



SANGER SWYSEN & DUNKLE

Representation of Criminal Defendants

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CRIMINAL JUSTICE

By Robert Sanger

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Introduction

The Editor of the Santa Barbara Lawyer asked that this month's *Criminal Justice* column discuss the representation of criminal defendants as well as some aspects of representing high profile clients, including the Michael Jackson. I will respectfully decline to discuss any particular client - especially Mr. Jackson regarding whom I have refused numerous network and national press requests - but will address issues encountered in high profile cases.

The representation of the rich and famous may be titillating but the representation of the indigent by lawyers employed in public defender agencies is timely. With budget cuts and expanding case loads, such appointed lawyers face an ethical dilemma. The Court of Appeal considered this issue on April 27, 2009.

High Profile Cases

High profile cases present particular challenges. A case may be high profile because the accused is famous or because the charges are sensational; or, a case might not make much impact in the general press, but is a *cause célèbre* within a particular group; or the client just has a lot of money.

There are some recurrent themes. The following is derived from a large number of cases and experiences in addition to those of the author (so no one should be doing that Carly Simon thing):

1. *Lawyers and judges may tend to “think” larger than life:* Decisions are not made in the same rational fashion that they are made in ordinary cases. Participants are distracted by other concerns - what other people will think - and the cases themselves become larger than life. There can be a certain amount of looking over the shoulder at members of the press or worrying about public opinion, rather than dealing with the legal and factual issues at hand. Of course, we have had the pleasure of trying cases in front of excellent judges who ran the courtroom as professionally as possible under difficult circumstances.
2. *Dream teams can be nightmares:* High profile cases can attract lawyers who consider their place in the media to be as important as representing the client. In addition, one of the most consistent complaints of criminal defense lawyers is that lawyers try to insinuate themselves into the case who are often marginal members of the bar, underemployed and who lack the ethical boundaries that keep most lawyers focused on their own cases. This is not to disparage the many true colleagues who offer moral support or good ideas without any attempt to cash in or get in the spotlight. What is particularly disturbing is to be trying to save a client’s life and have people running around in the background advancing their personal agendas.
3. *Dream teams can also be dream teams:* We have had those rewarding cases in which other true criminal defense lawyers are brought together and who work collegially in the client’s best interests. We have two cases right now in Los Angeles, one in state court and the other in federal court, where East Coast colleagues are contributing to successful defenses with the utmost of courtesy and commitment to the well-being of the client. Where co-counsel has the desired synergistic effect, relationships between such counsel often turn into professional and personal friendships that last a lifetime.
4. *Family members, hangers-on and self appointed experts who interfere with the attorney-client relationship:* These people are sometimes sincere, though overzealous, in their misguided attempts to help -- and other times are just ego-centric and destructive. They tend to challenge every decision or claim to have a friend who knows “someone” or to have the “magic bullet.” The lawyer’s time is taken from the case to field naive questions or to explain why something is happening - or to explain why the client has the right to a confidential relationship with her or his lawyer and that the lawyer cannot explain why the decisions made in are the client’s best interest.

The antidote to these problems is to keep your head down and think like a lawyer, not a media star. Request a gag order in high profile cases so that none of the participants can comment on the case while it is pending. Remember that you are representing the individual accused and no one else. It does not matter that the family has a lot of money or that the case will bring personal fame. Keep your eye on the prize - the prize is the liberty interest of the accused. If anything - media, relatives holding the purse strings, people who are second guessing - interferes with your representation, you either have to block them out or get off the case.

The Indigent Accused's Right to Counsel

Most people who are accused, rightly or wrongly, in the criminal courts are not rich and famous. Most, in fact, cannot afford to hire lawyers at all; they are represented by lawyers with the public defenders office or by appointed lawyers. These lawyers are dependent on the government for compensation which does not necessarily reflect the amount of work that might come their way. We are seeing budget cuts -- meaning a decrease in lawyers, support personnel and resources -- while caseloads increase.

Public Defender managers around the State are trying to be good administrators and adjust in times of economic stress. However, they also realize that they have a constitutional duty to each and every client to provide adequate assistance of counsel under the Sixth Amendment. The public defenders in the courtroom tend to be dedicated to being more than just being "adequate." They are committed to truly defending their clients with no less vigor - and often with more experience and ability -- than the lawyers for the rich and famous.

As a society, we claim to be interested in justice in the same way we are interested in having decent roads, police protection and public parks. We do not want to see innocent people convicted, jailed or executed - nor do we want a system so careless that the innocent are prosecuted and the true perpetrators, particularly of violent crimes, go free simply because there was no one there able to point out that the police and courts have the wrong person.

The answer is simple. We, as a society, have to pay for it. It is beyond the purview of this Column to discuss whether the mechanism is an increase in taxes, cuts in government waste or a combination thereof. But, as a matter of fairness - and as a matter of constitutional law - the indigent accused has to have a lawyer who has the time and resources to do an adequate job.

The Court of Appeal for the First District in *In re Edward S.*, 173 Cal.App.4th 387 (2009) addressed the issue of whether or not the failure of the county to provide adequate resources to the Public Defender's Office is just the way it is in tough economic times or whether it requires reversal and the appointment of counsel who has time to do it right. The case resulted in reversal. It is likely that the juvenile accused was innocent. The defender, unsuccessfully attempting to get resources from his office, simply did not have the time, the staffing, experts or financial backing to look into the defenses or defense evidence. It resulted in the finding of jurisdiction (guilt in adult terms). And, the old adage -- "if you don't have time to do it right, when will you have time to do it over" - is painfully applicable in terms of the costs of the false conviction, the appeal, the housing of the young man in custody. Not to mention the human cost of treating the young man as a criminal required to register as a sex offender and to spend time at the Youth Authority.

Conclusion

The only remedy for lawyers in public defenders offices and for their managers is to draw the line just like any other lawyer. If you are too busy or do not have the resources to properly handle a case, you are ethically required to decline the case. Good lawyers do that all the time in private practice. They refer cases out. They do not take on a case and do a substandard job. We cannot expect lawyers in public defenders offices to do what none of us would do in private practice. And, understandably, the appellate courts are also going to hold all of us to that same standard.