the need for involving the private bar in criminal cases, the Committee stated:

First, it seems clear to the Committee that federal legislation should not preclude the extensive use of compensated private attorneys in meeting the problem of the accused who is financially unable to obtain adequate representation in the federal courts. Systems relying primarily on the services of appointed private counsel have operated successfully throughout the world. In many of the federal districts such a plan may prove the most feasible and congenial. The Committee believes that positive values are gained from the widespread participation of the bar in these cases. Indeed, we believe many problems in the administration of criminal justice, both at the federal and state levels, result from absence of involvement of most lawyers in the practice of criminal law. An almost indispensable condition to fundamental improvement of American criminal justice is the active and knowledgeable support of the bar as a whole. There is no better way to develop such interest and awareness than to provide wider opportunities for lawyers to participate in criminal litigation at reasonable rates of compensation. The Committee believes it is highly important that the system of adequate representation should encourage rather than obstruct such participation.<sup>63</sup>

The Committee indicated its preference for a mixed system combining a defender agency and a private attorney assignment plan. They would share the representation of accused persons, and the defender office would serve as an auxiliary service agency to private attorneys by providing them with investigatory and secretarial services. The Committee concluded:

Such a "mixed" system combines the advantages of a continuing and experienced defense organization in the district with those derived from the participation of a substantial segment of the bar in the work of criminal defense.<sup>64</sup>

The ABA Standards for Providing Defense Services details standards for an assigned counsel system that would involve the private bar. But

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<sup>63</sup> ATTORNEY GENERAL'S REPORT 40.

<sup>64</sup> *Id.* at 42.

unlike many assigned systems where the court appoints from the entire bar, including lawyers who engage only in office practice, the ABA standards limit eligibility for inclusion on the assignment roster to lawyers "experienced and active in trial practice, and familiar with the practice and procedures of the criminal courts. . . ."<sup>65</sup>

In order to develop a new group of lawyers who would be trained in trial work and criminal cases, and thus ultimately take their place on the roster of lawyers eligible to receive assignments, the commentary suggests that in cases where the gravity warrants it associate counsel be appointed to assist the primary lawyer and thereby gain the experience that will make the appointee eligible to be put on the primary roster.<sup>66</sup>

In both the defender agency system and the assigned counsel system, the defendant is assigned his lawyer. He plays no part in choosing his own lawyer. Quite a different system exists in the Scandinavian countries of Sweden, Denmark and Norway.<sup>67</sup> There the concept of equal justice and the presumption of innocence of the accused are taken very seriously. The institutional office to serve poor defendants, such as our defender agency, has been rejected, since it smacks of welfare services and does not, according to the lawyers in Scandinavia, equate the poor man with the rich man in the justice system. Simply put, when the rich man is charged with crime he calls up his own lawyer and is represented by the lawyer of his choice. Why shouldn't the poor man do the same thing? There is no reason why not, say the Scandinavians, and their system allows any accused, rich or poor, to choose his own lawyer. If the defendant cannot afford to pay a fee, or if he can, but wishes to put the burden on the government of paying the cost of his defense, in the first instance, on the basis of his presumption of innocence, he requests his lawyer to seek designation as public counsel for the accused. This is a simple procedure accomplished at the Ministry of Justice. It guarantees the lawyer a reasonable fee for his services, paid by the government.

If the defendant is acquitted, no inquiry is made as to whether he could have afforded to pay for his own counsel, since the principle is accepted that even a rich man should not have to pay the costs of establishing his innocence, especially when the government moved against him and caused the incurrence of costs for defense. An intriguingly logical corollary comes into play if the defendant is found guilty. Then an in-

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<sup>65</sup> ABA PROJECT 26.

<sup>66</sup> *Id.* at 28.

<sup>67</sup> See ATTORNEY GENERAL'S REPORT 36-38, for a brief description of this system.

quiry is made as to whether he could have afforded the employment of his own counsel. If it is determined he could not, then the services are treated as proper free services provided by the government for a poor defendant in the interest of maintaining a fair system of criminal justice. But if the inquiry determines that the convicted defendant could have afforded to pay for his own lawyer, then in addition to his sentence, he receives a bill from the government for the legal services provided.

The lawyers in Scandinavia like the system. There is a heavy involvement of the bar in the handling of criminal cases, mostly on the basis of compensation for their services by the government on a scale generally considered reasonable and satisfactory by the lawyers.

