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ARE WE PREPARED TO OFFER EFFECTIVE ASSISTANCE OF COUNSEL?

PAUL J. KELLY, JR.*

I am told that this function or program comes about due to the concern and generosity of Mortimer Rosecan, who, I understand, was one of the premier trial lawyers of his day. His reputation was one of always being prepared and, although I never met Mr. Rosecan, I am reasonably certain that we would share common concerns about the practice of law and for those about to embark upon that journey. With a little bit of effort, practicing law can be one of the most rewarding careers a person could choose.

That said, we are not an untroubled profession. Each of us would do well to keep in mind the comments of Dean Roscoe Pound when he described the practice of law as "the pursuit of a learned art, a common calling in the spirit of public service, no less a public service because it is incidentally the means of a livelihood."

I am concerned, as I know Mr. Rosecan was, that perhaps we have reversed the order of Dean Pound's definition, placing pursuit of a livelihood before the spirit of public service. I quote from Dean Pound even though many will tell you the practice has changed. We must still aspire for the public service ideal, even as we make a living.

I would like to take a few moments to address the question of effective assistance of counsel in the larger sense, and whether we are living up to our oaths to serve the public without regard to "lucre or personal gain," a common phrase found in most attorney oaths. Before starting down that path, I would like to make a few preliminary comments to place the subject in perspective.

Lest there be any doubt about it, we have a great profession. The accomplishments of our brethren at the bar fill volumes. Whether we focus on Sir Thomas More defending himself from false accusations of treason, Thomas Erskine defending Thomas Payne, Justice Jackson's closing statement at the Nuremberg trials or Justice Marshall's advocacy in *Brown v. Board of Education*,[1] we are continually confronted with the great things done by great lawyers. Likewise, while we do not hear about it, quality legal representation,

* Circuit Judge, Tenth Circuit Court of Appeals. The text is a lecture Judge Kelly delivered at the 2000 Adler Rosecan Jurist-In-Residence Program at the Saint Louis University School of Law.

1. 347 U.S. 483 (1954).

rendered by competent and committed lawyers, occurs each and every day and sustains our profession.

As we drive the highways and byways of our cities, however, we are also confronted with the not-so-laudable parts of the profession. In New Mexico, we see billboards with larger than life pictures of counsel stridently advertising "I Sue Drunk Drivers." As one good turn of shameless commerce deserves another, not far away defense counsel proudly hawks on another billboard "I Represent Drunk Drivers." In recent years we have seen a proliferation of such advertising—because we have a First Amendment right. We also have seen a gradual decline in the camaraderie that was once the mark of the profession, brought about by "Rambo" litigation tactics that more and more attorneys are employing. Winning is the end all and be all. Or is it? Or perhaps to rephrase, should it be? Judge Miner of the Second Circuit notes, "A profession lacking collegiality is a profession lacking integrity."[2] These things, for starters, are troublesome—they bother me and they should bother you.

I have spoken in the past regarding what I thought was the responsibility of judges—to be more than referees, to carefully consider the positions of counsel, but to do more than sanction when lawyer conduct is proven egregious. Lawyers and judges have a responsibility beyond the short-term—billable hours and deciding cases; that responsibility is to mentor or teach newer members of the Bar. That responsibility is for the long-term good of the profession. One wonders whether admonitions and pleas about this important responsibility have fallen on deaf ears, or perhaps they have fallen on ears just too busy to heed. There are any number of valid excuses why this task is not being accomplished. When you leave Saint Louis University School of Law, for the most part, you will be on your own, even if you join a large firm. It wasn't always that way and hopefully, it will not always be that way in the future.

What does the public know about the law and lawyers? For the most part the public's only contact with our profession arises out of domestic relations cases and the criminal justice system. And, like it or not, how people react to the profession and how we are perceived is dependent on peoples' perceptions of the legal system as it functions on a day to day basis. Is it a good impression or a bad impression? Headlines from the *New York Times* and *Chicago Tribune* regarding persons unjustly condemned to death and on death row give one a feeling of discontent, a concern that something isn't right.

Periodically throughout my practice and more so since coming to the court of appeals, I have questioned whether we as a profession are rendering

2. Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 PACE L. REV. 323, 338 (1999).

effective assistance of counsel. The answer to that question depends on how we define the term or the reason we attempt to define it.

