

A CRIMINAL DEFENSE LAWYER'S PERSPECTIVE
COURT HOUSE TOUR
SAN ANTONIO YOUNG LAWYER'S ASSOCIATION

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***SOME VERY GENERAL ADVICE TO YOUNG LAWYERS ABOUT
THE PRACTICE OF CRIMINAL LAW***

A. Do more than the rules and cases require.

As you will see, the case law and the rules of professional conduct do not require much of lawyers representing persons accused of crime. Please understand that good lawyers will not be satisfied to perform merely at the level of minimal acceptability.

1. Constitutional Duties

a. Federal and State

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Texas Constitution have been interpreted to require the *effective assistance of counsel*. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984)(emphasis supplied); *Hernandez v. State*, 988 S.W. 2d 770, 770 (Tex. Crim. App. 1999). There are scores and scores of Texas cases which interpret the constitutional duty render effective assistance of counsel and an even cursory coverage of these cases goes far beyond the scope of this paper. Two lines of cases, though, are instructive.

i. Sleeping in the courtroom

Twice in recent years the Texas Court of Criminal Appeals has refused to grant relief to persons condemned to die merely because their lawyers slept through parts of their trials. See *McFarland v. State*, 928 S.W. 2d 482, 508 (Tex. Crim. App. 1996); *Ex parte Burdine*, 901 S.W. 2d 456 (Tex. Crim. App. 1995)(Maloney, J., dissenting). The federal district court appears to take a different view. See *Burdine v. Johnson*, ___ F. Supp. 2d ___, ___ No. CIV A H-94-4190 (S. D. Tex. September 29, 1999).

ii. The duty to investigate when not sleeping

Although *Burdine* and *McFarland* make it seem like the life of the criminal lawyer is pretty relaxed, some work is clearly mandated. In *Stearnes v. Clinton*, 780 S.W. 2d 216 (Tex. Crim. App. 1989), the trial court removed previously appointed defense counsel because they interviewed a witness for the prosecution, in violation of a rule of the Lubbock County District Attorney's Office. The court of criminal appeals granted the defendant's petition for mandamus, holding that the trial court had had no authority to remove counsel under the circumstances. *Id.* at 226. In the process, the court made it clear that the district attorney's rule requiring permission to interview "it's" witnesses was unauthorized. Indeed, the court recognized that defense counsel have a duty to make an independent investigation of the facts, which includes the duty to "seek out and interview potential witnesses." *Id.* at 224.

2. *Ethical Duties*

a. *STATE BAR RULES art. XII, § 8, Canon 7 (Repealed)*

Canon 7 of the *former* Code of Professional Responsibility provided the following: “A lawyer should represent a client zealously within the bounds of the law.” Although this was a nicely turned phrase, the former Code of Professional Responsibility was repealed by the Texas Supreme Court in 1983. Since January 1, 1990, Texas lawyers have been governed by the Texas Disciplinary Rules of Professional Conduct.

b. *TEX. DISCIPLINARY R. PROF. CONDUCT 1.01(b)*

The requirement of zealous representation does not expressly appear in the new rules themselves:

In representing a client, a lawyer shall not:

- (1) neglect a legal matter entrusted to the lawyer; or
- (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

TEX. DISCIPLINARY R. PROF. CONDUCT 101(b)(1989), *reprinted in* TEX. GOV’T CODE ANN. tit.2, subtit. G app. (Vernon 1998)(STATE BAR RULES art. X, § 9).

c. *Commentary*

Comment Seven to Rule 1.01 is somewhat more expansive:

Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer’s workload should be controlled so that each matter can be handled with diligence and competence. As provided in paragraph (a), an incompetent lawyer is subject to discipline.

B. Remember who you work for.

1. TEX. DISCIPLINARY R. PROF. CONDUCT 1.02

A lawyer in a criminal case shall abide by his or her client's decisions:

1. "as to the plea to be entered;"
2. "whether to waive jury trial; and,"
3. "whether the client will testify."

TEX. DISCIPLINARY R. PROF. CONDUCT 1.02.

C. Beware of the collateral consequences.

Never forget that decisions made in the courtroom always have consequences outside the courtroom, and indeed, that these collateral consequences are sometimes much more serious. The following is a decidedly non-exhaustive list of collateral consequences, intended to give you a flavor of what to expect:

1. Immigration. You may feel that you have done your client a great service by plea bargaining his charge down to some seemingly minor theft offense. In fact, if your client is not a United States citizen, what you may have done is insure that he will be deported for life, regardless of his length of residence in this country, regardless of his family ties, and regardless of any mitigating circumstances whatsoever. Federal immigration laws are both draconian and enormously complex. Thomas J. Esparza, Jr., an Austin lawyer, presented a useful paper at the State Bar's 1999 Advanced Criminal Law Course. Thomas J. Esparza, *Criminal Acts and the Consequences for Foreign Nationals*, 1999 Advanced Criminal Law Course (State Bar of Texas, July, 1999). Read this paper before going to court.

2. Probation or parole. Similarly, pleading your client guilty or nolo contendere to a lesser offense may be a great resolution for some clients; if, however, that client is on probation or parole for another offense, a plea might cause his probation or parole to be revoked, and result in a trip to prison. Make sure of your client's status before you plead.

