

# FROM THE PRESIDENT

STEVEN D. BENJAMIN

## The Truth Be Told: The Criminal Defense Lawyer and the Importance of Truth

I recently asked a preeminent defense lawyer whether it was his practice to encourage his clients to tell him the truth. Criminal defense lawyers do not often discuss this aspect of our practice, and asking the question felt a little awkward. His thoughtful answer was that he avoided questioning a client about the truth, preferring to use other means and sources to determine what he needed to know. This reluctance, he said, was especially applicable to cases that would ultimately turn on intent as opposed to the facts of what had occurred. This approach is the exact opposite of my own.

What is the role of truth in the criminal defense function? This topic arises more by reflex or joke than as a lesson in our training or as a principle in our standards of practice. Many make fun of it, pretending that the defense function has nothing to do with the determination of the truth. They fear that knowledge of the truth will impede effective advocacy, and compromise our efforts to represent or free our clients.

But this can't possibly be right, can it?

I begin new client interviews as we all do, by obtaining relevant biographical information and talking generally about the client's circumstances. I then explain the privileged nature of our communication, and that the privilege permits the client to talk to me without fear of incrimination. Then comes the point at which some of us might diverge: I tell the client to be completely truthful with me and to tell me exactly what happened, how and why.

I do this because knowing the truth is essential to an accurate assessment of the client's situation and to the exercise of good judgment in the provision of advice. The truth answers the

fundamental questions of whether a crime occurred for which the accused was a criminal agent, and if so, whether there might exist a reasonable doubt in the proof, an affirmative defense, or a mitigating circumstance. The truth guides the defense investigation, ensuring the collection of all facts relevant to the case without the creation of evidence harmful to the accused. The truth identifies the goals, strategy, and theory of a defense, and the alternatives to trial.

Should the case go to trial, knowing the truth means that I am better prepared to confront the evidence and any surprises. The truth also determines whether the accused should testify. Even a truthful and innocent defendant can harm his case by testifying; a juror, for example, might erroneously detect evasion or infer a consciousness of guilt where neither exists. And, of course, enabling a defendant to testify falsely is to follow a recipe for disaster. While a lawyer might avoid ethical concerns by circumscribing a client's disclosure, the consequences of permitting a client to testify without fully subjecting the account to rigorous challenge are often dire. Prosecutors, like defense lawyers, are trained in the art and skill of cross-examination. It is hard enough for the truthful witness to sustain credibility in the face of a probing examination; it is foolish to assume that the untruthful witness will do anything but implode.

These considerations underlie the mandate of the ABA Standards for Criminal Justice<sup>1</sup> that defense lawyers should explain to their clients the necessity of full disclosure and determine all relevant known facts from a client. The accompanying Commentary cautions defense counsel to avoid certain strategies, such as creating the impression that a client should conceal facts to afford greater defense opportunities, instructing the client "not to admit anything to the lawyer that might handicap the lawyer's freedom in calling witnesses or in otherwise making a defense," or explaining the legal consequences of different factual circumstances to influence the adoption of favorable facts.

My colleague suggests an approach inconsistent with these standards, but one that has considerable support within the ranks of the defense bar. His approach articulately illustrates the professional disagreement that exists within our field. That we differ in our methods might not be surprising; the richness of our profession and the diversity of our membership mean that we will always have different ways of lawfully and ethically representing our clients. Our professional development as lawyers requires a constant re-evaluation and adaptation of those skills and methods that make us good lawyers.

But when we train our new lawyers, what should we teach? Should criminal defense lawyers seek the full, unbiased, and truthful disclosure of facts from their clients within the confidentiality of the attorney-client relationship? The answer to this question seems so important to the representation of our clients that it suggests the need for a uniform standard. If such a standard is necessary, is the ABA standard correct?



Isaac Harrell

Steven D. Benjamin is an attorney in private practice with the firm of Benjamin & DesPortes. In addition, he serves as Special Counsel to the Virginia Senate Courts of Justice Committee. He has led criminal justice reform throughout his career, including as counsel in the landmark Virginia Supreme Court decision recognizing a constitutional right to forensic expert assistance at state expense for indigent defendants. He is a recipient of the Virginia State Bar's Lewis F. Powell Pro Bono Award.

### STEVEN D. BENJAMIN

Benjamin & DesPortes, PC  
P.O. Box 2464  
Richmond, VA 23218  
804-788-4444  
Fax 804-644-4512

E-MAIL [sdbenjamin@aol.com](mailto:sdbenjamin@aol.com)



Sign up for Twitter  
to follow President  
Steven D. Benjamin  
@Stevebenjaminva.

I invite you to share your views. I would like to explore how the defense bar throughout the nation approaches the question of how and when to seek full disclosure of the truth from a client. Informed by your responses, I plan to return to this important issue later in my term. Please email me at [president@nacdl.org](mailto:president@nacdl.org).