Many non-lawyers merely want to know if you can win the case. Without getting technical, "effective assistance of counsel" is not how many cases you win. After all if you involve yourself in civil litigation which roughly fifty percent of the participants lose every day, the losing lawyer is not necessarily ineffective.

Over eighty percent of criminal defendants are convicted so it obviously is not winning that defines effective assistance. Likewise, on appeal less than twenty percent of cases are reversed. Again, winning is not the criteria. Given the variety of circumstances faced by a lawyer in his or her professional career, no universal definition of effective assistance of counsel exists. Yet I would suggest that if each of us, whether we are retained or appointed, *consciously* attempts to give the client the best we have, after thorough investigation, research and preparation, we will have rendered effective assistance of counsel. That is how I would define the term.

The Sixth Amendment to the United States Constitution guarantees most defendants the right to counsel, and the right to effective assistance of counsel. I am concerned, however, that the public, and the profession too, have begun to equate the Constitutional standard, whether the Constitutional right to counsel has been met or fulfilled, with whether counsel has done an adequate job representing the client. The trouble with focusing solely on the Constitutional standard as a performance benchmark is that it was not meant to define what is acceptable professionally. Yet, the sheer number of ineffective assistance claims resolved by courts may contribute to the public's perception, if not the legal profession's perception, of what is acceptable. Conduct far below the norm is implicitly validated when it should be publicly rejected.

In the case of *Strickland v. Washington*,[3] Justice O'Connor laid out a two-part test to determine whether the constitutional standard of effective counsel has been met: A) Whether counsel's performance was deficient, meaning, whether the representation fell below an objective standard of reasonableness; and B) Whether the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial—or said another way, is there a reasonable probability that but for unprofessional errors the result would have been different? Where a defendant has pleaded guilty, this means that the defendant would not have pleaded guilty, but would have insisted upon going to trial. Reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding.

Thus, to prevail on a Sixth Amendment ineffective assistance of counsel claim, a defendant must establish both that counsel's performance was deficient and that it prejudiced him. The Supreme Court has made it clear that

3. 466 U.S. 668 (1984).

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a court need not reach the issue of deficient performance if it finds no prejudice, and vice versa.

In virtually every post-conviction proceeding, a defendant will allege ineffective assistance of counsel. Many of the claims are meritless, some are not. It is unfortunate, but understandable, that pro se defendants routinely accuse counsel of being ineffective—they didn't win. It is troublesome that the accusation also frequently comes up when the defendant has post-conviction counsel. It is also troublesome that one practitioner may casually accuse another of what amounts to legal malpractice. In some of these cases, the defendant's trial or appellate counsel will furnish an affidavit essentially admitting the allegations, and equally disconcerting is the fact that the allegations, if true, reflect lawyering totally devoid of that high sense of public service described by Dean Pound. By this I mean completely inadequate investigation, failure to subpoena necessary witnesses (be they expert or lay witnesses), failure to put on any evidence in the penalty phase of capital cases, failure to make either an opening statement or a closing argument, or totally erroneous advice concerning parole eligibility when a defendant is about to plead, and the like.

We all recognize that in the real world of jury trials and uncertain proof, a trial carries risks. It is not possible for a lawyer to experiment with different strategies if one goes awry. Jurors' reactions and judges' rulings often are unpredictable, and there are many different ways to competently represent a client. It is easy to find fault with counsel's strategies after the fact. Still, there is a class of errors that turn up that has very little to do with strategy and suggests totally inadequate preparation or a complete lack of awareness of the applicable rules.

From the standpoint of the public welfare, you quickly realize that where the defendant's guilt is supported by overwhelming evidence, such as three eyewitnesses, a DNA match or a confession, the conviction must be upheld regardless of counsel's shortcomings. In the rubric of *Strickland*, the defendant cannot establish prejudice—a reasonable probability that, but for counsel's omissions, the outcome would have been different. Thus, the Sixth Amendment claim fails.

