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Organizational Proposal: National Association of Criminal Defense Lawyers

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National Association of Criminal Defense Lawyers

Ethical Considerations for Criminal Defense Attorneys Serving as Legal Commentators¹

INTRODUCTION

Unprecedented, blow-by-blow coverage of criminal proceedings has resulted in an explosion of attorneys serving as legal commentators. With the increase in visibility come questions about the effectiveness and values of legal commentators generally. Within the criminal defense bar, these questions have required that the National Association of Criminal Defense Lawyers assess the role of the criminal defense attorney as commentator and consider how we might improve our effectiveness and the public's confidence in our work as legal experts.²

1. News Release, reprinted with permission from the National Association of Criminal Defense Lawyers.

2. See Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 U.S.C. L. REV. 1303, 1304, 1312 (1996) and *The Ethics of Being a Commentator II*, 37

NACDL adopts the position that fairness, honest disclosure of conflicts or bias, and, above all, professional competence are the indispensable hallmarks of ethical legal commentary. Our purpose is not to constrict or censor the free speech of our members, or to establish any requirements that commentators always be even-handed, or that they should always take one predictable point of view. We do believe, however, that all members of the bar have unique responsibilities when offering "expert" legal commentary about legal proceedings that arise from the ethical norms of our profession. These norms occasionally conflict with the demands of journalism and commerce. The electronic and print journalists who request our expert opinions and observations may not always encourage or facilitate our best efforts to advance fully informed and professional commentary; nonetheless, it is our responsibility to maintain high standards, and these Ethical Considerations are intended to serve as a bulwark in that endeavor.

PRINCIPLES

1. *Criminal defense lawyers have a duty to provide competent commentary.*

The duty to provide competent commentary requires the defense lawyer-commentator to know the legal and factual issues that are at issue in the case that is the subject of coverage.³ Unless a commentator knows and understands both the legal and factual issues in a case, that person cannot provide helpful or even fair commentary regarding a case.⁴ Toward that end, the media outlet that is seeking commentary should be encouraged to gather as much relevant and reliable data regarding the case as possible to permit competent commentary.

Criminal defense attorneys who are asked to comment but who lack sufficient factual knowledge, preparation time and/or legal expertise⁵ should decline to comment, and they should strongly consider directing the news media to other sources. Similarly, when a commentator's access to the proceedings is restricted or knowledge of the particular question of law in the relevant jurisdiction is incomplete, these limitations should be disclosed.

SANTA CLARA L. REV. 913 (1997) ("Ethics II"). We owe a debt to Professors Chemerinsky and Levenson for their thought-provoking and thorough examination of issues involved in legal commentary and their suggestions for a proposed voluntary code for commentators generally.

3. See Model Rules of Professional Conduct Rule 1.1 and comment 5 and 6 (1983).

4. Ethics II, *supra* note 2, at 918.

5. C., Model Code of Professional Responsibility EC 6-3 (1971).

Commentators should exercise caution when asked to give an opinion about the quality of performance, strategy or tactics of another criminal defense lawyer during the course of litigation. The commentator will rarely, if ever, be privy to the same discovery, investigation, client and expert communications, and legal research that informed the decisions and performance of the lawyer conducting the litigation. This does not mean, however, that commentators, or anyone else, should condone plainly ineffective representation.

2. Criminal defense lawyers who serve as legal commentators have a special obligation to educate the public about what it means to be "liberty's last champions"—our constitutional and ethical responsibilities as advocates for the accused.

Criminal defense lawyers have a responsibility to assist the public in viewing legal proceedings through the lens of the Constitution. Our task as commentators is an extension of our legal and professional obligations to those whom we represent. That means it is our duty to ensure adherence to the presumption of innocence, insist that the government's burden of proof in seeking conviction be met, foster respect for the system of trial by jury, and generally seek to improve the public's understanding of and appreciation for the state and federal constitutional guarantees that protect persons accused of crime.

Defense lawyer-commentators should avoid sweeping statements regarding an accused's guilt, especially in the pre-arrest, post-arrest or pretrial stages of litigation. Unfair speculation can jeopardize an accused's right to a fair trial.

3. Criminal defense lawyers have a duty to avoid conflicts of interest with clients and former clients whenever serving as legal commentators.

Criminal defense attorneys serving as legal commentators are nonetheless bound by their primary obligation as members of the bar to act in a manner consistent with the duty of loyalty and confidentiality they owe to current and former clients. While the attorney-client relationship may give the lawyer a unique and valuable insight into related proceedings, assuming the role of commentator runs the substantial risk that the lawyer will be asked questions that directly or indirectly challenge the lawyer's loyalty or seek disclosure of privileged information. Indeed, the attorney must anticipate these will be precisely the areas the *media* will seek to explore and should devise strategies to avoid the disclosure of privileged material.

Criminal defense lawyer commentators should recognize these conflict situations and resolve them, if they can be resolved, through the

traditional mechanisms of consultation, disclosure, and waiver as outlined in the Model Rules or Codes of Professional Responsibility in the jurisdiction where the lawyer practices.