

Representing the Unpopular Client After Sept. 11

By Michael Mears

It was late in the evening of Sept. 30, but the cool air of the Los Angeles night did not prevent perspiration from forming on the faces of the men carrying the two heavy suitcases into the alley behind the *Los Angeles Times* newspaper building. The men were working against time and they were searching for just the right place to put their suitcases filled with over two hundred large sticks of dynamite. They found the perfect place for the explosives near a storage bin filled with barrels of printer's ink. After carefully arranging the suitcases and attaching a detonating device,

they hurried away into the late night of downtown Los Angeles. Their timing device was set to activate and explode just before 1 a.m.

Unfortunately, for the early arriving worker at the *Los Angeles Times*, the detonating device was not set correctly and did not set off the explosion until after daybreak of the next day, Oct. 1. The dynamite created a horrifying explosion, ripping huge craters in the side and back of the concrete and brick building. However, the dynamite had another unintended terrifying aspect. The barrels of printer's ink acted as an incendiary propellant and the vapors from the ink barrels sent horrific waves of secondary explosions and flames throughout the building. The south wall facing Broadway Street collapsed, causing the second floor to also collapse under the weight of its machines onto the first floor. The first floor then collapsed into the basement, destroying the heating plant and gas mains. The building, with many of its workers trapped inside, was soon an inferno.

When the smoke and debris settled, 22 bodies were found in the

building and scores of other workers suffering from horrible burns were taken to local hospitals. The public was outraged and newspapers across the country called the terrorist incident the "crime of the century." Before the day was out, it appeared that another bomb had exploded at the home of the owner of the *Los Angeles Times* and a third bomb was found at the home of the director of the California Merchants and Manufacturers Association. The police assumed that all three bombs were the work of one group of terrorists. The governor of California called upon federal authorities to track down and arrest everyone connected with the bombing.

A nationwide investigation ensued and it was learned that the explosives were purchased in San Francisco and that a boat was rented in Oakland, Calif., to transport the dynamite to Los Angeles. The federal authorities were quick to connect the Los Angeles bombing with bombings in Oakland, Seattle and Cincinnati. In April of the following year, the trail of the bombers led federal authorities to

Toledo, Ohio. There, the authorities found that the suspected terrorists had stored 300 to 400 pounds of dynamite in a locked garage. As a result of the discovery of the stored explosives, authorities arrested James and John McNamara, and an explosives expert named Ortie McManigal. It appeared that all three individuals were connected with an organized labor union group. The public demanded that the union terrorists be sentenced to death.

The defendant's went on trial the next year in November and were represented by one of the most prominent criminal defense attorneys of the day. The year was 1911 and the defense attorney was Clarence Darrow.

The Defense Attorney's Professional Duty

All attorneys have a professional and ethical duty to make legal services available to the public in a way that will inspire respect and confidence from the general public in the criminal justice system. After the tragic events in New York and Washington, D.C., on Sept. 11, this duty has become even more relevant and important. For the individual attorney, this means that his or her actions must be compatible with the integrity, independence and effectiveness demanded by our profession.

An attorney practicing in the criminal justice system should and must be guided by certain professional and ethical principles. These professional principles must be elevated above all other considerations including fees, social relations and personal political feelings. Every person who finds them-

selves facing criminal charges, no matter what those charges may be, must have access to, and the services of, a lawyer who is qualified to provide such services. The will and the ability to provide competent legal services are the guiding principles, which must be observed by any attorney contemplating legal representation, particularly in a high profile or notorious case. It is therefore important that the members of the legal profession make known the availability of legal services to the public to assist each member of the public in finding an attorney who is competent to deal with his or her particular problem.

The individual attorney who is approached by a prospective client has a duty to assist the person in finding a competent attorney willing and able to deal with that potential client's particular problem. If the attorney who is approached is unable to act competently, for example, because of lack of experience or lack of available time and resources, he or she has an absolute ethical duty to either refuse to represent that person, or, even more responsibly, to assist that person in finding an attorney who is qualified and able to act. Such assistance should be given willingly and, except in very special circumstances, without charge.

