How can lawyers defend guilty clients?

How can you defend someone who is guilty?

This is perhaps the most frequently asked question of any lawyer in Canada.

The following excerpt, drawn from a 1963 article by the Hon. Mr. Justice Walter F. Schroeder, then a member of the Ontario Court of Appeal, addresses the obligation of a lawyer defending a client whom he believes may be guilty.

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The very nature of the advocate's task makes it inevitable that he will ever be confronted with ethical problems of the greatest nicety which imperatively demand solution. Since he makes his services available to those who seek to retain him he assumes a weighty obligation to his client, but there his duty does not end, for he is also bound by a duty to the Court, to the State, to his opponent, and to himself.

There is an honorable way of defending the worst of cases, and no less an aurthority upon criminal law than Sir Harry Bodkin, Q.C. put it rather tersely, saying:

"He is to get an acquittal if he can, whatever the merits of the case may be."

That view, so pithily expressed, raises the question as to a counsel's ethical duty as distinguished from his forensic duty and as to whether the two can be reconciled or must be regarded as mutually exclusive.

Jeremy Bentham allowed his zeal for the suppression of crime to carry him so far as to regard counsel who successfully defended a criminal, whether he knew him by his confession to be guilty or only believed him to be guilty, in the light of an accessory after the fact.

I would observe that Bentham disregarded the true function of the advocate defending a man accused of a crime.

The advocate does not express his own views, but he marshals the facts, and in the skilful presentation of them he says all that can be said in favor of his client's view of the facts.

It is thus no more proper to charge him with insincerity or duplicity than to make that charge against a member of a debating club who has laid upon him the task of supporting the affirmative or negative side of an argument on a subject not of his choosing and, perhaps, on a side which does not appeal to him.

Dr. Johnson, a contemporary of Bentham's was a stern moralist of robust good sense and while not a member of the legal profession which he always held in high regard, he disposed of the problem in a reported discussion with Boswell, his biographer, which has often been quoted.

"BOSWELL: But what do you think of supporting a cause which you know to be bad?

JOHNSON: Sir, you do not know it to be good or bad till the judge determines it. You are to state the facts clearly; so that you thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from supposing you arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why then, Sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

Almost a century after Dr. Johnson's death Baron Bramwell delivered a judgement in Johnsons v. Emerson in which he expressed broadly the substance of Dr. Johnson's pronouncement when he stated:

"A man's rights are to be determined by the Court, not by his advocate or counsel. It is for want of remembering this that foolish people object to lawyers, that they will advocate a case against their own opinions. A client is entitled to say to his counsel. 'I want your advocasy, not your judgement: I prefer that of the Court'."

While counsel who undertakes any case owes it *to his client to put himself* in full possession of all the material facts, he is under no ethical constraint to satisfy himself by investigation that his client is in the right before he undertakes the duty of acting for him. It is not for counsel to decide whether the client's story is improbable and to be rejected by him. To do that would be to usurp the function of judge and jury and, apart from being utterly impracticeable, such a course could only lead in most instances to great injustice. Experience in the courts has demonstrated again and again that improbable stories can be and are true, despite their apparent improbability. Whatever counsel may privately think about the truthfulness of the client or of any of his witnesses, or whatever doubts he may entertain about a proposed alibi would unquestionably influence the advice that he would feel disposed to give the client as to the conduct of the case, but on the broader question as to whether he should or should not undertake the case, or having undertaken it whether he shouyld continue to represent the client, his personal beliefs or opinions are wholly irrelevant. In the ordinary affairs of life an advocate may be taken to be expressing his own beliefs or his own honestly held convistions, but not who when he is in the forensic arena. What he says there is not and is not to be presumed to be the expression of his own mind. Moreover, he has no right to assert his belief in his client's innocence or in the justice of his cause. That is one thing that he must absolutely refrain from doing. It is his business to place before the tribunal all that can be said on behalf of his client's cse - all that the client would have said for himself if he had possessed the skill and knowledge adequate to the occassion. It is not for counsel to assume to prejudge the issue, his principal concern being that the court does not pronounce judgement before having heard all that could possibly be urged on his side.

RULE OF LAW

Should police obey same laws?

By DAVID MATAS
A Winnipeg Lawyer

The rule of law means the absence of arbitrary power.

It means equality before the law.

It means a focus on remedies.

Those were the three different meanings given to the rule of law by A.V. Dicey in his book "Introduction to the Study of the Law of the Constitution".

Equality before the law means everyone is subject to the same law. Laws do not differ for those in power and for the public. The highest official in the land is subject to the same law as everyone else.

The Commission of Inquiry Concerning Certain Activities of the RCMP, the McDonald Commission, re-examined this traditional concept of the rule of law.

Counsel for the RCMP submitted that police had the power to commit acts that would be unlawful if committed by the public. They maintained all that was required was that the acts be reasonably necessary for the performance of police duties.

The Canadian Bar Association, appearing before the Commission, argued that the police did not have a general power to commit acts that would be illegal if committed by members of the public.

The defence that the acts were reasonable necessary for the performance of police duties was not, to the association, a good defence to a charge the police had acted illegally.

The commission concluded there is no general defence of reasonable necessity open to the police. They are subject to the same law as everyone else.

The government of Canada, however, disagreed with the commission. The government maintains, despite the McDonald Commission Report, that there is one law for the police and another for the public. In other words, it maintains that the defence of reasonable necessity exists.

Did You Know?

There are approximately 350 offences listed in the Criminal Code of Canada. Canadians are subjected to an estimated 20,000 federal offences (for example the Income Tax Act, the Fisheries Act) and some 20,000 provincial offences (for example, Highway Traffic Acts, Environmental Protection Acts, as well as countless offences created by municipal laws).

Less than 10 per cent of all crimes in Canada involve violence.

The judicial function

by Marvin A. Zuker
Provincial court judge
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The function of the judge is, in its simplest and yet most majestic form, the use of his judgement, making choices where there are "no clear mandates," requiring him to decide one way or the other.

Another generalization that is compelling is that the only judge most citizens will ever see or know at first hand is the trial judge. He is, in most communities, the embodiment of justice. It is his style, the tone of his performance and the results that emerge from his courtroom that give the law its character and flavour. For most people, other judges and other courts are remote (and quite commonly, of only passing interest, at most).

The judge is the umpire in the contest that every legal case becomes under the "adversary" justice system.

It is assumed that the judge, as umpire, is neutral. It is his obligation to be.

But the neutral umpire is not strictly confined to making simplistic judgements based on arbitrary rules for the legal contest. He can and often does intervene deeply and directly in the case itself, while it is in preparation or after it is in preparation or after it has gone to trial.

MUST RULE

A significant part of his role is to keep the case in proper bounds, legally, by ruling on points of law and procedure.

But just as important, more important, actually, for the trial judge - is the part he plays in seeing that the facts are brought out as fully as is necessary to make a legal judgement upon them.

A trial judge often invites opening statements by lawyers prior to the commencement of a case.

The opening statement puts before the court a clear statement in narrative form of the facts and issues. The parties are identified and, in a jury case, a brief outline of the background of the plaintiff, if relevant to a claim for damages, is mentioned.

Reference is also made to any legal principles which may apply.

You must keep in mind that the jury is the sole judge of the facts while the trial judge is the sole judge of the law.

Trial judges are obliged to use their authority to control the conduct of all participants in the trial. They must ensure a fair and impartial administration of justice. Judges must avoid conducting themselves so as to threaten their ability to remain impartial with respect to the proceedings before them.