Defending the Innocent

Craig Shultz and Michael Shultz
Shultz Law Office, P.A.

Introduction

Nobody likes to lose in trial. Regardless of the circumstances, as trial lawyers we want to win, sometimes even in spite of the facts. Defending individuals who you believe to be innocent of the criminal charges brought against them has the obvious added stress that arises from the simple fact that these are cases we don't want to lose! Winning never seems more important.

All individuals charged are, of course, presumed to be innocent in the eyes of the law, and our obligation as criminal defense lawyers is to represent them to the best of our ability, considering this presumption of innocence. But, in many cases the reality of the facts may be that the client is not truly innocent. Still, if no compromise can be reached for some type of plea agreement, the lawyer's obligation is to defend the client with the goal that he or she be found not guilty.

While the general public may not understand or even appreciate that obligation, it is one which we take seriously. My father, a well-known criminal defense lawyer in Kansas, used to tell me that in his experience, people in general believe that most people who are charged with crimes are guilty and should be found guilty and often sentenced harshly – UNLESS it is their father or their brother or their mother or their son, in which case they want the best attorney to represent their loved one and to get the best result possible.

But this seminar is primarily intended to deal with those cases where not only is the client entitled to a not guilty verdict but is truly innocent. Defense lawyers are not immune from making assumptions and judgments about how the facts of the case tend toward guilt or innocence but every now and then, we actually get clients who shouldn't be charged with a crime. Those are the ones that make you work harder, keep you up at night, and create an increased sense of pressure to get the right result.

Our office has tried well in excess of 150 jury trials, though most of those were civil cases. I generally believe the system gets it right. Of the criminal cases I have taken to trial, there are six I was convinced that my client was truly innocent of what he was charged with. And I'm happy to report that in all six of those cases, my client was found not guilty. I've had only two cases where I was convinced my client was guilty of something but was found not guilty. And those were relatively minor property crimes. Moreover, in both instances, the prosecutor had overcharged them. Thus, I had no mixed emotions about winning those cases.

The goal for this presentation is to discuss techniques to provide the best possible chances for success and is our intention to draw from some of the experiences we've had. Frankly, much of the techniques or thoughts we might share are equally applicable to any trial but often involve chances that can and were taken to get to the right result.

Innocence Matters

The Protection of Innocence Matters to the System

The protection of the innocent underpins the entirety of the system of criminal justice and has its roots in sources throughout nearly all of human history. In analyzing the failure of a lower court to give a "presumption of innocence" instruction, the United States Supreme Court, in *Coffin v. United States*, noted "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." 156 US 432, 453 (1895).

Providing a broad litany of examples, the Court explained that the presumption was virtually universal and was warranted by the importance placed on the protection of the innocent by numerous societies:

> It is stated as unquestioned in the text-books, and has been referred to as a matter of course in the decisions of this court and in the courts of the several States.
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> . . .
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> Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show:
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> "Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day."
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> "The noble (divus) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent."
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> "In all cases of doubt, the most merciful construction of facts should be preferred."
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> "In criminal cases the milder construction shall always be preserved."
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> "In cases of doubt it is no less just than it is safe to adopt the milder construction."
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> Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary,

> Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Cæsar! if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?". . .

Coffin, 156 U.S. at 454-455 (internal citations omitted). The reason for this universality is the weight society has attached to the protection of the innocent, expressed frequently in the well-known ratio:

> Fortescue says: "Who, then, in England can be put to death unjustly for any crime? since he is allowed so many pleas and privileges in favor of life; none but his neighbors, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused guilty. Indeed, one would much rather that twenty guilty persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally."
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> Lord Hale (1678) says: "In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die."
> …
> Blackstone (1753-1765) maintains that "the law holds that it is better that ten guilty persons escape than that one innocent suffer."
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> How fully the presumption of innocence had been evolved as a principle and applied at common law is shown in McKinley's case (1817), 33 St. Tr. 275, 506, where Lord Gillies says: "It is impossible to look at it [a treasonable oath which it was alleged that McKinley had taken] without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been and is my impression. But the presumption in favor of innocence is not to be reargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly; he seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman; and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only of absolute certainty."

Coffin, 156 U.S. at 455-456 (internal citations omitted).

The Protection of Innocence, and Innocents, Matters to the Defense Lawyer

In addition to the weight of innocence in the law, the weight of defending the innocent is elevated in criminal practice as well. Why?

