

Cutting Bait

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When faced with the choice between preserving the English monarchy and protecting his client's interests, Lord Henry Brougham famously set forth the duty of zealous advocacy in stating:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.¹

To a criminal defense attorney, there is something inherently reassuring, if not inspiring, about Lord Brougham's ethic of advocacy. It portrays the criminal defense attorney as the final, and perhaps only, bulwark between the client and the rest of the world. To Brougham, an advocate must disregard all others, as well as his own interests, in defense of his client. The advantage of such a conception, with its emphasis on unwavering fealty, is that any ethical dilemma can be reduced to a simple inquiry test: does the lawyer's decision serve his client's interests?

This ethic of advocacy is particularly useful for the criminal defense attorney. Ideally, the criminal defense attorney conducts his work in an adversarial system where the stakes could not be higher. While it is true that the criminal case, like any civil matter, can resolve in settlement, the bargaining chip ultimately involves the client's liberty interest. In such a world, accepting the maxim that the advocate's sole responsibility is to protect and further the client's interests is not only critical, but indispensable to effective advocacy. Brougham's exhortation of heedlessness, the disregard of others, ultimately lies at the root of the criminal attorney's dilemma and goes to the very heart of the current hypothetical. The issue raised in both instances is the question of how much disregard of others is too much, and how much disregard of the attorney's own ethics is required.

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¹ 2 TRIAL OF QUEEN CAROLINE 3 (1874).

The counter-argument to Brougham's ethic of zealous advocacy, often embraced by prosecutors, is the contention that a criminal defense attorney's responsibilities do not only extend to the client. Rather, the attorney has responsibilities to the integrity of the legal system, as well as to greater societal interests. By disregarding all else in favor of a client's interests, the advocate ignores these greater, purportedly more noble, obligations.

This perspective is without merit. First, because criminal cases purportedly occur within the parameters of an adversarial system, the defense attorney best serves the greater public interest when he zealously safeguards the interests of his client. Justice Powell said it best in noting that "a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" ²

Furthermore, the notion that a defense attorney needs to protect the integrity of our legal system incorrectly presumes that our system is fair and just and thus worthy of protection. If such a proposition were true, the current hypothetical would not exist and our confidence in the outcome of our judicial proceedings would never waiver. The reason that the current hypothetical is relevant, at least in the federal system, is that its ethical problems are not only real, but unremarkable.

Indeed, the hypothetical accurately reflects a world where harsh mandatory minimum sentences apply to the majority of drug cases. Because of that fact, law enforcement agents manipulate narcotic transactions, often through multiple drug buys, in order to reach drug quantities that trigger mandatory sentences.

More importantly, in a legal system where mandatory minimum penalties determine the sentences, the traditional sentencing discretion of the neutral and unbiased magistrate is replaced by the judgment of the prosecutor who effectively decides the defendant's sentence by choosing how to charge the case.³ In effect, we have arrived at the absurd reality where the Queen of Heart's nonsensical statement "[s]entence first—verdict afterwards" is realized.⁴

For the criminal defendant confronting the minimum mandatory sentence, cooperation (snitching against others) is his only means of avoiding the harsh penalty.⁵ In such a dark wood,⁶ the incentive to embellish, exaggerate or simply lie

² Polk County v. Dodson, 454 U.S. 312, 318–19 (1981) (citation omitted).

³ In *United States v. Polizzi*, Judge Jack Weinstein provides an insightful analysis of how prosecutorial prerogative has replaced judicial discretion in the federal world of mandatory minimum sentencing. 549 F. Supp. 2d 308 (E.D.N.Y. 2008), *vacated*, 564 F.3d 142, 163 (2d Cir. 2009). As Judge Weinstein correctly observes, the use of mandatory minimums has eroded our constitutional protections by not only undermining the judge's role in federal sentencing, but also by preventing the jury from exercising its historical role in this context.