An attorney has a general right to decline particular employment (even when assigned as counsel by a court when the attorney is not competent to provide the required representation). Generally speaking, the attorney should not exercise this right merely because the person seeking legal services, or that person's particular case is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are

involved, or because of the attorney's private opinion about the guilt of the accused or because of private opinions about the reprehensibility of the charges against the accused. As stated in the above paragraphs, an attorney who declines to represent an individual in a criminal case has a duty to assist the person in securing the services of another attorney who is competent and capable of acting on behalf of the person accused.

In all instances, the attorney must comprehend, and appreciate, that the representation is for the person accused of a crime, not the cause for which the crime might have been committed.¹

Professional Consideration When Representing the Unpopular Client

It is not mere happenstance that the first Rule of the Georgia Code of Professional Responsibility is:

A lawyer shall provide competent representation to a client. Competent representation as used in this Rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

This is a tall order in even the most mundane of criminal cases; however, under the glare of public opprobrium and disapproval,

these requirements can be seen as an encumbrance or impediment to the next scheduled news conference or “talking head” sound bite. Thirty years ago, Professor Marshall McLuhan taught us that the “medium is the message.” The “medium” in the criminal justice system can easily be seen as the attorney or the “cause” or “crime” which has brought the client to the attorney’s office. Unfortunately, the client too often becomes just another prop for the attorney’s next public appearance. Unfortunately, this criticism is most often spoken by the public and not by members of the legal profession. Attorneys seem to have accepted that it is our profession’s due to become an actor on humanity’s stage rather than an integral part of the criminal justice system’s adversarial process. Thus, it might be said that the first victim of the notorious client/case becomes the ethical responsibility of the attorney to provide competent representation rather than becoming a part of the notoriety of the case.

This critique of the attorney’s role in a high profile, notorious case certainly does not mean that the attorney should be nothing more than a part of the background scenery, however, the ethical responsibility of the attorney is first and foremost to provide competent representation of the “client,” not the cause or the “case” itself.

Standard 4-1.6 of the American Bar Association’s Standards for Criminal Justice, the defense function provides:

The duties of a lawyer to a client are to represent the client’s legitimate interests, and considerations of personal and professional

advantage should not influence the lawyer’s advice or performance.

The commentary to this standard discusses the natural desire of an attorney to be in the forefront in developing new legal concepts; however, this does not justify an attorney risking the client’s conviction and a severe sentence where a plea can be negotiated. This standard emphasizes that the correct role of a defense attorney is to strive not for “courtroom victories” or public exposure, but for results that serve the client’s long-range interests.

The Proper Professional Relationship

This is one of the most difficult areas for the attorney representing a high profile client. Does the attorney take on the mantle of the client’s case, personality or cause? How does an attorney establish the necessary public communications necessary to defend his or her client in the public arena and at the same time not become a part of the client’s cause or case? One of the most renowned, and for many of us who are criminal defense attorneys our most revered hero is Clarence Darrow. Darrow was seen by his generation as the defender of the downtrodden, the spokesperson for the oppressed and came to be, in life and death, an icon depicting the epitome of the criminal defense lawyer.

What many do not remember or even know, is that at age 54, and at the apex of his career, Darrow was indicted and prosecuted on charges of attempting to bribe jurors. Although he was acquitted of the

charges, the accusations made against him were substantial in the minds of many of his critics. The bribery charges came, in large part, as a result of his pushing the envelope and being perceived as being a part of the client’s cause rather than a defender of the client.

