From the President

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The Tireless Fight

A federal court judge wrote recently to express his considerable concern that in a column[1] in *The Champion*, Bonnie Hoffman described defense lawyers as being engaged in a tireless fight against the courts. He wrote: "I find it quite distressing that any lawyer would think that he or she is engaged in a fight against a court, particularly the federal courts which, of course, provided the substantive decision in the very case, *Gideon v. Wainwright*, that is the subject of [the] article." The judge felt that characterizing the bench/bar relationship as adversarial was inaccurate, and had no place in serious legal writing.

This objection came from a judge who personifies the highest standards of judicial integrity, fairness, and civility; a judge who understands and enforces *Brady;* a judge who is neither a former prosecutor nor without considerable former experience as a trial lawyer.

So how could he be so wrong?

Here is what Bonnie wrote: "Fighting tirelessly against the government, the courts, and the general public, indigent defenders assure that people who are often marginalized and forgotten by society have a voice, are heard, and are treated with dignity and respect. Defenders serve as a shield against unjust accusations and a sword against oppression."

Do any of us disagree? Her words ring true, yet the judge objects that they are hyperbole best left to television or the movies. That defenders must fight the courts to protect the liberty and rights of their clients is indeed the perception of the criminal defense bar. That this perception exists is precisely why this topic is appropriate for a professional journal.

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No lawyer would dispute that the courts are essential to the preservation of liberty, or that many excellent judges devote their lives to the fair and equal administration of justice. Yet the existence of a judicial bias against the accused is of sufficient concern that it has been the subject of considerable and serious discussion. A 2008 law review article from my own state, suggesting the "truism that many judges pay insufficient attention to the constitutional and other fundamental rights of the criminally accused,"[2] categorized the rights in criminal cases for which judicial violations have resulted in actual discipline or removal.[3] Professor Abbe Smith, a former public defender, in a 2004 essay described the "ordinary experience" and "reality" for "defenders everywhere … who routinely face hostile judges who bully, ridicule, interrupt, and obstruct."[4] The 2009 report of the National Academy of Sciences discussed whether a biased double standard of admissibility for forensic science evidence was reflected by judicial rulings in criminal cases,[5] and cited a source's conclusion that trial and appellate courts apply *Daubert* "more lackadaisically in criminal trials — especially in regard to prosecution evidence. …"[6]

Bias is inimical to the equal protection of the law, and actual bias by a court is a circumstance a lawyer would be expected to challenge, as artfully as possible.[7] But lawyers must "fight" the courts in a broader sense, and for more benign reasons than challenging prejudicial hostility or bias. Appreciating this necessity requires an understanding of our culture, values, and role, and what it means for us to fight.

Our profession requires zealous advocacy; our clients expect us to fight. The terms mean the same thing, but the latter expression better conveys the visceral meaning of what our profession and the criminal justice system requires of us to safeguard a client's freedom. Of course we do not "fight" in the sense of engaging in physical combat. What we do is best described in another definition of the word fight: "to struggle" or "to put forth a determined effort."

The courts are not a party to a prosecution, so the objection might be that attorneys do not "fight" a non-adversary whose responsibility is to preside over a case as a neutral arbiter of the law, fact finder, and sentencing authority. Maybe the disagreement is only one of semantics. When we fight opposing counsel, we use the same forensic skills and arguments as when we seek to persuade a court. Using the same conduct and words concerning the same issues and for the same stakes feels like the same fight. A fight by any other name is still a fight.

Moreover, the criminal justice system requires defense lawyers to interact with courts in a way that is similar to how they interact with their adversary. Trial judges are not proactive. They rely on attorneys to investigate the facts and to present admissible evidence. They act on motion and rule on submitted proof. An attorney must act affirmatively to persuade a judge to grant a motion, vindicate a right, or dismiss a prosecution.

Good lawyers do not merely state those motions and accede to adverse rulings. They try to win. They employ advocacy, they argue, they disagree. If a ruling is adverse, they are required to object and to explain to the judge each of the reasons the judge is wrong. The decorum, deference, and respect that characterize this confrontational process render it no less a struggle.

The effort directed at the courts begins at the earliest stages of a prosecution. In many jurisdictions, the indigent defense bar must fight for the basic tools necessary to provide an adequate defense. Judges sit as gatekeepers to the information and resources sought by the defense, and administer a jurisprudence stacked against the indigent accused. An attorney cannot simply ask for the investigative services or expert witnesses she needs; even as an officer of the court, her own determination of materiality is generally insufficient as a matter of law, especially in the state courts. Instead, she must prove to the court both a particularized need for resources and a likelihood of erroneous conviction in the event of denial — all of this prior to trial, and without the resources or information sought in the first place. Thus begins the struggle to persuade the court to empower the attorney to develop the facts that are essential to the court's ability to administer justice. By shouldering the burden of persuasion, the attorney fights for what she needs to do her job.

