

Moral and Ethical Consideration in the Defense of Those Accused of Crime

Hugh R. O'Connell

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Hugh R. O'Connell, *Moral and Ethical Consideration in the Defense of Those Accused of Crime*, 35 Marq. L. Rev. 311 (1952).
Available at: <http://scholarship.law.marquette.edu/mulr/vol35/iss3/9>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

JURISPRUDENCE

MORAL AND ETHICAL CONSIDERATIONS IN THE DEFENSE OF THOSE ACCUSED OF CRIME

In view of the fact that attorneys, both in numbers and in influence, have always played so vital and leading a role in society, the current clamor over the disintegration of moral standards must especially give pause to members of the legal profession to examine anew their duties and responsibilities. In the process of his evaluation, one of the problems with which the attorney will be confronted is that of the relation of the concepts of morality and legality, that is, to what extent, if any, they are separable or co-extensive. Though applicable to all areas of legal activity, a proper solution to this problem seems particularly insistent in connection with the defense of those indicted for crimes. The publicity afforded to this phase of the law, the interest that the layman displays therein, and the seeming resurgence of organized crime, to say nothing of the fact that this sphere of law deals with the very building materials of society, human life and liberty, calls for a reiteration of the duties of the attorney in this regard, and the limitations imposed by morality and the Canons of Professional Ethics on those undertaking the defense to a criminal prosecution. This article is directed to that end.

The attitude of attorneys to practice in criminal law courts ranges from a total "hands-off" policy, to specialization in that field. It is true that due to the contractual nature of the attorney-client relationship, a lawyer has the *legal* right to accept or reject cases as he chooses, though economic considerations sometimes make this element of choice difficult for the young attorney. This right to accept or reject the defense of those accused of crimes is restated in the Canons of Professional Ethics,¹ the one exception being the case of appointment by a court as counsel for an indigent prisoner.² The Supreme Court of Wisconsin in an early case³ stated that courts of record of Wisconsin have the power and duty to appoint defense counsel to indigent defendants charged with crimes. Unlike some jurisdictions,⁴ the attorney so appointed is not required to render his services gratuitously in Wisconsin, but whether compensated for or not, an attorney should not ask to be excused from this duty except for a serious reason, and when appointed should put forth his best efforts on the defendant's behalf.⁵

Apart from legal rights and duties, the question of whether or not an attorney has the *moral* right to so accept or reject, consistently and

¹ Canon 5, CANONS OF PROFESSIONAL ETHICS, AMERICAN BAR ASSOCIATION, (the word Canon as used hereafter refers to the CANONS OF PROFESSIONAL ETHICS, A.B.A.).

² Can. 4.

³ County of Dane v. Smith, 13 Wis.*585 (1861).

⁴ Ruckenbrod v. Mullins, 102 Utah 548, 133 P. (2d) 325 (1943).

⁵ *Supra*, note 2.

without regard to his ability, is another question; one which must be examined in the light of certain principles and presumptions. By constitutional mandate,⁶ persons accused of crime have the right to a fair and impartial trial and the assistance of counsel therein. By the higher mandates of justice and natural law, one accused of the commission of a crime is presumed innocent until proven guilty beyond all reasonable doubt.

"Let the circumstances against the prisoner be ever so atrocious, it is still the duty of the advocate to see that his client is convicted according to those rules and forms which the wisdom of the legislature have established as the best protection and security of the subject."⁷

It lies not within the province of the attorney to judge the guilt or innocence of such a client; that is the duty of the court and jury, and the possibility of conviction of innocent persons through lack of proper defense is not a burden lightly to be dispensed with.⁸ The attorney is, it must be remembered, primarily a servant of the bar of justice, a service demanding objective deliberation and subordination of self. It is not necessary that an attorney be personally convinced of his client's innocence, indeed, it is improper for him to assert in argument his personal belief in that regard.⁹ This consideration however, points to certain factual situations in which the moral rather than the legal right to accept or reject a case sometime presents, especially to young attorneys, the difficulties of a Gordian knot.