Darrow was indicted on charges that he had authorized the bribing of two jurors at a murder trial he was litigating. The case arose out of the bombing of the *Los Angeles Times* building. Two labor organizers were arrested for the crime, and organized labor leaders sought out Darrow to defend them. According to Geoffrey Cowan, one of the biographers of Darrow,² Darrow did not want to get involved. At 54, he had become tired of legal practice and disenchanted with the political process. As one friend described him during this period: “He is humorous, but he is also tragic hopelessness of his outlook. . . His aggressive cynicism makes him repellent to many.” Samuel Gompers, one of the major labor leaders of the day, finally persuaded him to take the case by offering him \$50,000 — at the time a huge sum.

However, Darrow’s sense of hopelessness got worse when he arrived in Los Angeles to begin the defense of the labor leaders who were accused of the bombing. Darrow quickly realized that the case and the evidence against his clients were overwhelming. But in his life-long cynicism and alienation from the criminal justice system, he also felt that the judicial system was rigged against the brothers and that they would not receive a fair trial in the anti-union city.³

The case ended suddenly during jury selection when Darrow plead-

ed his clients guilty. Three days earlier, authorities had arrested one of Darrow's investigators when he attempted to bribe a potential juror. Whether Darrow's decision to end the case was a result of arrest is unknown. Nevertheless, he incurred the universal condemnation of those who believed he had betrayed labor's cause.

Darrow himself was later charged with conspiring to bribe several of the jurors. At his trial, Darrow acted as his own lawyer. When the three-month trial finally moved to summation, Darrow delivered the most impassioned speech of his life, arguing that he was being persecuted for his vigorous defense of the poor and workers. In his closing argument he told the jurors:

I have tried to live my life and to live it as I see it, regarding neither praise nor blame, both of which are unjust. No man is judged rightly by his fellow men. Some look upon him as an idol and forget his feet are clay, as are the feet of every man. Others look upon him as a devil and can see no good in him at all. Neither is true. I have known this, and I have tried to follow my conscience and my duty the best I could and to

*do it faithfully, and here I am today in the hands of you twelve men who will one day say to your children, and they will say it to their children, that you passed on my fate.*⁴

The jury deliberated less than one hour before acquitting Darrow.

Darrow recovered from the humiliation of his indictment and subsequent trial and went on to defend John Thomas Scopes' right to teach Darwin's theory of evolution. In 1924, his clemency plea on behalf of Nathan Leopold and Richard Loeb, the Chicago

teenagers who were charged with murdering one of their schoolmates because they thought they were capable of committing the perfect crime. On May 21, 1924, Bobby Franks was kidnapped, beaten to death, and his lifeless body was thrown into an industrial swamp in south Chicago. Franks was the 14-year-old son of a wealthy Chicago family.

It was the Leopold and Loeb case in which Darrow so eloquently voiced one of the most memorable statements about the American justice system and, quite appropriately

for this place and time, why the notorious client should be represented in the face of public outcries for their execution.

The Leopold and Loeb case came shortly after World War I and the injury to our national conscience by the enormous loss of lives in the European conflict was a raw wound on the public psychic. The worldwide press had a feeding frenzy on the case. Because of the wealth of the families of Leopold and Loeb, speculation was rife with predictions that Darrow would raise an insanity defense and bring in expert witness from around the



world to explain the conduct of his clients. However, Darrow waived a jury trial and entered a guilty plea on behalf of his clients and pleaded for mercy from the trial judge. Darrow's closing summation and argument to Judge Caverly on behalf of Leopold and Loeb lasted three days.⁵ No more eloquent statement can be made about the proper relationship of a defense attorney to an unpopular client than in the words of Darrow during Leopold and Loeb's sentencing hearing. These words can have no greater meaning than they do in today's climate of outrage over the tragic events in New York City and Washington, D.C. — events which have led our nation to a new war

and to the brink of the renunciation of many of our nation's most precious civil liberties.