The struggle of persuasion reaches its zenith at trial, where the attorney confronts rules of trial procedure and appellate review that are inflexible and unforgiving of attorney error. The exceptional judge might act *sua sponte* to question inadmissible evidence or ask that an issue be raised, but only the foolish lawyer sits silently in reliance on judicial intervention or lenity. The moment the lawyer falters in her attention, fails to object, or neglects a material point in her client's defense, the integrity of the process is diminished and the harm is done, often unreviewable on appeal. For this reason, lawyers are taught that in the courtroom they are alone in their responsibility to defend the accused, and that they must be prepared to struggle against even the court as another opposing force or obstacle standing between an accused and his freedom.

Beyond the struggles of trial is the challenge to be heard on appeal. Appellate judges do not comb the record for reversible error. Only those issues that the lawyer preserves with specific objection and exact timing will be reviewed. This rule is justified by considerations of judicial efficiency known to us all, but it inexplicably applies as well to those errors that are obvious and clear, essentially immunizing from appellate review judicial error denying any but the most basic structural rights. Even those narrow exceptions that permit review when necessary to avoid manifest injustice or the denial of essential rights are at risk of being trumped by a jurisprudence that hypothesizes bizarre defense strategies, as imaginary as unicorns,[8] in order to invoke the doctrine of invited error. In addition, the procedural requirements for obtaining review of properly preserved issues seem to multiply in both number and complexity with little apparent purpose other than to erect more barriers to an accused's being heard.[9]

I do not doubt that judges have their own concerns about lawyers who they think fight too hard and cross examine too long, who take cases to trial that should be pled, who file motions they regard as frivolous. I am sure that must be vexing, for we all know judges who through the admonition to "move along," the threat of contempt, or by other tactics have made it abundantly clear that the path of persuasion and zealous advocacy is not an easy one. That too is part of an innate tension between us and perhaps an unavoidable aspect of a human system in which the stakes are so high.

But injustice results when lawyers stand mute, make no objections, file no motions, and bring no fight to a client's defense. Too many lawyers have taken judicial vexation to heart, have been beaten down, and have learned that it is easier to just be nice and go along. That any lawyer should stand quiet in the defense of a client is inexcusable. The client — whether rightly or wrongfully accused — deserves active representation to ensure that his interests are protected and that the process is fair, not just in result, but also in the manner that the result is reached.

Our criminal justice system is far from perfect. Even when provided the full panoply of fair trial rights, innocent people are convicted on the strength of perjury, mistaken identification, coerced confession, forensic fraud, and prosecutorial misconduct — all of which are the unavoidable features of human weakness or error.

The defense lawyer is the final safeguard; she has the ultimate responsibility to guard against fallacy, fault, and error. It is the duty of the criminal defense lawyer to be the voice for the liberty and rights of the accused. If the defense lawyer fails to use her voice, injustice will occur.

Courts understand that we must fight actual bias no matter where it resides. And courts will respect our professional obligation "to put forth a determined effort" to protect clients from adverse rulings, even when the struggle to do so seems directed at them.

We mean no affront when we include courts as entities against which defenders must fight to protect the indigent accused. Instead, we ask that courts recognize as more distressing that a lawyer might stand silent before even a neutral court. No truth about what we do is more important than this — our responsibility is a responsibility to justice that requires vigilance, challenge, and objection. It is a tireless fight for which there can be no surrender.

Notes

1. Bonnie Hoffman, *Recognizing Gideon's Champions*, The Champion, June 2012 at 66.

2. Keith Swisher, *The Modern Movement of Vindicating Violations of Criminal Defendants' Rights Through Judicial Discipline*, 14 Wash. & Lee J. Civil Rts. & Soc. Just. 255, 256 (2008).

3. *Id.* at 262-268.

4. Abbe Smith, *Defense-Oriented Judges*, 32 Hofstra L. Rev. 1483, 1494 (2004).

5. National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 85-110 (2009).

6. *Id.* at 98 n.53. A report to Congress that includes the possibility of a judicial bias in the administration of the criminal law is of no small significance, especially in consideration of its authorship.

7. *See, e.g.*, Keith Swisher, *The Modern Movement of Vindicating Violations of Criminal Defendants' Rights Through Judicial Discipline*, 14 Wash. & Lee J. Civil Rts. & Soc. Just. 255, 272 (2008) ("It is arguably malpractice not to raise the violation with the judge.").

8. During oral argument on Nov. 28, 2012, in *Henderson v. United States*, the question arose whether lawyers would intentionally refrain from objecting to an issue at trial in hope that a plain error on that issue would present itself by the time of the appeal, and Justice Breyer explained that the lawyer who thinks that way "is like the unicorn, he doesn't really exist."

9. *Evans v. Commonwealth*, 2012 Va. App. LEXIS 419 (Va. Ct. App. Dec. 26, 2012) (appeal dismissed because wrong case number listed on notice of appeal even though the parties both referred to the correct case in briefs and there was no prejudice to the Commonwealth from the typographical error). ■