Perhaps the most difficult, though not the most rare, illustration of this type of dilemma is that in which the attorney, either through the admission or confession of the defendant-client, or by reason of seemingly indisputable and conclusive evidence, has proof of the guilt of the accused. Even in a situation involving the most heinous of offenses, no moral or legal considerations stand as a bar to the acceptance of the case. Under either the servant of the bar or adversary theory, the interests of justice and the moral welfare of society require that both sides of the coin of controversy be presented with equal force and completeness before the court, nor should fear of judicial disfavor or public unpopularity restrain the attorney from the full and sincere discharge of his duty.¹⁰ Again, it is in the consistent rejection or acceptance of such cases that moral problems arise. The attorney should remember that confessions may or may not be valid, that they are often the result of a deep-seated, though perhaps innocent, guilt complex, and that po-

⁶ U.S. CONSTITUTION, Art. 6; WIS. CONSTITUTION, Art. 1, sec. 7.

⁷ GEORGE W. WARVELLE, *ESSAYS ON LEGAL ETHICS*, (Chicago, Callaghan & Co., 1902), sec. 236, p. 144.

⁸ *Supra*, note 1.

⁹ Can. 15.

¹⁰ *Supra*, note 9.

lice records of any large city are replete with cases of confessions to crimes by persons having absolutely no connection therewith. He should also recall that there have been cases in which innocent persons have been convicted through circumstantial evidence, and that what appears to be conclusive evidence may disintegrate on careful probing by an objective, analytical, legal mind. On the other hand, the young attorney who contemplates the practice of criminal law as a specialty would do well to consider the validity of the statement that:

“‘A man cannot handle pitch and not be defiled,’ and we may say, with equal certainty, that a man cannot stand as an apologist for crime and a defender of criminals without having his moral sensibilities sadly blunted.”¹¹

Much the same considerations arise in the case of an attorney who discovers such proof of guilt after accepting the defense, but here an additional factor presents itself, namely, the right to withdraw from the case.

“It is felt by a majority that the lawyer who discovers his client’s guilt after he takes the case should not be able to withdraw.”¹²

In an opinion¹³ directed to a question arising under Canon 5, it was felt that a lawyer who makes it a practice to withdraw from the defense of a person accused of a crime if he becomes convinced of his guilt, should inform the client of such practice before receiving confidential information from him. Further, under Canon 44 it is felt that the rights of a counsel to withdraw from employment, once assumed, arises only from good cause, and withdrawal should not be made if the same would work serious injury to the client.¹⁴

Additional questions relating to the conduct of the case, once accepted, may arise. If the attorney adheres to the rules generally applicable to the prosecution of litigation, he will not err in this regard. The defense attorney can use every means consistent with honesty and fairness, and using the law as a shield, seize every point in his client’s favor, stressing his strong points and exposing the weak points of the prosecution. It is not necessary that he point out inconsistencies in his own case, but he should refrain from the idea that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client’s cause, and must keep in mind that he is to obey his own conscience and not that of his client.¹⁵ He can emphasize points that would seem to indicate that the accused could not have been at the scene of the crime,

¹¹ *Supra*, note 7.

¹² *Supra*, note 11, sec. 226, p. 137.

¹³ Opinion 90, Opinions of the Committee on Professional Ethics and Grievances, A.B.A., Dec. 3, 1932.

¹⁴ *Supra*, note 13.

¹⁵ *Supra*, note 9.

for example: If a witness for the defense without the knowledge or connivance of the attorney gives false testimony, the lawyer has no duty to point out the perjury.¹⁶ A question arises as to how he can treat such a statement, if vital, in his summation. At most, he could state X made a particular statement and then set up a hypothetical situation somewhat like this: "X said he saw the defendant at point B at 7:00 on the evening of the crime. If the defendant were at point B at that time, he could not have committed the crime of which he is accused." Needless to say, the attorney cannot state that he regards the testimony as true.¹⁷

The dignity and prestige of the legal profession and its relation to the social structure requires that morality and legality be not regarded as isolated concepts, that candidates seeking admission to the bar be well grounded in the catechism of legal ethics, and that those already members make frequent examinations of their consciences in this respect.

HUGH R. O'CONNELL

¹⁶ FATHER FRANCIS J. CONNELL, C.S.S.R., S.T.D., *MORALS IN POLITICS AND PROFESSIONS* (Newman Bookshod, Westminster, Md. 1946), p. 111.

¹⁷ *Supra*, note 16, p. 112.