Before we get locked into a system of providing defense services for the poor through expanded defender institutions, staffed with salaried lawyers, as is apparently the trend, it would be wise to try out the Scandinavian model in a number of jurisdictions.<sup>68</sup> Undoubtedly, this program will cost the taxpayers more, but it may more closely approximate our goal of equal justice under law. Public defender agencies have received criticism on the ground that they are too easily politically controlled, and degenerate into an office of mediocre lawyers providing a minimum of services for their clients.<sup>69</sup> The criticism has often been unfair and unsupported. There is evidence that a number of public defender offices provide vigorous and loyal representation for their clients.<sup>70</sup> The creation of private boards of trustees to select the staff of the public defender agency and control its policies has been offered as a solution to prevent political interference. The Legal Aid Agency of the District of Columbia is a model of such a system.<sup>71</sup>

But can large institutions staffed by salaried lawyers who get their clients on a wholesale basis by assignment maintain the necessary individual zeal, concern and dedication to a client's cause that is the sine qua non of the attorney-client relationship? Are there not some built-in conflicts where an agency represents fifty percent or more of the criminal defendants in a community? Does not the responsibility of representing this many cases cause the agency occasionally to hold back a justified vigorous assault on a prosecutor's or a judge's action in an individual

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<sup>68</sup> A few demonstrations following this model are presently going on under the sponsorship of OEO. TASK FORCE REPORT: THE COURTS 59.

<sup>69</sup> Dimock, *The Public Defender: A Step Towards a Police State?*, 42 A.B.A.J. 219 (1956).

<sup>70</sup> ATTORNEY GENERAL'S REPORT 41.

<sup>71</sup> *Id.* at 25.

case in the interest of not jeopardizing the treatment that will be given other present and future defendants? Similarly, where the defender agency realistically can expect to obtain a certain proportion of favorable plea agreements from the prosecutor, is not the agency forced to pick and choose from among its clients; whereas, if each client were represented by an individual private lawyer, he would be assured at least a try for a better deal by his lawyer?

Dedicated and zealous staff members of defender agencies deny there are any real conflicts. If there are, perhaps it is an inherent problem that cannot be resolved. Yet it still seems worthwhile to leave open the door to alternative models like the Scandinavian system so that we will have an opportunity after a period of years to assay what we are doing in providing defense services in terms of the goal of equal justice. Though to do this will cost more money, can we afford not to do it? Judge Learned Hand's warning against "rationing justice" should be our guideline.

No matter what system for providing defense services different communities will choose, it is an exciting fact that more lawyers are now representing, and in the future will represent, defendants in criminal cases than at any prior time. Included among them will be older, experienced members of the civil bar, many from large and distinguished law firms. These same law firms will also provide their younger associates for appointment in criminal law cases.

Another large group of lawyers who will be joining the ranks of defense lawyers in criminal cases will be the lawyers who will join the staffs of the expanding defender agencies throughout the country. Well-paying jobs are presently being offered in these agencies, and the trend is that the salaries will increase in order to insure the development of career services in defender agencies. An interesting development that is now noticeable and will apparently continue is the movement of men between the prosecutor's office and the defender agency's office. This mobility has the healthy effect of producing lawyers well-versed and experienced in both prosecution and defense of criminal cases. They often move on to private practice as valuable assets to the trial division of a law firm, and make excellent candidates for appointment to the bench. In addition they take their place in the private bar ready to receive appointments in criminal cases, fully equipped to provide the most effective service for a defendant.

Thus, we are experiencing an infusion of legal manpower in the

criminal justice system on the defense side. Two noteworthy features attend this development. First, the participating lawyers are able to perform their services on behalf of criminal defendants as professional lawyers without suffering the stigma that once attached to this practice. Second, there appears to be general support from judges and law enforcement officers, backed by public opinion, for providing increased defense services and spending the money required to support them. As suggested earlier in this article, this changed image appears to have resulted in part from the recognition that criminal law is poverty law, and this identification has provided a basis for honorable participation in the process on behalf of defendants by all members of the bar.

Beyond this is the stark realization by all those familiar with the criminal justice system that in the face of massive pile-ups of criminal cases coming into the system every year, and increasing backlogs in the courts, criminal defense lawyers are absolutely necessary for the speedy disposition of criminal cases.