First, lawyers generally want to do a good job. The ABA Model Rules provide that a lawyer has various duties:

> **Preamble: A Lawyer's Responsibilities**
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> [2] As a representative of clients, a lawyer performs various functions. As advisor, **a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications**. As advocate, **a lawyer zealously asserts the client's position** under the rules of the adversary system. As negotiator, **a lawyer seeks a result advantageous to the client** but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.
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> [4] **In all professional functions a lawyer should be competent, prompt and diligent.** A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.
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> [7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, **a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill,** to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

ABA Model Rules of Professional Conduct, Preamble, ¶¶ 2, 4, 7 *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/

Second, criminal defense lawyers are called to courage and devotion:

> (b) Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. **The primary duties that defense counsel owe to their clients**, to the administration of justice, and as officers of the court, **are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.**

ABA, Criminal Justice Standards for the Defense Function, Fourth Edition (2017), Standard 4-1.2, Functions and Duties of Defense Counsel, *available at* https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

Henry Brougham, the lawyer in Queen Caroline's Case, when threatened that he might create national turmoil in his defense of the "injured queen," put it more loquaciously:

> [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, amongst 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 the consequences, though it should be his unhappy fate to involve his country in confusion.

2 The Trial of Queen Caroline 3 (1821).

Third, conscientious lawyers know that wrongful convictions happen and that often they are attributed to inadequate lawyering. *See, e.g.*, Inadequate Defense, *Innocence Project*, *available at* https://innocenceproject.org/inadequate-defense/. Even where a lawyer's performance is not "ineffective," the weight of such a case can remain for decades. *See, e.g.*, Pamela Colloff, Texas Monthly, "The Innocent Man, Part One," November 2012 (noting that Bill Allison, a "well-regarded Austin lawyer," who mounted a "vigorous defense" in a trial loss, was "haunted by the verdict for years to come).

Fourth, criminal defense lawyers often get to know, and like, their clients. One of the most important parts of their jobs is understanding the dignity and humanity of those in the criminal justice system, and doing so often causes us to see what others might not.

Finally, in no other area of the law is someone's liberty so directly at stake. The consequences feel enormous, and that enormity is magnified when the consequences might fall on an innocent person.

Principles for Defending the Innocent (or, Really, Anyone)

1. **Keep in mind the big picture—sometimes the narrative of the entire prosecution goes beyond what is presented in court. Jurors can pick up on that, and you can use it to your advantage.**

2. **Sometimes it pays to "admit" to one crime to avoid conviction (or even prosecution) for something more serious.**

3. **Sometimes it's best to share your evidence with the prosecutor, but the timing matters.**

If you are involved early in the investigation in a federal case, and your client has not yet been indicted, consider providing exculpatory evidence to the prosecutor if it is truly sufficient in making a difference. DOJ regulation 9-11.233 requires the US to present that evidence to the Grand Jury:

> It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

Justice Manual, 9-11.233 - Presentation of Exculpatory Evidence, *available at* https://www.justice.gov/jm/jm-9-11000-grand-jury#9-11.233.

But such disclosures do not always need to be done early or immediately, where strategic timing may make a difference:

> (a) Many important rights of a criminal client can be protected and preserved only by prompt legal action. Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation.
> …
> (d) Not all defense actions need to be taken immediately. If counsel has evidence of innocence, mitigation, or other favorable information, defense counsel should discuss with the client and decide whether, going to the prosecution with such evidence is in the client's best interest, and if so, when and how..

ABA, Criminal Justice Standards for the Defense Function, Fourth Edition (2017), Standard 4-3.7 Prompt and Thorough Actions to Protect the Client, *available at* https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

4. Don't let fear make you give into unfair demands of the prosecutor, and relatedly, in multi-defendant cases, where at all possible, stay united with co-defendants.

5. Don't get boxed in by your cultural perspective—the criminal justice system is really different for different people.

6. Don't assume you can rely on the government's records and documents, and never assume that the government's interpretation of records or events is truthful.

7. Select jurors you can trust in spite of their presumed bias.

8. Think outside the box:

a. In the experts you hire--don't be afraid to seek out those who may be on the other side.

Select good, honest experts with great credentials -- don't hire a phony.

Sometimes when consulting doctors in civil or criminal cases, they want to stress to lawyers that they are "not just going to tell you what they think you want to hear," implying we want them to give a favorable opinion regardless of what they truly believe. Explain that you want to hear the truth - that these cases are very serious and that if there is a problem, you want to know up front. Often, that type of response seems to put experts at ease and increases the chance that they will evaluate the case honestly and thoroughly. (Plus, most of the time, you don't want an expert who will just tell you what you want to hear—that will come back to bite you eventually).