⁴ LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 146 (Random House 1946) (1865).

⁵ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009). In drug cases, a defendant can avoid mandatory minimum sentences through U.S.S.G. § 5K1.1 (substantial assistance) or U.S.S.G. § 5C1.2 (safety valve). Since sentencing reductions under both guidelines require the government's approval, they guarantee and promote the preeminent role of prosecutorial discretion in federal sentencing.

about the purported criminal activities of others, as portrayed in the hypothetical case, is powerful, if not overwhelming.⁷ This fact indicates the most insidious aspect of the federal system in its betrayal of the Sixth Amendment right to trial. By effectively compelling cooperation through substantial rewards, the regime ensures that most federal cases are not resolved through the crucible of trial.

Having said all that, the hypothetical, whether reflective of an unjust system or not, still demands an answer. Applying Brougham's ethic of advocacy to the questions presented underscores both its utility and limitations as a guidepost for the criminal defense practitioner. The answer to the first question of whether counsel should inform his client regarding the government's interest in a particular individual seems obvious.

Although the system may unfairly reward the cooperater, it is the world we live in. Zealously advancing the interests of the client requires the advocate to provide all relevant information to her so that she can make informed decisions about her case. The attorney's own suspicion that the client may provide false testimony does not relieve the advocate from this duty of disclosure. Interjecting his own concerns regarding unrealized future occurrences into the mix, with its paternalistic underpinnings, contradicts Brougham's admonition that the advocate must place his client's interests before all else.

The second question, concerning the advocate's duty when he knows his client has provided false testimony and will continue to provide false testimony, is a thornier problem.

A literal reading of Brougham's statement regarding an advocate's duty suggests that the lawyer do nothing since he has the overriding obligation to advance his client's interests. To quote a famous legal scholar, however "a [lawyer's] got to know his limitations."⁸ Brougham's ethic of zealous advocacy does not require the lawyer to utilize all means in defense of his client, regardless of their legality. Rather, Brougham's duty mandates that the advocate use all *lawful* means at his disposal.⁹

Remaining silent while one's client falsely incriminates another individual is not simply inaction on the attorney's part. Rather, the advocate's mere presence places an imprimatur of legitimacy on his client's testimony whether in the courtroom or in a room full of agents. And though the criminal defense attorney

⁶ See DANTE ALIGHIERI, *LA DIVINA COMMEDIA, INFERNO, CANTO 1* (1472) ("Midway upon the journey of our life I found myself within a forest dark, for the straightforward pathway had been lost.").

⁷ The only remarkable aspect of the hypothetical is that the client does not possess enough sense to remain silent about her dishonesty. Most cooperating defendants are shrewd enough to avoid such disclosure to their attorneys.

⁸ Harry Callahan, *MAGNUM FORCE* (Warner Brothers 1973).

⁹ See Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 *HOFSTRA L. REV.* 1319, 1324 (2006).

must ply his trade in a world which provides such tainted rewards, he should not be forced to contribute to its worst abuses.

The rules of professional conduct may not only compel the attorney to withdraw from his representation of the client, but may also require him to disclose the malfeasance to the relevant tribunal.¹⁰ And therein lies the rub. The system that so handsomely rewards the snitch encourages the advocate to become one himself—a truly Machiavellian usurpation of Brougham's ethic.

Such a perversion of Brougham's duty of advocacy reveals its essential limitation. The ethic is meant to apply to the advocate who operates in a truly adversarial system. In such a world, the zealous advocacy of the defendant's cause is critical to the pursuit of justice through the protection, if not vindication, of individual rights. But, when the landscape is changed in a committed effort to eliminate adversariness, as it is in the current federal regime, Brougham's duty loses both its force and effect. Against such a backdrop, the advocate becomes nothing more than the lowly fishmonger, hoping to sell his dismal product (i.e., his client's cooperation) before its stench becomes overwhelming.

¹⁰ See Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 142–48 (2008).