I concede that the optimistic description of bar involvement in the criminal process I have just made is subject to some dispute as of the moment. Until now there has been no sense of urgency in a number of jurisdictions to do what is necessary under constitutional requirements now not so recently defined by the Supreme Court. Today throughout the country, many criminal defendants who cannot afford lawyers are still assigned uncompensated lawyers who are not providing effective assistance of counsel. Defender agencies exist in many places but not in most.<sup>72</sup>

But there are clearly signs of movement in the development of diversified assigned counsel systems and the expansion of existing defender agencies.<sup>73</sup> What is more important is that the achievement of what I have projected is inevitable—and inevitable soon.<sup>74</sup> The ABA has done more than just develop standards and publish them. It has set in motion an energetic program to implement the standards through its Criminal Law Section. Congress through its Omnibus Crime Control & Safe Streets Act<sup>75</sup> has set in motion a program of grants to the states to improve the administration of criminal justice, and the Department of Justice, which is administering this program, has publicly recognized that providing

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<sup>72</sup> L. SILVERSTEIN, *supra* note 36, at 41 (defender offices in only 200 counties out of more than 3100 counties in U.S.).

<sup>73</sup> *Equal Justice Under Law*, 26 LEGAL AID BRIEF CASE 97 (1968).

<sup>74</sup> TASK FORCE REPORT: THE COURTS 58.

<sup>75</sup> Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3731-37 (Supp. IV 1968).

increased defense services is an essential part of improving the machinery of justice and combating the crime problem. The leadership on this position was taken by the President in his recent message to Congress on crime in the District of Columbia.<sup>76</sup>

#### THE ROLE AND FUNCTION OF THE CRIMINAL DEFENSE LAWYER

Given then that many lawyers will be representing defendants charged with the full range of street crimes—petty larceny, robbery, rape, and murder—what are these lawyers professionally supposed to do for their clients? The question is not any different in the case of a lawyer paid a fee by a criminal defendant. In such a case it may be put: what services does the fee purchase?

The skeleton in the closet for the legal profession is that most lawyers do not have a professional answer to these questions. What lawyers do know as a result of their law school education and early experience in practice are the procedural steps in the criminal case, the legal definitions of specific crimes and the elements that must be established by the prosecutor to make out a case, the rules of evidence, general and specific defenses to individual charges, and other matters relating to working with the law and its procedures in the adversary process.

What they as a rule do not know before entering the criminal practice is their role and function as a defense lawyer in a criminal case. They have been given no professional background as a basis for developing this knowledge. In speaking of the role and function of the criminal defense lawyer, I am referring to those aspects of his professional behavior dealing with his relationship with his client; the manner in which decisions are made concerning the conduct of the case; the obligations and services he properly owes to the client and those he does not; his application of the insights into the practical workings of the criminal justice system he must possess; the relationships with defense and prosecution witnesses; his relationship with the investigators he uses; his relationships with the prosecutor, the court and the jury; and many other behavioral factors in his day-to-day work on behalf of his client that refer to his professional status.

The concept of the role and function of the lawyer is not so much concerned with the specific act a lawyer performs for his client as it is with the professional justification and reason for his beginning it. Thus,

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<sup>76</sup> Washington Post, Feb. 1, 1969, at 1, col. 1.



standards on the role and function of the defense lawyer will not deal with the technique of cross examining a witness, but will deal with his duty to control the decision as to whether he will cross examine the witness, his duty not to harrass the witness, and if in his professional judgment he believes cross examination is in the interest of his client, his duty to perform this service for his client.

There is really no magic to the professionally acceptable answers to most of the specific questions that arise under the behavioral categories outlined above. All honorable trial lawyers with substantial criminal practice arrive, at one time or another in their careers, at a clear concept of their role and function as a defense lawyer. And it is striking that except for a small number of problems they all come out with the same decisions on the critical issues revolving around the defense lawyer's role and function.

The sorry neglect of the profession has been that it has left lawyers to find their own way. No effort has been made in the past to collect the experiences of the competent and experienced defense lawyers and develop guidelines or standards that can be provided to young lawyers as they begin their practice so they can know what their professional role is in a criminal case and act upon such knowledge with confidence.

It is no exaggeration to state, for example, that most young lawyers on graduating from law school and passing the bar do not know what they are professionally supposed or permitted to do for a defendant they may be appointed to represent in a criminal case. Not having a known professional role to fall back on, they must adopt some role in order to relate to the client and engage in action. Perhaps it is not surprising that many of these young lawyers adopt the role exemplified by a fictional T.V. defense lawyer or their concept of the role performed by a legendary criminal lawyer, and then "play act" as a lawyer rather than provide professional services.