Likewise, it is difficult to establish deficient performance under the Sixth Amendment because a defendant must overcome a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance, and that counsel's decisions were strategic or tactical. Only in a very narrow class of cases—for example where counsel was laboring under a conflict of interest or the defendant effectively was unrepresented by counsel - will prejudice be presumed. The Supreme Court was reluctant to adopt any set standard of performance so as not to restrict counsel's independence and tactical choices, and because the Sixth Amendment's effective assistance guarantee was "not to improve the quality of legal representation, although that

is a goal of considerable importance to the legal system . . . [but] simply to ensure that criminal defendants receive a fair trial."[4]

While the Sixth Amendment may not have been designed to improve the quality of legal representation, neither should it serve to lessen the quality of that representation. Given the volume of ineffectiveness claims, my concern is that we not become desensitized to less than competent representation. The low standard for effective assistance of counsel under the Sixth Amendment should not be mistaken for competent representation. I would suggest, where the record is clear, courts should point out deficient performance of the nature I have described and not merely reject the ineffectiveness claim as without merit, saying that counsel was "not ineffective" or "defendant has failed to show he had ineffective assistance."

Opinion after opinion resolves the issue in this abbreviated fashion, however, despite serious issues of professional competence. I would suggest each time this occurs a new benchmark, lower than the one before, implicitly comes into existence, and it is against this new benchmark that the conduct of the next practitioner will be measured. Though we know that constitutional ineffectiveness is different than professional competence, it is naive to think that the former does not have an effect upon the latter. And, who cares—the guilty guy is in jail. I hope you care.

We see in Illinois that thirteen persons on death row have been exonerated. *The New York Times*[5] notes the defense lawyers failed to prepare any strategy, arguments were incoherent and that the lawyers failed to attend hearings and call witnesses. To the extent that this is true, what is startling is that convictions and death sentences were all affirmed and no one said or did a thing about the lawyers involved. College students working on a class project were able to find evidence that escaped the attention of defense lawyers and which could have possibly exonerated the defendant.

In *McFarland v. Texas*,[6] when complaints were registered about a capital defendant's lead counsel sleeping, the trial court reportedly responded, "the Constitution guarantees you a right of counsel, but does not say the lawyer has to be awake." Defendant's lead counsel was an attorney who had practiced forty-two years, who later testified, "I'm seventy-two years old. I customarily take a short nap in the afternoon."[7] Over a dissent, the appellate majority held that, while it did not condone the napping, co-counsel adequately represented the defendant. Thus, defendant could not show prejudice.[8] The appellate

4. *Id.* at 689.

5. Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death* Row, N.Y. TIMES, February 5, 2000, at A1.

6. 928 S.W.2d 482 (Tex. Crim. App. 1996).

7. *Id.* at 505.

8. *Id.*

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majority also suggested that co-counsel's allowing lead counsel to sleep may have been tactical to produce sympathy,[9] a suggestion termed "utterly ridiculous" by the dissent.[10] I should point out that some courts would presume prejudice under the Sixth Amendment where counsel sleeps through a substantial portion of the trial.[11] But quite apart from the Sixth Amendment inquiry, one has to wonder what was done to the lawyer? Obviously, merely not condoning such napping is not enough to insure that clients are represented competently and the profession has standards that mean something.

In *Haney v. State*,[12] defense counsel assisting lead defense counsel came to trial so intoxicated that the judge sent him to jail. The next morning, the judge produced both the client and co-counsel from jail, the capital murder trial of the defendant proceeded, and a sentence of death was imposed. Defendant claimed that co-counsel's incarceration deprived her of access to counsel, thereby infringing her constitutional right to counsel (a different claim than ineffectiveness). Yet, what of the lawyer? The comment by the appellate court that "[a]ll parties agreed that subject counsel had been sober and had performed satisfactorily during the first three days of trial," is not very reassuring.

Out of California in 1989 is *People v. Garrison.*[13] A lawyer was stopped on the way to court. His blood alcohol level was so high (.27) he could not legally operate a motor vehicle. He got a ride to the courthouse, and his client was convicted. It was undisputed that the lawyer was an alcoholic and that he consumed large amounts of alcohol during the trial. The appellate court declined to adopt a rule that impaired attorneys are per se incompetent and upheld certain guilt phase convictions, finding that counsel "did a fine job in this case,"[14] echoing the sentiments of the trial judge. The court's observation that defense counsel "did a fine job" seems to beg the obvious question, but the reported case indicates that counsel died of alcoholism pending appeal.

