



ALIVE and Well

The Philadelphia Lawyer Upholds A Tradition of Representing Unpopular Clients

BY THOMAS G. WILKINSON JR. AND JOSEPH A. SULLIVAN

The cover of a recent issue of Philadelphia magazine featured a dear departed lawyer in a casket, his arm still clutching a briefcase, with the headline “Who Killed the Philadelphia Lawyer?” The story posed the question whether “the quaint notion” of the Philadelphia lawyer is dead. To the contrary, while a number of local firms seem to be sprouting offices around the globe, they are also heavily involved in both high- and low-profile pro bono representation in the greater Philadelphia area and beyond.

Those familiar with the quaint notion of the Philadelphia lawyer may tend to equate it with Andrew Hamilton's successful 18th-century defense of famed publisher John Peter Zenger on charges of seditious libel. The Philadelphia Bar Association does much to keep that public service notion alive, including its partnership with the Bar Foundation to raise financial support for legal services in various ways, from the annual Bar Foundation Hamilton Ball to the relatively new Raising the Bar campaign. In 2007 alone, those combined efforts generated more than \$1.5 million in donations to worthy nonprofit legal aid organizations that provide legal assistance to those unable to afford an attorney. Indeed, while some aspects of the tradition are longstanding, such as the annual presentation of a replica of Hamilton's snuff box to the outgoing Bar Chancellor, newer aspects continue to emerge, such as the steady expansion of small, but effective, public interest law centers to the growing pro bono infrastructure in many private firms.

CASH AND CARRY

Not all unpopular clients have been unable to pay their lawyer. Never one to shy away from a high-profile case, A. Charles Peruto Jr. has represented several notorious offenders. Among his most well-known clients are serial killer Gary Heidnik and former Supreme Court Justice Rolf Larson, who was charged with judicial misconduct in a most unfortunate chapter in the court's long history. When asked how he could possibly represent an admitted rapist and murderer of the likes of Heidnik, Peruto famously replied, "I have 10,000 reasons," referring to the amount of his then-sizable retainer. Now in his 80s, Peruto is winding down his practice but not apologetic for having taken on the tough cases and the scorned clients. "If we refused to represent the bad guys, then who would?"

More broadly, the question might be asked: If lawyers refused to represent unpopular or controversial or indigent clients, who else would take up the charge?

A STRONG PHILADELPHIA TRADITION

Are those who represent vilified or unpopular clients courageous, simply contrarian types or upholding the best traditions of the bar?

The Bar's annual fundraising efforts benefit more than thirty legal aid centers representing not only low-income residents but many groups and individuals currently unpopular in the eyes of some, from migrant workers to death row inmates. This tradition of controversial advocacy, begun with Hamilton's vigorous defense of Zenger, led to the coining of the phrase "Philadelphia lawyer" precisely because Hamilton stepped forward in an atmosphere of intimidation so intense that the two lawyers in New York, where Zenger published his newspaper, who were willing to represent him were disbarred for doing so.

Many Philadelphia lawyers have followed in those famous footsteps, generously and courageously offering their services, and any effort to list them would be justly criticized as incomplete. Henry Reath, Bernie Segal, Gus Ballard and countless other legends of the bar have been tireless advocates for the unpopular and disadvantaged.

PRO BONO BY THE RULES

The Pennsylvania judiciary and the organized bar's commitment to serving the downtrodden and degraded is enshrined in the Rules of Professional Conduct. The rules make it clear that public interest legal service is integral to the practice of law and to the role of lawyers in our society.

PA RPC 6.1 Voluntary Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

In addition to signifying that public service is an integral part of the practice of law, Rule 6.1's Comment notes that "personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."

Moreover, the rules make clear, in Rule 6.2, that lawyers are not to turn down court appointments due to personal or political considerations, but only for good cause.

The rules also emphasize, in Rule 1.2(b), that representation of a client, and particularly an unpopular or vilified client, does not amount to an endorsement of the client's political, economic, social or moral views or activities. In other words, a lawyer's zealous advocacy has nothing to do with personal perspectives.

TAKING THE LEAD

What considerations flow through the minds of law firm managers when presented with a proposal to represent a convicted cop killer on death row, Guantanamo detainees accused as Al-Qaeda members, or members of a group on the edge of society, such as undocumented aliens or migrant workers? The black hole of lost fee income? Professional duty? The law firm pro bono rankings? Negative public reaction? Or even, "What will our longstanding corporate clients think?"

J. Gordon Cooney Jr., now managing partner at Morgan Lewis, partnered with Michael Banks on a death row inmate appeal more than a dozen years ago. The firm took on the case pro bono, invested well over \$1 million in time on the case and secured the client's release on charges of a New Orleans murder after more than fifteen years of post-conviction proceedings due to the discovery of concealed blood evidence. The resulting favorable publicity not only won national headlines for the firm, but also generated a feature film deal and an attorneys' fees award under prevailing party provisions in federal civil rights laws.