The trouble is that if the role they have chosen requires that they get their client "off" by pulling a rabbit out of a hat or by some other thrilling closing-scene maneuver, they will find avenues of that nature nonexistent in their case, and the only substitutes they can invent to free their client may get their client in worse trouble or result in disciplinary proceedings.

This problem is not just confronted by young lawyers. Older lawyers who for years have engaged in a commercial office practice are now being appointed to criminal cases and are frequently lost as to their function

and role in the case. The sound professional judgments they have developed in their own field of practice provide no help to them in their strange new setting. For as to criminal law matters, they, as a rule, have no professional judgment, and may shape their course of conduct based on the myths and rumors concerning what criminal lawyers are supposed to do that they have heard through their years of practice.

The following kinds of questions frequently posed by these lawyers reveal their confusion as to their function as a defense lawyer: (1) Should I allow the defendant to admit facts of an incriminatory nature to me in my interview with him that will prevent me from putting him on the stand? (2) Should I not stay away from the prosecuting attorney to keep him guessing and prevent him from getting the impression I have a weak case? (3) Can I ever fully represent my client by advising him to plead guilty without fighting the government all the way? (4) If my client wants me to argue a particular point of law, although I believe there is no basis for it, or if he wants me to cross examine a prosecution witness by asking him certain questions I believe are strategically unwise and will probably prejudice his case, am I not bound as his lawyer to comply with his wishes, since after all, it is his skin at stake, not mine? and (5) For the same reason, am I not bound to put my client on the stand, if he insists, to testify in his own defense as to facts exculpating him of the crime charged when he has told me privately and confidentially that these facts are false and I have determined by my own investigation that they are false? But still isn't it his trial and doesn't he have a right to have me offer his false defense and argue it to the jury?

A competent and experienced criminal defense lawyer would never ask these questions. He realizes that they incorporate within them certain mythical assumptions as to the defense lawyer's role, and that they therefore suggest courses of conduct on the part of the defense lawyer that are incompatible with his professional function and role.

Therefore, with so many lawyers now serving for the first time as defense lawyers in criminal cases without any clear understanding of their professional function in this capacity, the need has become urgent for a definitive set of professional standards on the defense function that the organized bar will adopt for the guidance of lawyers providing defense services to criminal defendants. The special committee of the ABA on Minimum Standards for the Administration of Criminal Justice was created in 1964 and included in its program the task of providing standards for the prosecution and defense function.

The Advisory Committee on the Prosecution and Defense Function has been under the chairmanship of Judge Warren E. Burger of the United States Court of Appeals for the District of Columbia Circuit.<sup>77</sup> Judge Burger is now chairman of the special committee responsible for the work of the committees on standards covering the complete criminal process, succeeding Judge J. Edward Lumbard of the Court of Appeals for the Second Circuit.

The defense function standards, which have been identified and recommended by the Advisory Committee after five years of work, will soon be presented to the lawyers of this country and will undoubtedly shape the future professional conduct of defense lawyers engaged in criminal practice throughout the country.

I have deliberately stated that the standards were *identified* by the committee. This is because the committee did not, for the most part, create new professional standards for the defense function. It attempted to determine what standards were followed and agreed upon by a representative sample of the most competent and experienced criminal defense lawyers in this country, Canada, and England.<sup>78</sup>

To a large degree this basic information concerning how experienced criminal defense lawyers perform their function was obtained at hideaway

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<sup>77</sup> The members of the Advisory Committee on the Prosecution and Defense Functions are: Joseph A. Ball, Esq. (practicing trial lawyer in California); Chester Bedell, Esq. (practicing trial lawyer in Florida); Sumner Canary, Esq. (practicing trial lawyer in Ohio and former appellate judge); Hon. William H. Hastie (Chief Judge, United States Court of Appeals for the Third Circuit); Hon. Frank S. Hogan (District Attorney of New York County); Leon Jaworski, Esq. (practicing trial lawyer in Texas); Hon. Andrew W. Parnell (Circuit Judge, Tenth Judicial Circuit of Wisconsin); Herman I. Pollock, Esq. (Chief Defender, Defender Association of Philadelphia, Pennsylvania); Hon. Walter F. Rogosheske (Associate Justice of Supreme Court of Minnesota); Professor Louis B. Schwartz (University of Pennsylvania Law School). The reporters to the committee providing staff drafting and research services have been Professor Lester J. Garor of the University of Utah Law School and Robert S. Erdahl, former Chief, Appellate Section, Criminal Division, United States Department of Justice. The author has served as a consultant to the committee.