### Note

1. Standard 4-3.1 (a) ... Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

Standard 4-3.2 (a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses. (b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts. ■

## David M. Benjamin, Ph.D.

Experienced Forensic Toxicologist



- ◆ Analysis of Results of Blood, Urine, & Hair Drug Tests
- ◆ Cocaine/Narcotics Issues: Possession vs. Personal Use
- ◆ Dram Shop & Vehicular Homicide
- ◆ Medical & Law School Teaching Experience
- ◆ Excellent Communicator

*References Available*

617-969-1393

[www.doctorbenjamin.com](http://www.doctorbenjamin.com)

[medlaw@doctorbenjamin.com](mailto:medlaw@doctorbenjamin.com)



## AFFILIATE NEWS

[WWW.NACDL.ORG/AFFILIATES](http://WWW.NACDL.ORG/AFFILIATES)

### 2012-2013 NACDL & AFFILIATE CLE CALENDAR

- |                       |   |
|-----------------------|---|
| <b>November 9-10</b>  | <b>Pennsylvania: PACDL's 2012 White Collar Practice Seminar</b><br><b>Ritz Carlton Hotel, Philadelphia, Pennsylvania</b><br>Contact: PACDL Executive Director Debra H. McGovern at 717-234-7403 or email <a href="mailto:pacdl@aol.com">pacdl@aol.com</a>   |
| <b>November 15-16</b> | <b>NACDL's 8th Annual 'Defending the White Collar Case: In &amp; Out of Court' Seminar</b><br><b>Fordham University Law School, New York City</b><br>Contact: NACDL's Education Assistant Akvile Athanason at 202-465-7630 or email <a href="mailto:aathanason@nacdl.org">aathanason@nacdl.org</a> . For more details, visit our meetings website at <a href="http://www.nacdl.org/meetings">www.nacdl.org/meetings</a> |
| <b>November 15-16</b> | <b>Louisiana: LACDL's Criminal Litigation Seminar</b><br><b>Lafayette, Louisiana</b><br>Contact: LACDL Executive Director David Tatman at 225-767-7640 or email <a href="mailto:david@tatmangroup.com">david@tatmangroup.com</a>  |
| <b>December 7</b>     | <b>New Mexico: NMCDLA's 'Forensics: Up Close and Personal' Seminar</b><br><b>Albuquerque, New Mexico</b><br>Contact: NMCDLA Executive Director Cathy Ansheles at 505-992-0050 or email <a href="mailto:cathy@nmcdla.org">cathy@nmcdla.org</a>   |
| <b>December 7</b>     | <b>Washington: WACDL's 'Taking Your Trial Skills To the Next Level' Seminar</b><br><b>Washington State Convention Center, Seattle, Washington</b><br>Contact: WACDL Executive Director Teresa Mathis at 206-623-1302 or email <a href="mailto:teresa.mathis@wacdl.org">teresa.mathis@wacdl.org</a>  |
| <b>December 14</b>    | <b>Tennessee: TACDL's Year-End 'Search, Seizure &amp; Ethics' Seminar</b><br><b>Nashville, Tennessee</b><br>Contact: TACDL Executive Director Suanne Bone at 615-329-1338 or email <a href="mailto:suannebone@tacdl.com">suannebone@tacdl.com</a>   |
| <b>December 15</b>    | <b>California: CACJ's 2012 Annual Fall Criminal Defense Seminar</b><br><b>Hotel Nikko, San Francisco, California</b><br>Contact: CACJ Administrative Director Gail Jones at 916-643-1800 or email <a href="mailto:gjones@cacj.org">gjones@cacj.org</a>  |
| <b>January 13-18</b>  | <b>NACDL's 33rd Annual Advanced Criminal Law Seminar: 'Emerging Trends, Novel Defenses'</b><br><b>St. Regis Hotel, Aspen, Colorado</b><br>Contact: NACDL's Education Assistant Akvile Athanason at 202-465-7630 or email <a href="mailto:aathanason@nacdl.org">aathanason@nacdl.org</a> . For more details, visit our meetings website at <a href="http://www.nacdl.org/meetings">www.nacdl.org/meetings</a>            |
| <b>February 20-23</b> | <b>NACDL's Midwinter Meeting &amp; Seminar: 'Reasonable Doubt &amp; Actual Innocence'</b><br><b>Omni Shoreham Hotel, Washington, DC</b><br>Contact: NACDL's Education Assistant Akvile Athanason at 202-465-7630 or email <a href="mailto:aathanason@nacdl.org">aathanason@nacdl.org</a> . For more details, visit our meetings website at <a href="http://www.nacdl.org/meetings">www.nacdl.org/meetings</a>           |