"Leadership from the top is critical," Cooney says. "Several years back, our firm chair, Fran Milone, challenged all of our attorneys to take on pro bono matters. Fran worked with a team of associates on a matter for the Education Law Center and urged our practice group leaders to take on pro bono cases and help lead by example. We have seen a marked increase in pro bono activity as a result. Also, we have long given full billable hour credit for pro bono work."

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"I'M GOING TO GITMO"

Just this June, the U.S. Supreme Court ruled in *Boumediene v. Bush* that detainees at Guantanamo Bay have a right to appeal their detention in federal courts. Yet, facing Kafkaesque obstacles, lawyers representing detainees at the Guantanamo facility have been fighting for more than five years for meaningful, confidential access to their clients, and some have never actually met their clients. Detainees dubbed enemy combatants are not entitled to access to classified evidence against them. Some detainees have been held without formal charges for more than six years. Some have refused outright to cooperate or even communicate with their appointed counsel, severely hampering their defense.

Pro bono attorneys have continued, despite these conditions, to persevere in efforts to provide due process and other basic protections for these clients. Lawyers from several firms, including Reed Smith, Dechert, Pepper Hamilton, Hangley Aronchick and Schnader Harrison Segal & Lewis here in Philadelphia, as well as the Federal Defender Office and sole practitioner Judith Brown Chomsky, have been honored for their pro bono service.

"We took [the Guantanamo cases] on because the government's position that it was not accountable in any way for its detention of these men was unconscionable," says Charles Carpenter, a Pepper partner who leads a team of four lawyers working on Guantanamo cases. Has Carpenter heard from his fee clients about representing detainees? "There is some controversy about representing men said to be affiliated with Al-Qaeda. My other clients have been supportive, but not all of my partners have had the same experience." Nonetheless, Carpenter says that one of the most rewarding aspects of the case is that support has vastly outweighed the negative comments: "I have been surprised, and gratified, by the number of people, paying clients especially, who have thanked me for taking this on."

Christopher Walters, senior pro bono counsel at Reed Smith, says his firm's pro bono committee, if asked to approve a controversial matter, will "touch base with senior management and say, 'Here's what we're leaning toward doing, do you see any problems that would prevent this?'" Walters recalls that in 2005, two senior litigators approached him about representing Guantanamo detainees, and the pro bono committee "thought it would be a positive thing to do." Walters says the request was sent to senior management, and "to their credit they came back within 24 hours and said, 'Go ahead.'"

"I don't have any problem myself, defending unpopular clients,"

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says Elizabeth Ainslie, partner at Schnader Harrison Segal & Lewis, "and I bring the same effort to their representation as I bring to that of popular clients." But Ainslie, whose unpopular clients are sometimes fee-paying, sometimes at federal court-appointment rates and sometimes pro bono, has a concern about how the controversy surrounding clients affects the outcome of the representation itself: "In these days of intense media coverage, it's rare to get to trial with one of these cases and to feel the judge and jury haven't been influenced by the publicity and the unpopular nature of the client."

Ainslie also has represented some Guantanamo detainees and believes, like Charles Carpenter of Pepper, that this work has actually been good for the image of lawyers with controversial clients. "The Guantanamo representations in a way have mitigated the criticism sometimes leveled at lawyers with unpopular clients. The media have generally acknowledged the legitimacy and efficacy of the Gitmo pro bono efforts by lawyers from blue-chip firms, and that makes our representations in unpopular causes more tolerable to regular clients and the public across the board. At least I hope so."

NO STRANGER TO CONTROVERSY

In some communities, the mere mention of the ACLU constitutes the proverbial "fighting words," especially when coupled with hot-button topics such as same-sex marriage, execution by lethal injection, and religion vs. science in schools. When the Dover School District "intelligent design" controversy arose, the ACLU took up the challenge. Pepper Hamilton lawyers Steve Harvey and Eric Rothschild jumped into the breach, eventually demonstrating to the satisfaction of Middle District Judge John E. Jones III that the school district's dictate that intelligent design be taught as part of the science curriculum was a proxy for religious instruction barred by the Establishment Clause. The ACLU also joined with Cozen O'Connor lawyers in challenging the anti-immigrant restrictive ordinances enacted by the city of Hazleton, and has partnered with many other large Philadelphia firms.

Among the many rewards cited by Steve Harvey in the intelligent design case, apart from a "dramatic 40-day trial in front of a packed courtroom," were the fact that the Pepper lawyers "were invited to speak at leading universities and law schools [and] were the subject of a NOVA special and five full-length books so far." More important to Harvey, however, was the fact that "the controversial nature of the case convinced me that lawyers have to step up to the plate on important legal issues even, and particularly, when they are controversial."

'TIL DEATH DO US PART

Only three death row inmates have been executed in Pennsylvania in recent memory. Now that the U.S. Supreme Court, in *Baze v. Rees*, has found that Kentucky's method of lethal injection is not unconstitutional, there will likely be a renewed effort to move the Pennsylvania cases forward to the execution stage.

