

## PROSECUTORS, KNOW YOUR CRIMINAL DEFENSE LAWYER\*

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Prosecutors for the most part are dedicated and honest public servants. They certainly don't do what they do for the money. They do it because they believe in it. Prosecutors are given a staggering amount of power and authority over the lives of individual citizens. The danger comes when they lose perspective and believe that they are all knowing — the end justifies the means. In a prior life, I was Chief of the Criminal Division for the United States Attorney's Office, and before that, I was the Felony Division Chief for the State Attorney's Office. I became an Assistant State Attorney right out of law school, but I had a few years in private practice before I went into the United States Attorney's Office to prosecute again.

Those few years of maturity helped me understand why it is absolutely and constitutionally necessary for the role of the prosecutor and the role of the defense attorney to be totally different. My time in private practice helped me to understand that difference and the reason for it. Some prosecutors don't believe the difference should exist, and they can't understand how a criminal defense lawyer can represent a guilty man. This view comes as no surprise, considering the vast majority of the public can't understand the defense lawyer's role either and believes the system would work so much better if we didn't have criminal defense lawyers.

Prosecutorial offices have two types of prosecutors — the young prosecutor right out of law school, who has seen very little of life, and the career prosecutor, totally dedicated to his side of the court

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room until he retires. Within the career prosecutor category are also two types. One has a balance and understanding not only of his place in the justice system, but that of the criminal defense lawyer as well. The other is so blinded by his dedication to his task, he condemns the role that the criminal defense lawyer plays in our justice system. Those prosecutors who fail to see the divergent roles need only look at the ethical rules and case law to understand the how and the why.

The prosecutor's ethical responsibility is summarized in a comment to the *Rules Regulating the Florida Bar*, which provides that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”<sup>1</sup> Ethical rules create a dual duty in the prosecutor “to guard the rights of the accused as well as to enforce the rights of the public.”<sup>2</sup> *Berger v. United States*<sup>3</sup> defined the role of a prosecutor as:

[one who represents] a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. . . . But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>4</sup>

I am sure no prosecutors would disagree with these words. But, would they, with the very same vigor, also agree with the words used to define the defense function, and would they agree to the necessity of the defense function in the process?

The need for prosecutors to understand the defense function and the need for a person charged with a crime to have competent representation cannot be disputed. Then why do so many prosecutors dispute it? Do these prosecutors not understand that the crimi-

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1. R. REGULATING FLA. BAR Rule 4-3.8 cmt. (1998).

2. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Part I, 1.1 commentary at 44 (1970).

3. 295 U.S. 78 (1935).

4. *Id.* at 88.

nal justice system works best when all parties perform their function to the best of their ability? Everyone has their specific responsibility. The prosecutor, the criminal defense lawyer, and the judge all must perform that responsibility within the ethical standards established by the system.

Any attempt to circumvent, to deviate, or to corrupt these standards will result in a total breakdown of American jurisprudence. The Constitution depends on the prosecutor understanding the criminal defense function. It depends on fair, unbiased, and moral prosecutors. There is no doubt when it comes to a prosecutor, character matters. No greater manifestation of that character exists than in the visible signs exhibited when dealing with the opposition, a criminal defense lawyer.

In *United States v. Wade*,<sup>5</sup> Justice Byron White wrote:

If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. . . . In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.<sup>6</sup>

Judge Henry Friendly of the Second Circuit Court of Appeals once wrote, "Under our adversary system the role of [defense] counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. . . . [C]ausing delay and sowing confusion not only are his right but may be his duty."<sup>7</sup>

The criminal justice system is frightening to anyone with an ounce of sense. As a criminal defense lawyer, I am aggressive, I am challenging, I am questioning, and I am doing my best to beat a prosecutor who has the power to ruin my life. Without any justification, an unethical prosecutor can serve a grand jury subpoena or investigative subpoena just as retribution. If a prosecutor fails to turn over documents during discovery, it's always inadvertent. If a criminal defense lawyer fails to turn over documents in discovery, it's obstruction of justice.

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5. 388 U.S. 218 (1967).

6. *Id.* at 257–58 (White, J., dissenting in part and concurring in part).

7. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1288 (1975).

Trial by its very nature is a heated adversarial process, but professionalism must dictate that when a trial is over, the lawyers shake hands and go their separate ways. Invariably, their paths will cross again. Unfortunately, a minority of prosecutors do not view defense counsel as performing an ethical, necessary, and constitutional function. For those prosecutors, the defense lawyer is the enemy — no better than the individual they defend, and certainly a co-conspirator.

The ability to abuse is much greater in the federal criminal justice system than in the state system. In our state system, the broad discovery rules, the ability to depose witnesses, and the ability, before trial, to subpoena documents, witnesses, and other material make it much harder for an unethical prosecutor to hide evidence or fail to disclose *Brady* or *Giglio* material. In the federal system, prosecutors have to be particularly strong morally, because of the greater power they exert. They can subpoena anyone in the country. They have law enforcement agencies willing to do their bidding anywhere in the country, and they have the power of the entire United States government behind them. Lastly, the federal prosecutor's boss does not have to run for re-election.

The federal system does not allow for depositions, nor for the disclosure of witnesses, and only when extremely justified, will the court allow a defense lawyer to subpoena documents before trial. In this system, a prosecutor has to be even more vigilant to search inside himself to make sure he is not letting his zeal for conviction get in the way of his ethical duty to provide what the rules require.

Perhaps one way to alleviate the suspicion and tension between the prosecutor and the defense lawyer is more interaction outside of the court room. Out of necessity, state attorneys, as elected officials, are extremely accessible to and socialize regularly with the general population, as well as with criminal defense lawyers. This interaction begins to give the prosecutor greater understanding of the criminal defense lawyer and his role in the system.

The criminal defense lawyer is not a co-conspirator with his client, nor as bad as his client, and he does not represent his client just because he believes the client is innocent. It is always entertaining to watch a public official or a prosecutor, who has condemned the role of the criminal defense lawyer and his tactics repeatedly, call a criminal defense lawyer as soon as anyone starts investigating them. Thus, they instantly recognize the need and the right to effec-

tive representation. And who do they normally call? Usually they call the lawyer who gave them the most trouble, fought them the hardest, but ultimately gained their respect. So, the next time a prosecutor sees a criminal defense lawyer across the courtroom, he should realize that without the two of them, our system of justice could not work, and this country would not be as great.