

Public Perceptions of Actors in the Justice System

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The most common question asked a criminal defence lawyer is "How can you defend some monster you know is guilty?" The question itself is indicative of the lack of public understanding of the defence lawyer's role in Canada, and by extension, the true role of all the actors, and even of the system itself. Adding to the misperceptions are the pervasive and pernicious hype of U.S. media versions of criminal law, never so great as in these days of O.J. and the Dream Team.

My legal career of nearly a decade has been spent for the most part in the field of criminal law. It includes some experience as a prosecutor, several years in solo defence practice in northern Alberta with mostly aboriginal clients, and over a year in my current position as permanent "duty counsel" in Calgary's provincial Court. All are of a "front-line" nature where I am often the first contact a person may have with the court portion of the justice system. It has been my experience that very few people have an accurate view of my role in particular, or of the other actors in the system.

The general public's view of the criminal defence lawyer is perhaps the most inaccurate. If we return to defence counsel's most common cocktail party question, "How can you defend...?", this perception is apparent. It is assumed that counsel must believe an accused in order to defend him, or that part of counsel's job is to actively lie on behalf of his client, or even that counsel "likes" his clients. Clearly, these kinds of assumptions arise from a lack of basic knowledge about Canada's system of justice, and are now compounded by a steady diet of O.J. Simpson Dream Team statements outside the courtroom.

The role of defence counsel is of course to defend the accused as that accused would defend himself if he had similar education, training and experience; a hired gun in the truest sense. It is not defence counsel's job to decide the accused's innocence or guilt; that is for the judge. It is not his job to like or believe his client; this is for the accused's family and supporters. It is not his job to state evidence; that is for the witnesses, sometimes including the accused. It is however counsel's job to test the veracity and validity of the evidence as much as possible. It is his job to ensure the system is honest and remains so. It is his job to protect the individual from the arbitrary oppression of the state.

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Perhaps one of the few positives to come from the infamous Bernardo case here in Canada is the great service John Rosen has provided Canadians by demonstrating the true nature of defence work. Mr. Rosen's professionalism can only be admired. His outstanding defence of such a despicable accused, testing the weaknesses of the Crown's case, all the while maintaining his objectivity and a realistic view of his client, are goals to which all defence lawyers can aspire. One can only hope that Canadians have gained some realistic appreciation of what defence counsel tries to accomplish everyday.

While the general public's perception of defence counsel is distorted, so is that of many accused when they first come in contact with their lawyer. People are often misinformed as to their situation, rights and obligations. Again, the influence of U.S. media is easily discerned when talking with many accused by way of frequent reference to terms, names, rights and procedures that do not exist in Canada. There are also unrealistic expectations of what counsel can do for a client, particularly in the area of "technicalities". While accused persons rightly expect their counsel to be their champion, it is not a matter of all or nothing. The lack of understanding of the rules and strictures under which defence counsel works can be both frustrating and damaging for the client. The most common example is lack of disclosure by the client. Human nature being what it is, most persons are reluctant to reveal negatives about themselves, such as previous criminal record or what they perceive to be the "bad parts" of their situation. Yet, anticipating problems and portraying events, past or present, in the best light possible are amongst the most important services defence counsel provide to their clients. The accused's misperception of a lawyer's role can severely limit the effectiveness of their own defence.

In my view, perhaps the most important role defence counsel plays in the system is not conduct of a trial, but shepherding accused persons, and often their families, through the system to an appropriate outcome. The vast majority of accused persons are not career criminals with extensive knowledge and experience of the system. Rather they are most often people with significant financial, emotional or psychological problems frequently compounded by alcohol or drugs. These people often cannot afford lawyers, and frankly, often do not want them. They simply wish to deal with their matters with some semblance of dignity and a chance to explain their behaviour or situation. In these circumstances, while a lawyer is responsible for outlining the possible defences, it is certainly his obligation to enter a guilty plea if the client wishes. Therefore, in my view the role of the defence bar is not only, or even predominantly, to champion the innocence of the accused by any and all ethical means, but to ensure that the system is fair and his client fairly treated.

My current position as permanent "duty counsel" in Provincial Court is a clear reflection of this latter aspect of a defence lawyer's role. My job is to provide advice and help accused persons while they are in docket Court. This includes simple adjournments, show cause hearings and bail revocation applications, applications for psychiatric evaluations, entry of guilty pleas and speaking to sentence, and applications for pre-sentence reports. Much of the work entails explaining the system, outlining options and suggesting a course of action. With continued government cutbacks, more and more accused persons are unrepresented, even for relatively serious allegations. Given the

restrictions and obligations on judges, and the potential conflict of interest of the Crown, the growing numbers of unrepresented persons could significantly slow down the already lengthy court process, to the detriment of all concerned. A central aspect of my current role is to keep the system moving at an appropriate pace while ensuring that the rights of the accused are protected.

Why these differences in the perception of the role of defence counsel? As with most differences, it seems to stem from poor communication and a lack of knowledge. Most lawyers have difficulty finding the time to explain adequately the details of the court system to their clients. Despite its voracious appetite for crime reporting, the general public has little interest in learning about criminal law and the reasons for its importance to our society. The media respond by focusing on the titillating and morbid in order to sell advertising. If one is unfortunate enough to become involved in criminal justice, whether as an accused, a victim, or family of either, emotions often understandably preclude any desire to know how and why the system works as it does.

How to reduce the differences in perception of the defence counsel's role? The obvious answer is education. Unfortunately, public legal education has been fighting an uphill battle for years. My own experience would indicate the battle has been fought with limited success. It may be time to explore the option of cameras in the courtroom. I would, however, strongly advocate that cameras not be allowed in major trials such as murder and sexual assault. This is especially so for those which attract much media attention such as Bernardo and Simpson. The clear and obvious dichotomy between the dignity and solemnity of Bernardo's trial and the circus of Simpson's should silence any proponent of mass media coverage of major criminal trials. If the electronic media truly wish to educate the public as they claim, how much more instructional would be coverage of the every day drama of matters like impaired driving, shoplifting and domestic assaults. It just may be possible to educate, sell, and maybe even entertain, without the likes of Johnny Cochrane.