3. Sex offender registration. If your client (adult or juvenile) is convicted (including a deferred adjudication) of a variety of enumerated "sex offenses" he may have to register for the rest of his life as a sex offender. See TEX. CODE CRIM. PROC. ANN. arts. 62.01-62.12. For some people, registration is more to be avoided than trial and possible conviction. Effective September 1, 1999, "[b]efore accepting a plea of guilty or nolo contendere [for these sorts of offenses] the court shall ascertain whether *the attorney representing the defendant* has advised the defendant of registration requirements under Chapter 62." See TEX. CODE CRIM.

PROC. ANN. art. 26.13(h)(emphasis supplied).

4. Suspension of driver's licenses. Conviction for certain offenses require the suspension of the defendant's driver's license. *See* TEX. TRANSP. CODE ANN. § 521.341(criminally negligent homicide in a motor vehicle; evading arrest; driving while intoxicated; intoxication assault with a motor vehicle; intoxication manslaughter; motor vehicle felonies; failure to stop and render aid resulting in injury or death; use of fictitious license); TEX. TRANSP. CODE ANN. § 521.372(drug offenses). How many people in San Antonio can easily manage without a driver's license?

5. Professional licenses. One convicted of certain crimes may be ineligible to be licensed to practice some professions. *E.g.*, RULES GOVERNING ADMISSION TO THE BAR, Rule III(d) (1992)(a period of ineligibility attaches to anyone convicted of a felony). Conviction of certain crimes can result in the suspension of some professional licenses. *E.g.*, TEX. R. DISCIPLINARY P. 8.04 (1992)(attorney convicted of "intentional crime" shall be suspended).

6. Insurance premium surcharges. Certain alcohol related driving offenses can cause an increase in your clients's insurance payments. *See* TEX. INS. CODE ANN. Art. 5.03-1.

7. Guns. Convictions for some crimes may make your client ineligible to possess a firearm. *See* 18 U.S.C. § 922; TEX. PENAL CODE ANN. § 46.04. Or to obtain a license to carry a concealed handgun. *See* TEX. GOV'T CODE ANN. § 411.172(a). Guns are *very* important to many people in South Texas, and your client deserves to know -- in advance -- whether what he does in court will take away his weapons of choice.

8. Employment. People are fired all the time, and others are not considered for hiring to begin with, because they have been convicted of crimes. The military will not take people with certain criminal records.

D. Don't be bullied.

1. It is the primary duty of the prosecutor, "not to convict, but to see that justice is done. . . ." TEX. CODE CRIM. PROC. ANN. art. 2.01. Most prosecutors are fully cognizant of the awesome power they have, and take their responsibilities very seriously. Still, ours is an adversarial system, and prosecutors -- as do defense attorneys -- like to prevail, within the bounds of the law. Occasionally a prosecutor (and, occasionally, a defense lawyer) will try to bully a less experienced opponent. The tone of their voice may become inordinately hostile, the content of their speech may become insulting, or threatening. You may be accused of ignorance, incompetence, and -- the cruelest cut of all -- unethical behavior, if you fail to see the case their way. Maybe you really are ignorant, incompetent or unethical, but don't assume that you are just because your opponent says so. You have a license to practice law, just like your opponent, but only you represent your client. Seek advice from those whom you trust, figure out what is the right course of action for your client, and pursue it. Ignored the undeserved hostility.

2. One also sometimes hears of the bullying judge. Unquestionably, lawyers must show respect for all judges they appear before. A judge, though, is no more entitled to bully you than is your opponent, and when he or she tries you must remember it is your primary duty to represent your client. This may be one of the most challenging tasks you face as a new lawyer.

E. Don't be a bully.

1. The prosecutor is your opponent, not your enemy.
2. The courts's staff are people, too.
3. Come to the judge with the sword of righteousness, not the assassin's dagger.

F. Represent the poor as diligently as the rich.

Lawyers do not take vows of poverty and there is nothing wrong with being fairly compensated for your work. On the other hand, the criminal lawyer has no higher calling than to diligently represent his or her fair share of poor people. Luckily for you, the young lawyer will have ample opportunity to do so.

1. Court Appointments

a. Felonies

If you are interested in being appointed to represent persons accused of felonies, contact Gabriel Gonzales in the San Antonio Bar Association, 227-8822, to be placed on the "wheel" comprising lawyers eligible for such appointments. Also introduce yourself to the court coordinators in each of the District Courts, and let them know you are interested in being appointed when attorneys are needed in appeals and motions to revoke probation.

b. Misdemeanors

There are two primary ways to be appointed to represent persons accused of misdemeanors.

i. County Courts at Law Numbers Two, Four and Nine rely on the centralized selection system maintained by the County Courts at Law Administration Office, located in suite 4071, Bexar County Justice Center. Interested lawyers must be in the Bexar County Attorney System Data Base and must register in the County Courts at Law Administration Office. Their names will be placed on an assignment roster in the mainframe computer, and they will be selected for appointments to these courts as needed, on a rotational basis.

ii. County Courts at Law Numbers One, Five, Six, Seven, Eight, Ten

and Eleven are run by the Judges and Coordinators of those Courts. Lawyers interested in appointments there should speak to the Coordinators.

c. Bonus

Lawyers who have been in practice for at least one year may seek “bonus” appointments in felony cases, pursuant to the “San Antonio Plan.” In these cases, participating lawyers are paid additional money. Interested lawyers should contact fill out an application with Gabriel Gonzales, San Antonio Bar Association, 227-8822.

d. Other Counties

Surrounding counties are often happy for San Antonio lawyers to handle their court appointments. Contact the Court Coordinators there if you are interested.