Pennsylvania has one of the largest death rows in the nation and the governor has signed death warrants in more than seventy cases. The Federal Defender Office defends only those already sentenced to death. And while some prisoners have been exonerated based on DNA testing, prosecutorial misconduct or newly discovered evidence, the majority of inmates sentenced to execution remain on death row. Perhaps that is why several large firms in Philadelphia participate in cases referred by the ABA Death Penalty Representation Project. Since 1993, Marc Bookman and his colleagues in the Homicide Unit have devoted virtually all of their time defending those charged with first-degree murder.

Bookman says that the Public Defender's staff has reconciled to the fact that many of their clients may be guilty, while at the same

time knowing that every accused person is entitled to a full and competent defense. “I don’t think there’s very many lawyers that come into our office thinking that most of our clients are completely innocent. There certainly are a percentage of our clients that are innocent, and I think that that should keep any good lawyer vigilant.”

“Of the clients that are not innocent, many of them are guilty of less than they’ve been charged. And then there’s a percentage that are guilty of the crime they’ve been charged with. Certainly if the death penalty is involved, I have a moral — an ethical — opposition to that and, frankly, a factual one as well. There are many good reasons to oppose the death penalty. Providing an accused with the same representation he would have to pay a lot of money for and can’t afford to is satisfying work. So I try to represent everybody as if they were somebody’s brother.

“[T]here’s a much higher [incidence of] physiological or organic brain impairment, [as well as] a much higher percentage of abuse as children — every bad quality that you can have as a human being is magnified in the population of people that are accused of serious crimes.”

FROM PUBLIC DEFENDER TO DEFENDING PUBLIC SAFETY

During his 22-year career as a public defender, Everett Gillison defended some of Philadelphia’s most notorious criminals, including a serial rapist and cop killer Solomon Montgomery. In March, Mayor Michael Nutter appointed Gillison to the city’s newly created post of deputy mayor for public safety. The role includes coordination of the city’s criminal justice departments, including the police and fire departments, emergency management, district attorney’s office and the prison system. But the appointment had not first been run by the folks Gillison was charged with coordinating.

No sooner had his appointment been announced, Gillison found himself in the Fraternal Order of Police’s crosshairs. The FOP president bashed Nutter for sending the “wrong message to the police and the public,” and urged that the appointment be withdrawn. Nutter stood by the decision, stating through a spokesman that Gillison should not be condemned for simply doing his job as a senior defense attorney, recognizing that lawyers do not always have popular clients.

Gillison began his career in the homicide unit at the Defenders Office — starting at the same time as Marc Bookman. Gillison first served as a case work intern and social worker. “I was a practical idealist. You needed to be a lawyer to have an impact. So I came back as a trial lawyer, and provided a compassionate voice for offenders.”

Gillison recalls defending a man charged with brutally raping a 10-year-old child, the same age as his daughter. She saw the arrest on TV and said: “Daddy, that kid is the same age as me.” How did Gillison respond? “I told her what I did and told her that I was representing him because everybody deserves somebody to stand with him. His story needs to be told like everybody else. We are supposed to question authority. I am comfortable presenting cases for people whom others had given up on.”

Gillison adds: “I respect the police. I always have. But I knew I had a part to play. Law enforcement includes those of us who stand on the other side too.”

In the weeks and months since his appointment, Gillison feels he has developed a very good relationship with the FOP. “I have been pushing resources to help the police as best I can. I have seen trauma for thirty years daily. Trauma knows no rank. This isn’t a political thing. I’m not a politician. I react as a person to what I see and I call it as I see it.”

STILL DEFENDING AFTER ALL THOSE YEARS

Daniel Alva has been defending a mix of white collar and criminal defense clients for thirty years. “All of my clients are unpopular,” he observes.

Alva, whose contributions to the Philadelphia Bar Association include serving as chair of the Board of Governors under Chancellor Alan Feldman, is familiar with a wide array of unpopular clients, including Mumia Abu-Jamal’s brother, William Cook, who also was tried but ultimately avoided a homicide conviction, and Joseph Kindler, a former “most wanted” murderer and escapee from Holmesburg Prison.

“You can’t really pick your clients,” Alva notes. “You never know who’s going to walk in the door. You want to make sure the system works and that they get a fair trial. Everyone has to be treated the same.”

In light of the politics and pressures of handling controversial matters, why do Philadelphia lawyers continue to take them on, often pro bono, for clients that many people would not want as a neighbor, business associate or friend? The themes cited by lawyers include a desire to even the playing field, promote access to the courts, and ensure that even the most scorned or disadvantaged person has the opportunity to get his or her day in court.

Schnader partner Ainslie adds a personal perspective: “I do pro bono cases for myself as well as for the clients and the community. They add variety to my workload, broaden my life experience, and remind me how lucky we are to have a legal system where voiceless people can find voices to speak for them.”

Not long after Andrew Hamilton successfully defended Zenger, an American living in London wrote, in *Letter From A Citizen of America to his Correspondent in Philadelphia*: “They have a proverb here, which I do not know how to account for; in speaking of a difficult point, they say, it would puzzle a Philadelphia lawyer.” (*Columbian magazine* 181-82 (1788)). The longstanding tradition of taking difficult and puzzling cases lives on. ■

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