

On Making Lawyers a Bit More Socially Responsible

A lawyer recently confided that if someone were to sue his client, he would imply that the accuser was a child abuser. “Even without any foundation?” a communitarian wondered. The lawyer chuckled: “Many people drop their suits right then and there. Go prove that you have *not* abused children!” He added that the media would carry the implied accusation, but because the smeared party would not be on trial, he could not obtain a verdict of innocence, and thus clear his name.

To the lay person the possibility of being subject to such abuse seems just short of unbelievable. Checking with a law professor, a caller was informed that while such tactics “may not be proper, it can and is done.” For instance, in a cross-examination a lawyer may raise questions about child abuse, attempting to reflect on the witness’s credibility. True, the press may not pick up the story, but if the stakes are high enough a public relations firm could see that the word gets out. In any event the party at issue will need to take his chances if he chooses to proceed.

In this context, it is also noteworthy that many people believe that O.J. Simpson will walk, whether or not he is guilty, because his lawyers concocted a conspiracy theory that the Los Angeles Police Department is framing him because it is racially prejudiced.

Floyd Abrams, an eminent lawyer, wrote in the *New York Times* that in our current climate we should not be surprised when lawyers state things that “have nothing to do with the truth” because we should know that they will say anything that might help their client. It’s like sitting down to play poker—one should expect the other side to bluff.

But courts are not a game. Lives, liberty, and fortunes are at stake. Justice is not served by both sides playing the court for all they can. Can we find ways to maintain our adversarial system, but also expect lawyers to truly live up to their responsibilities as officers of the court?

In the quest to make lawyers a bit more communitarian—to enhance somewhat their responsibility to the community—I posed a hypothetical case (based on an actual one) to several legal authorities: Eight women charge that a physician sexually molested them while he had them connected to a wire that he claimed would endanger them if they moved. The defense argues that the women fabricated the whole thing, conspiring to extort money from the physician. No evidence of any kind is presented to support this claim. Assume, I suggested, that the lawyer made up the whole defense; should this be allowed?

All those approached responded that lawyers' only obligations are to their clients. George E. Bushnell, Jr., former president of the American Bar Association, put it starkly:

While your report of the sexual molestation defense on its face is irresponsible, I cannot agree that the rights of the defendant should in any way be changed or modified. Rather it is my judgment—and conviction—that *only* through full protection of defendants' rights is the total community best served. For it is only by emphasizing the rights of the least of us that the rights of all of us—the rights of the total community—are preserved.

Alan M. Dershowitz, in his recent novel, *The Advocate's Devil*, put the following line into the mouth of his legal maven: "In this game, there's only one bottom line—winning—whether the client is black or white, innocent or guilty."

The rush to not reform is astonishing both because justice is too often denied in the existing system, and because as it is there are already several rules on the books—in the law itself, and in the ethics of the profession—that curb lawyers in the community's interest. For example, if a lawyer knows that her client is about to commit perjury, the lawyer is supposed to stop the client or alert the court. (Many lawyers circumvent this rule by warning their client not to tell them more than they need to know.)

Similarly, the Supreme Court ruled that lawyers may not elicit what they know to be a false answer from their clients. True, lawyers regained much of their wiggling room by narrowing what is considered “eliciting.” But still, there is some limit on what lawyers can do when it comes to bearing false witness.

Also, lawyers may not pay the secretaries of their opposition to slip them copies of what is on file. We have added, over recent years, some limitations on what aspects of the sexual history of a rape victim the defense may bring up. Why not consider strengthening these rules a bit in the interest of justice and the community?

For instance, how about prohibiting lawyers from pleading a client not guilty when they know he is guilty; and similarly prohibiting lawyers from challenging the other side’s veracity when they know it is telling the truth? Abrams believes we should ask lawyers to show less willingness to make certain arguments (for example, those that *could not* be true) and greater willingness to “view themselves as part of a system of law” rather than as alter egos of their clients. This is surely a sentiment that we should encourage, even as one recognizes that it needs additional specification before one can use it to hold people accountable.

Finally, judges may need to become a bit more active. During my recent service as a juror, the defense was in the hands of a legal aid attorney who must have been on her first case. (I would not be surprised if she had barely scraped by on the bar exam.) The prosecutor, on the other hand, was quite accomplished. The judge was in obvious pain, trying to find leeway for the defense, but was boxed in by the rules. Allowing judges to ask questions would move us forward.

The details need to be worked out, but first the public dismay—heightened by the way the O.J. Simpson case and several other highly publicized cases were handled—needs to be galvanized. The point that needs to be emphasized is that, given that there are already some very loose limits on what lawyers may do, proposals such as the ones mentioned above are not a violation of our legal or ethical traditions. It is time to move the marker over some more, in a socially responsible, communitarian direction.

Nobody questions the need to protect the rights of the defendant, but these rights do not include allowing those who are guilty to walk because they have as lawyers the best fiction writers money can buy. True, public interest in justice should not take precedence over the defendant's rights—but it should not be wantonly ignored, either.

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