2. Experts and investigators

Lawyers who represent paying clients often rely heavily on expert witnesses and investigators. Counsel for poor people are also entitled to assistance. Article 26.05 of the Texas Code of Criminal Procedure provides for reimbursement “for reasonable expenses incurred with prior court approval for purposes of investigation and expert testimony. . . .” *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), holds that an indigent defendant is entitled to an expert to "assist in evaluation, preparation, and presentation of the defense." *See also DeFreece v. State*, 848 S.W.2d 150 (Tex. Crim. App. 1993). Do not be shy about requesting the trial court to appoint experts and investigators you need to represent your client effectively.

G. Get an honest accountant and follow his or her advice.

H. Resources.

1. Other lawyers.

- a. Watch them in court.
- b. Ask them questions.
- c. Volunteer to help.

2. Organizations

- a. San Antonio Criminal Defense Lawyers Association
George Scharmen, President 1999-2000
401 South Presa
San Antonio, Texas 78205

(210) 226-2566
(210) 224-5722 (fax)

- b. Texas Criminal Defense Lawyers Association
Michael P. Heiskell, President 1999-2000
600 West 13th Street
Austin, Texas 78701
(512) 478-2514
(512) 469-9107 (fax)

- c. National Association of Criminal Defense Lawyers
William B. Moffitt
1025 Connecticut Ave. NW, Suite 901
Washington, DC 20036
(202) 872-8600
(202) 872-8690 (fax)

3. *Seminars*

a. Advanced Criminal Law Course. Every year in late July the State Bar puts on a four day seminar at which some of the best lawyers in the state write and speak on a variety of topics concerning state and federal criminal law, procedure and evidence. Next year's course will be held in San Antonio.

b. San Antonio Criminal Law Institute. This is the oldest, and one of the best, seminars in Texas on the subject of criminal law, held every spring in San Antonio. It meets next on March 11-12, 2000. Contact the San Antonio Bar Association for details.

c. Criminal Trial Advocacy Institute. This six day course is held yearly in Huntsville, on the campus of Sam Houston State University and uses Texas practitioners to teach criminal trial advocacy to students of all levels of experience. The next course is from March 26-31, 2000. Contact the Texas Criminal Defense Lawyers Association for details.

d. Annual Rusty Duncan Advanced Criminal Law Seminar. This four day seminar is sponsored by the Texas Criminal Lawyers Association and is held each year in San Antonio. It is similar to the Advanced Course put on by the State Bar, except that it covers only state law topics. The next seminar will be held at the Marriott Riverwalk Hotel on June 1-3, 2000. In addition to the Duncan seminar, the Texas Criminal Defense Lawyers Association and its Criminal Defense Lawyers Project regularly sponsor useful seminars concerning both law and practical skills.

e. Monthly CLE programs from the San Antonio Criminal Defense Lawyers Association. On the third Thursday of each month, the San Antonio Criminal Defense

Lawyers Association sponsors approximately one hour of CLE concerning a variety of criminal law and procedure topics. The Honorable Pat Priest will speak on October 21, 1999 at 12 noon on the Fifth Floor of the Bexar County Courthouse. Admission is free to members.

4. Books

a. You just have to buy *current* versions of the Texas Penal Code, the Texas Code of Criminal Procedure, the Texas Rules of Evidence and the Texas Rules of Appellate Procedure, and, for juvenile cases, the Texas Family Code. The remaining books on this list are readily available in the community and can be borrowed or consulted when needed.

b. Course books published annually by the State Bar of Texas in connection with its Advanced Criminal Law Seminar.

c. 7, 7A, 8 MICHAEL J. MCCORMICK, THOMAS D. BLACKWELL & BETTY BLACKWELL, TEXAS CRIMINAL FORMS AND TRIAL MANUAL (Texas Practice 1995).

d. TEXAS CRIMINAL PRACTICE GUIDE (Matthew Bender 1999).

e. GERALD S. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS (2d Ed. 1993).

f. PAUL J. McCLUNG & W. SCOTT CARPENTER, TEXAS CRIMINAL JURY CHARGES (1999 ed.).

g. 40, 41, 42, 43 GEORGE E. DIX & ROBERT O. DAWSON, CRIMINAL PRACTICE AND PROCEDURE (Texas Practice 1995).

h. MICHAEL B. CHARLTON, TEXAS CRIMINAL LAW (Texas Practice 1994).

i. PAT PRIEST, TEXAS COURTROOM CRIMINAL EVIDENCE (Lexis 1998).

j. LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (Michie 1993).