<sup>78</sup> The manner in which the Advisory Committee functioned and much of the subsequent material in this article are reported by me on the basis of information I obtained as a consultant for the committee, which involved working closely with the Chairman and participating at all of the committee meetings. Nevertheless, what I say represents solely my own recollection and interpretation of the committee's work and activities and does not purport to represent the views of any of the members of the committee or to serve as an official statement on behalf of the committee concerning the standards recommended by the committee or the policy considerations underlying them. It is my opinion, however, that the statements I make are consistent in every respect with the positions the committee has taken.

meetings. Eminent and highly successful criminal defense lawyers with national and international reputations for leadership at both the trial and criminal defense bars spent long hours being brutally candid about the dilemmas and problems they faced in representing criminal defendants and how they resolved them during their relationship with their clients, from the time of the first meeting with the client to the last professional service rendered whether at trial or on appeal or at a post-conviction remedy proceeding. Present at these meetings were experienced prosecutors and members of the committee and committee staff who joined in spirited discussion after the presentation of the defense lawyers.

Though a record of the statements and the discussion that followed was transcribed for use by the committee in formulating standards, the statements were given in confidence to the committee and were not to be identified with any of the lawyers making them without their consent. The precaution for anonymity was adopted to assure candor. Anyone present in the room at any of these meetings would not have the slightest doubt as to the candor of the lawyers reporting their practices. Yet the net result of their disclosures displayed such high standards of professional responsibility and integrity that the record of the meetings could not in the slightest way embarrass any one of them, but on the contrary would do them honor.

It is also remarkable that with different groups of lawyers meeting at different times there was no disagreement as to the proper standards of conduct for a defense lawyer in the most troublesome and critical questions relating to the defense function.

This is not to say that all of the standards as tentatively approved by the committee would receive the complete acceptance of all of the consulting lawyers. The committee, itself made up of experienced judges, prosecutors and defense lawyers, dealt with some subjects that were not discussed by the consulting lawyers and also came to its own decisions on some of the subjects that were discussed. But it is fair to say that the core of the standards dealing with the major questions relating to the function and role of the defense lawyer is in essence a restatement of the professional conduct agreed upon without exception by all of the prominent experienced criminal defense lawyers who consulted with the committee.

Many other interviews were conducted by the chairman of the committee with judges, defense lawyers and prosecutors in this country and in England. The draft of the standards and commentary that resulted from a distillation of all the material collected were exposed at numerous

meetings to a vigorous interchange among the members of the advisory committee whose suggestions remolded the drafts. As tentative drafts were prepared, they were submitted to many more experts in the criminal law field including judges, prosecutors, defense lawyers and law professors for their review and comment. The present draft represents a blend of the most meaningful and valid ideas believed by the committee to offer the best guidance to defense lawyers as to their function in a criminal case.

It is not my purpose in this article to review the specific standards of the defense function tentatively approved by the committee, or to quote parts of them. They will be published shortly in tentative draft form by the American Bar Association and will be exposed to the entire bar for critical review and comment. Rather, I will attempt to present a fundamental rationale of the role and function of the defense lawyer, which is implicit in these standards and which should put in proper perspective the professional activities of a lawyer responsible for the representation of a defendant in a criminal case today.

Acting as a barrier to a clear understanding of the defense lawyer's role is the romantic image of him as a winner of criminal cases. This image is based on the myth that he represents innocent defendants or on the myth that his primary function is to get his client off in any way he can, legally or illegally.

Practicing defense lawyers relish the few occasions in their careers when they represent innocent defendants. Innocent persons do on occasion get arrested and are tried on criminal charges. Some have been convicted. Over the years, covering the country as a whole, the number of innocent persons who have been convicted is sizeable enough to force us to remember that the underlying purpose of the constitutional safeguards of the Bill of Rights, the presumption of innocence, and the burden on the government to prove guilt beyond a reasonable doubt is to prevent the conviction of the innocent.<sup>79</sup> For this reason we must remain vigilant to insure that our criminal procedural safeguards stay strong and are constantly applied. The defense lawyer performs this function on behalf

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<sup>79</sup> Recent Supreme Court decisions make it clear that our system of criminal justice is not solely concerned with protecting the innocent. The system incorporates important values concerning the relationship of the state with persons who may in fact be guilty of offenses charged against them.