How long, your Honor, will it take for the world to get back the humane emotions that were slowly growing before the war? How long will it take the calloused hearts of men before the scars of hatred and cruelty shall be removed? We read of killing one hundred thousand men in a day. We read about it and we rejoiced in it if it was the other fellows who were killed. We were fed on flesh and drank blood. Even down to the prattling babe. I need not tell your Honor this, because

you know; I need not tell you how many upright, honorable young boys have come into this court charged with murder, some saved and some sent to their death, boys who fought in this war and learned to place a cheap value on human life. You know it and I know it. These boys were brought up in it. The tales of death were in their homes, their playgrounds, their schools; they were in the newspapers that they read; it was a part of the common frenzy what was a life? It was nothing. It was the least sacred thing in existence and these boys were trained to this

cruelty. It will take fifty years to wipe it out of the human heart, if ever. I know this, that after the Civil War in 1865, crimes of this sort increased, marvelously. No one needs to tell me that crime has no cause. It has as definite a cause as any other disease, and I know that out of the hatred and bitterness of the Civil War crime increased as America had never known it before. I know that growing out of the Napoleonic wars there was an era of crime such as Europe had never seen before. I know that Europe is going through the same experience today; I know it has followed every war; and I know it has influenced these boys so that life was not the same to them as it would have been if the world had not been made red with blood. I protest against the crimes and mistakes of society being visited upon them. All of us have a share in it. I have mine. I cannot tell and I shall never know how many words of mine might have given birth to cruelty in place of love and kindness and charity. Your Honor knows that in this very court crimes of violence have increased growing out of the war. Not necessarily by those who fought but by those that learned that blood was cheap, and human life was cheap, and if the State could take it lightly why not the boy?

... ..


The easy thing and the popular thing to do is to hang my clients. I know it. Men and women who do not think will applaud. The cruel and

thoughtless will approve. It will be easy to-day; but in Chicago, and reaching out over the length and breadth of the land, more and more fathers and mothers, the humane, the kind and the hopeful, who are gaining an understanding and asking questions not only about these poor boys, but about their own - these will join in no acclaim at the death of my clients. These would ask that the shedding of blood be stopped, and that the normal feelings of man resume their sway. And as the days and the months and the years go on, they will ask it more and more. But, your Honor, what they shall ask may not count. I know the easy way. I know your Honor stands between the future and the past. I know the future is with me, and what I stand for here; not merely for the lives of these two unfortunate lads, but for all boys and all girls; for all of the young, and as far as possible, for all of the old. I am pleading for life, understanding, charity, kindness, and the infinite mercy that considers all. I am pleading that we overcome cruelty with kindness and hatred with love.

... ..

I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men. When we can learn by reason and judgement and understanding and faith that all life is worth saving, and mercy is the highest attribute of man.⁶

Indeed, the final word on the question on why the unpopular client must be fairly and competent-

ly represented lies in the future. Unless we acknowledge our own humanity in the way we, as a society treat the unpopular criminal defendant, how can we ever hope for a time when hatred and cruelty will not control the hearts of men? 



Michael Mears is director of the Multi-County Public Defender's Office, Atlanta, Ga. Mears received his B.A. and

M.A. degrees from Mississippi State University. He received his J.D. from the University of Georgia Law School. In 1983, Mears was elected to the Decatur, Ga., City Commission and, in 1985, was elected mayor of the City of Decatur, where he served until 1993. He is the author of *The Death Penalty in Georgia: A Modern History 1970-2000* and *A Brief History of the Georgia Indigent Defense Council*.

ENDNOTES

1. See, Preamble to the Georgia Rules of Professional Conduct, "A Lawyer's Responsibilities [1] A lawyer is a representative of clients, an officer of the legal system and a citizen having special responsibility for the quality of justice.
2. COWAN, Geoffrey, *The People V. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer*, Times Books, 1993
3. *Id.*
4. Geoffrey Cowan. "The People v. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer." New York: Times Books/Random House, 1993.
5. *People v. Richard Leopold and Nathan Loeb*, Circuit Court Case Numbers #33623 and 33624, Cook County, Illinois.
6. *Id.*