You can use local consultants who may be unwilling to get involved in a local case to evaluate your claim confidentially. But for experts you want to use at trial, get the right experts –people who are qualified, can evaluate the case objectively, and speak about it well. **You** must like the way they handle themselves, because if you don't feel good about them, the jury won't either.

b. In the evidence you seek, don't be afraid to think broadly.

c. Consider the rules of evidence from different perspectives—use them to get favorable evidence in rather than to keep unfavorable evidence out.

9. Use the prosecution's aggressiveness against them—hyped cases often have hidden problems.

10. Conventional wisdom can lead to conventional results—be unconventional.

Some Other Trial Principles

1. General thoughts about voir dire and opening statements in trial:

a. If you can't tell the story without notes, you can't tell the story.

Make notes but don't use them anymore than is absolutely necessary. Use them for brief reference to keep you on track. This isn't as hard to do as you might fear.

b. If I speak with the tongues of men and of angels, but do not have love, I have become a noisy gong or a clanging cymbal. I Corinthians 13:1.

Juries somehow have the ability to tell how much you care about your client and the case. If the jurors don't think it makes any difference to you, it will make less difference to them.

c. Be credible and maintain that credibility

Credibility may very well be key to a successful argument. You must establish (and later maintain) a rapport with the jurors. This is best done by simply being yourself. Gerry Spence"s explanation for establishing credibility is by "openly revealing our feelings." I would suggest it is simply being sincere rather than acting sincere. So what must we do to avoid the appearance of insincerity and win the battle for credibility? The following are some suggestions.

d. Avoid gimmicks

Someone else's gimmick can kill your opening statement. (Including suggestions here). Catchy phrases, attention-getters, clichés, and trial themes have seemingly been suggested in various places as the key to the effective opening. Impact statements are perhaps the most commonly recommended tool. If you rely on these things to win your case, you'll be disappointed. In the proper case and at the proper time, all of these are legitimate tools to consider using but often they're abused, overdone and fake sounding. Impact statements make the wrong impact.

e. Talk from the heart, not from your head. **Know what you are talking about**.

In order to help the jury know your client, you have to know your client. How can you help the jury understand your friend if you don't understand him or her? Believing your own story is critical because if you don't believe it, the jury won't either.

f. What's left out may be important.

While I think its not usually a good idea, there may be important things you wish to leave out for a variety of reasons such as: (1) the creation of mystery; (2) retention of shock value; (3) if you know a witness will lie, you may want to give them room to do that; (4) laying a trap for your opponent; (5) saving emotion for the proper time - holding back so the evidence has its greatest effect; or, (6) you don't know what the evidence is going to be.

g. Exaggerating your facts will shorten deliberations.

Your story has to be true and cannot be exaggerated or you'll pay dearly when the other side makes its closing. Don't promise more than you can deliver. Jurors will remember and they will resent it. Stating things in a positive but accurate way will establish credibility when the jury hears the evidence and help it ignore the other side's arguments. Don't make promises you cannot keep.

h. Have fun with the jury.

Don't be afraid to use humor but use it with some discretion. For example, humor can be very important in a criminal case. Jurors don't like to convict people they like.

i. Never tell the jury that what you say is "not evidence."

Why do that? You might, in the proper case, at closing mention that what the other lawyer says is not evidence. Tell them "the evidence will show" whatever you know it will show.

2. General thoughts about criminal defense practice.

a. Micah 6:8 He has told you, O man, what is good; and what does the Lord require of you but to do justice, and to love kindness (or mercy), and to walk humbly with your God?

b. When you represent someone, you represent them all the way - without reservation.

c. If you think a judge is wrong, tell him or her.

d. It's always about the client, not your ego. Sometimes you have to fall on your sword.

Every lawyer likes to try (and win) cases, but it's not about you. It's about what's best for the client, and sometimes (maybe most times) that means missing out on the opportunity to try a case:

> "(a) Defense counsel should be open, at **every stage** of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment, including diversion from the criminal process.
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> (b) In **every** criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest."

ABA, Criminal Justice Standards for the Defense Function, Fourth Edition (2017), Standard 4-6.1, Functions and Duties of Defense Counsel, *available at* https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.