An example of this is the Court's extending the federal "exclusionary rule" to the states; it excludes all evidence obtained by a police officer in an illegal search and seizure. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

of an accused in his role as challenger of the government in an adversary system.

But it is a fact of the real world that most people arrested and charged with crime are guilty and that, therefore, defense lawyers are primarily involved in representing guilty, not innocent, defendants.<sup>80</sup> It is also true that in most cases the prosecution has sufficient evidence to convict the defendant, and that the defense lawyer whose clients plead not guilty usually loses his case.<sup>81</sup>

What role and function, then, remain for the defense lawyer? His first and foremost function is to provide his client with loyal and vigorous representation and to assure that his client is not convicted unless in accordance with law. This role requires him first to obtain from his client a full and frank statement of the facts in his client's possession. The lawyer must learn the worst he has to face in order to make sound legal and strategic judgments concerning the conduct of the case.

He should make his own investigation of the facts of the case and seek to learn what evidence is in the possession of the prosecutor. This investigation may lead him to conclude that despite his client's admission of guilt to him, the prosecutor is unable to prove his guilt in accordance with law. Under these circumstances he should advise his client to plead not guilty, and seek to obtain an acquittal based on the failure of the prosecutor to make out a case.<sup>82</sup> The lawyer's investigation must include the circumstances surrounding the arrest, including the obtaining of evidence or the taking of a confession from the defendant. If he can find any reasonable basis on the facts and the law to challenge the manner in

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<sup>80</sup> TASK FORCE REPORT: THE COURTS 57. See generally D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966).

<sup>81</sup> TASK FORCE REPORT: THE COURTS 57.

<sup>82</sup> The function of the defense lawyer in securing an acquittal of a guilty defendant serves a broader purpose than his duty to fully and vigorously represent his client within the law. It serves society's interest in maintaining a system of justice which deters the prosecution from carelessly proceeding against an accused without sufficient evidence, creating the danger of convicting an innocent person. The prosecutor who has been challenged by a vigilant defense lawyer and has been exposed as unprepared or careless, will give more careful attention to the preparation of his next case. The President's Crime Commission emphasized this role of counsel:

The importance of counsel also proceeds from values transcending the interests of an individual defendant. Counsel is needed to maintain effective and efficient criminal justice. Ours is an adversary system of justice, which depends for its vitality upon vigorous and proper challenges to assertions of governmental authority and accusations of crime.

TASK FORCE REPORT: THE COURTS 52.

which the government obtained the evidence it relied on for a conviction, it is the defense lawyer's duty to make the necessary motions to suppress the evidence. If he loses on the motion to suppress, he may decide to recommend to his client to plead not guilty, and renew his objection to the evidence at trial, taking the issue to the appellate courts if necessary, depending of course upon his assessment as to the soundness of his case.

The only qualification to his proceeding to trial to further his challenge to the evidence is that an attractive offer by the prosecutor for a plea of guilty may, on balance, lead the lawyer to recommend to the client that he plead guilty, after first presenting all the alternatives, including the possibility of escaping conviction altogether by some later ruling in favor of the motion to suppress. It is the client's decision as to how to plead after full advice has been given.

Absent any opportunity to challenge the legality or sufficiency of the prosecution's evidence, the function of the defense lawyer is to seek the most favorable disposition for his client without trial. Indeed the role of the defense lawyer as to the disposition of the defendant is perhaps his most important function of all. For it bears repeating that in most cases the defendant is guilty, the prosecution can obtain a conviction, there is no basis to challenge the legality of the evidence, and there is no basis to raise such issues as mental incompetence or insanity. For these reasons most criminal defendants either plead guilty or are found guilty and face a judge for sentence.<sup>83</sup> Therefore, so far as the client is concerned, the most important part of the case for him is the sentencing stage and his greatest concern is what the judge will do.

However, prior to sentence, there is a major area of defense responsibility that can have a direct bearing on sentencing alternatives, and on whether the defendant is kept within the criminal process. The plea negotiation process has become recognized as the nerve center of the criminal process. Prosecutors may exercise a great amount of discretion, and good prosecutors know that, unless they dispose of most of the cases by pleas, they will cripple the court with a mass of cases, which will simply result in long delays, increased incidents of crimes committed by defendants awaiting trial, and a general breakdown in the machinery of justice.<sup>84</sup> The defense lawyer's function is to enter into plea negotiations with the prosecutor and seek the most favorable plea for his client. But he must always remember that the final decision on the plea is the defendant's.

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<sup>83</sup> *Id.* at 9.