To be sure, these are extreme examples. The vast majority of lawyers deliver competent and committed representation, often under difficult circumstances. But we cannot ignore those who do not provide such representation. The Model Rules of Professional Conduct's Rule 1.1 provides that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." It seems that trial judges and opposing counsel may be ignoring the fact that incompetence is unethical and judge and lawyer alike are equally culpable for

9. *Id.* at 505 n.20.
10. *Id.* at 527 (Baird, J., dissenting).
11. *See, e.g.*, Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984).
12. 603 So.2d 368 (Ala. Crim. App. 1991).
13. 765 P.2d 419 (Cal. 1989).
14. *Id.* at 441.

not taking steps to report the particular practitioner. Under the Model Code of Judicial Conduct[15] and the Model Rules of Professional Conduct,[16] the judge and the lawyer have a duty to inform the appropriate professional disciplinary authority when either knows that a practitioner is not fit to practice. All of us must be cognizant of our professional duty to assist in and improve the legal system.

Appellate judges, too, generally ignore violations of ethical norms. Perhaps they are too busy, have too many cases or too much time has passed between the trial and the appeal; however, when lawyers as well as judges ignore what is in plain view they become responsible for the problems about which we often hear them complain. Appellate judges, trial judges, opposing counsel and co-counsel all have a positive obligation to monitor, encourage and enforce adherence to the rules of professional conduct. This means doing something about impaired attorneys, those who are no longer fit to practice or a new practitioner who is simply in over his or her head and cannot deliver adequate representation.

I recently referred an attorney to the disciplinary board for the state in which he practiced even though five years had elapsed from the trial to federal post-conviction proceedings. Will it do any good? It will get the attention of the Bar and, I hope, my colleagues. Would a paying client get the same service? Perhaps. An old New Yorker cartoon that I came across depicts a lawyer talking to his client: "You have a pretty good case; How much justice can you afford?"[17] Sad, but possibly true.

I would suggest that in the private sector the problem, while still troublesome, is somewhat self-correcting because the offender will be sued for malpractice, a disciplinary complaint will be filed or the lawyer will go out of business if bad enough. In the public or court-appointed sector, I have read that the ABA has suggested that inadequacy of compensation is one of the primary reasons for the problems being experienced. Defense counsel should be adequately compensated just as public defender caseloads must be reasonable, but I think that the compensation issue is too convenient an excuse. While an underfunded defense can be a problem, an incompetent lawyer is worse, and I don't believe money would make that lawyer more competent.

We know that the caliber of person entering and graduating from law school should be higher than ever before because of higher LSAT scores, better undergraduate preparation, and even markedly higher GPAs (though this last factor may suggest grade inflation). We know the scholarship of the faculties in our law schools is better today than in the past.

15. Canon 3(D)(2).

16. Rule 8.3(a).

17. J. B. Handelsman, NEW YORKER, Dec. 24, 1973, at 52.

Has the quest for billable hours deprived the newer lawyer of the training that thirty or thirty-five years ago was routinely expected by the newer lawyer, as well as the experienced practitioner? Have law schools, in order to improve retention rates, granted social promotions? Have bar exams been watered down such that a certain percentage of those passing simply will never be fit to practice law? As suggested earlier, are judges condoning, implicitly or otherwise, less than competent representation in their courtrooms?

The answer is probably a little bit of all of the above.

The solution is not simple, and I have no idea how long it will take or if the problem can ever be totally solved; but I know that it must begin with each of us in this room. It must begin with each of us reminding ourselves on a regular basis after we leave law school just how vitally important our profession is to the delivery of justice. We must not forget that the adversarial system assumes that the truth can be served best *only* if each side is represented by a competent attorney. Judges must not hesitate to get involved with lawyers appearing before them; professors must recognize the tremendous responsibility that they have assumed to insure that the next generation of attorneys recognize, in the words of Joseph Califano, that "lawyering at its finest is a noble profession."[18]

If you are embarking on a career in the law merely to make money or gain high office, think again and perhaps chose a different career. As Dr. J. Phillip Wogaman, a clergyman non-lawyer, concluded recently at a seminar on the profession: "To be a lawyer is to be a servant of the community . . . by which the community itself can be judged."[19]

With recognition of the problem and the fact that we are the only solution, I will close my remarks by leaving with you the thought of an anonymous author that I have carried with me since beginning my practice of law: "A different world cannot be made by indifferent people." Thank you for your kind attention.

18. J. Califano, *The Law: Once a Noble Profession*, WASHINGTON POST, Jan. 28, 1996, at C1.

19. J. Phillip Wogaman, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent,* 26 FORDHAM URB. L.J. 827 (1999).