<sup>84</sup> *Id.* at 9-13.

However, the discussions with the prosecutor need not relate only to a plea of guilty. There are many criminal cases that are marginal in nature, in which programs can be developed in the community to help the offender.<sup>85</sup> If these cases can be directed out of the criminal justice system at an early stage for treatment in the community, there will be a substantial lessening of the load on the court and the correctional system. Defense lawyers have a responsibility to obtain staff assistance, such as social workers, to help them develop such plans for their client for presentation to the prosecutor.<sup>86</sup> Other expert assistance may be needed, such as a psychiatrist if mental therapy is to be part of the plan.

The point is that full preparation with the aid of expert assistance is as much a function of the defense lawyer at the plea negotiation stage as trial preparation and use of ballistics experts or psychiatrists on a not guilty plea.

The ABA standard for providing defense services recommends that funds be made available to defense counsel to obtain such supporting services: at pretrial, for discussions with the prosecutor; at trial, where relevant to issues and evidence; and at sentencing, to present a plan for the defendant as an alternative to a jail sentence.<sup>87</sup>

Finally the defense lawyer has a major role to play at the sentencing stage of the case.<sup>88</sup> As stated earlier, this is the most important part of the case to the defendant, and he needs professional assistance to present his argument for the most favorable disposition under the circumstances of his case. Too often defense lawyers bow out at this stage and leave their client's fate to the resources of the court, which are usually the probation department. Just as the defense lawyer must prepare himself to discuss the plea with the prosecutor on the possibility of early diversion of the case out of the criminal system, so at sentence he needs the assistance of experts who will provide a complete background report on the defendant, similar to the presentence report the probation officer will give the judge.<sup>89</sup> Beyond this the defense lawyer, with the aid of a social worker, should be prepared to offer a rehabilitation plan, such as a job, a training program, and social services for the family. Such a plan, which has actually been negotiated out in the community so that a job or

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<sup>85</sup> *Id.* at 7-8, 54.

<sup>86</sup> *Id.* at 54. See generally Medalie, *The Offender Rehabilitation Project: A New Role For Defense Counsel at Pretrial and Sentencing*, 56 GEO. L.J. 2 (1967).

<sup>87</sup> ABA PROJECT 22.

<sup>88</sup> TASK FORCE REPORT: THE COURTS 19-20.

<sup>89</sup> *Id.* See generally Medalie, *supra* note 86.



a training opportunity is waiting, may mean the difference between a jail sentence and probation.<sup>90</sup>

Although under the "game" theory of wins and losses, the defense lawyer is realistically a loser, this is not a professional way to regard his role. It is obvious that if defense lawyers were winning most of their cases, there would have to be something terribly wrong with our police and prosecutorial systems. It is comforting to know that most of the people who are arrested are guilty and that prosecutors are able to convict them. But this does not mean that defense lawyers who represent such defendants must "lose" their case professionally. If they provide the complete service required of them either at pretrial plea discussions or at sentencing and are able to accomplish a favorable disposition for their client, then despite a plea of guilty, or even a verdict of guilty, they have given successful professional service to their client.

Now, of course, if the myth were true that it is the primary function of the defense lawyer to get his client off in any way he can, legally or illegally, then the fact that the defendant is guilty and that the prosecution has sufficient evidence to prove its case would not be an impediment, since the lawyer could win his case by putting on perjured testimony, fixing a juror, or bribing a witness. Doubtless some lawyers adopt this role, but they are simply criminals themselves and should be prosecuted and disbarred. What is unfortunate is that laymen who express an opinion about what criminal lawyers do indicate that they believe the prevalent practice of defense lawyers includes corrupt and criminal conduct and they assume this is part of the defense lawyer's function in seeking to free his client. Of course, such a public view reinforces the stigma attached to criminal practice.

It can be categorically stated that a lawyer who represents a defendant in a criminal case does so as a professional member of the bar in accordance with the standards of professional responsibility. This requires that all his acts on behalf of his client, though loyal and vigorous, be within the law and not in violation of the law.<sup>91</sup> Of course, there are troublesome problems relating to professional conduct that confront a defense lawyer on occasion and are difficult to resolve. Most of these are dealt with by the standards of the ABA Committee. But there remain some that the committee could not resolve by a standard. As to

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<sup>90</sup> TASK FORCE REPORT: THE COURTS 19-20.

<sup>91</sup> ABA CANONS OF PROFESSIONAL ETHICS No. 15.

these, the committee believed that the only guide a lawyer with integrity can follow is his own good judgment as to what is right and honorable under the specific circumstances of the case.

The fundamental concept underlying and defining the lawyer's function in the professional representation of a defendant is the lawyer's responsibility to control the ethical and professional strategic decisions of the case.<sup>92</sup> There are, of course, certain decisions that belong to the defendant, such as whether he will plead guilty or not guilty, whether he should request a jury trial, and whether he should take the stand. On these decisions of the defendant, the lawyer must first fully advise him of the probable consequences of alternative courses of action depending on the special circumstances of the case. Even as to decisions over which the lawyer retains control, he should always keep his client fully advised and give consideration to the client's recommendations and suggestions.

The defense lawyer must never allow himself to act on the myth that he is the alter ego of the accused. Guiding his conduct throughout the case must be his clear understanding that he is the professional representative of the accused and not his messenger boy, or in the vernacular, his "mouthpiece."

In this regard, some current attention has been given to the question whether a defense lawyer may knowingly put his client or a witness for his client on the stand to give perjured testimony if his client insists on his doing this. A view supporting the lawyer's compliance with such instructions from his client is based on the argument that the lawyer's knowledge of the falsity of the testimony that is to be offered was obtained through the confidential relationship with his client, and that to deny his client the opportunity to lie on the stand or have a witness give false testimony is incompatible with the duty of the lawyer to maintain the confidences of his client.<sup>93</sup>

This is nonsense. No professional duty of the lawyer to his client requires him to engage in criminal conduct such as subornation of perjury. Indeed perjury is the very antithesis of the judicial trial process. This process in criminal cases is based on the serious effort to determine the guilt or innocence of the accused through the means of the testimony of witnesses, which is ultimately evaluated and applied to the legal issues of the case by a jury or a judge sitting as a jury. The presence of perjured

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<sup>92</sup> See E.B. WILLIAMS, *ONE MAN'S FREEDOM* 11 (1962).

<sup>93</sup> Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966).

testimony at a trial by definition destroys the very foundation of this system of fact determination and reduces the proceedings to a charade. It is no answer that the prosecutor may reveal the perjury by his cross examination or that the jury may disbelieve the witness. These considerations merely deal with measures for curing a disease in the system and are not a basis for ignoring the legal and ethical mandates designed to prevent the disease.

Of course, defendants and other witnesses frequently lie on the stand, including witnesses for the prosecution. But this is a problem that must be of deep concern to all of the officers of the court, including defense lawyers, since the fact that perjury is known to occur does not forestall the eroding effect it has on our system of justice and the community's continued confidence in it. Lawyers by their professional position and the oath they have taken have a primary duty to protect the trial process against perjury. In the face of this duty, a lawyer who knowingly and affirmatively directs the testimony of a lying witness, and who in his closing argument to the jury includes the false testimony as part of his presentation, commits more than a criminal act—he betrays the very system of justice that he has been given the special privilege to serve.

The relationship of the perjured testimony of his client to the lawyer's duty to preserve his client's confidences deserves brief comment. The confidential relationship between attorney and client serves a single valuable function necessary to the ability of a lawyer to represent a client. It is aimed at inducing and encouraging the client to present a full disclosure of the facts to his lawyer with the assurance that his lawyer will not reveal any of these facts to anyone, especially the government authorities. The principle behind the confidential privilege rests on the need of the lawyer to know all the facts in order to make the soundest professional judgments and decisions in his representation of the defendant.<sup>94</sup>

The duty of preserving the client's confidences simply prohibits the lawyer from revealing incriminating facts given to him by his client; it does not transform him into a conspirator with his client to perpetrate a fraud on the court through the introduction of perjured testimony. It is a sheer myth that he is forced to follow his client's decision to lie on the stand because of any duty he owes his client, or because his lips are sealed as to the facts his client has confided to him. Indeed, under Canon 37 of the American Bar Association's Canons of Professional Ethics,

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<sup>94</sup> 8 J. WIGMORE, EVIDENCE §§ 2290-92 (McNaughten rev. 1961).

there is a specific exception to the duty of a lawyer to maintain the confidences of his client in the situation where the client announces to his lawyer an intention to commit a crime. The client's disclosure to his lawyer that he will lie on the stand has been argued by some to come within this exception. But it is not necessary to conclude that the lawyer should turn his client in for revealing his intent to commit perjury, to firmly and unequivocally conclude that the lawyer may not professionally join his client in the actual commission of the perjury.