

Friday, July 25, 2008

Why treat prosecutors for happy hour?

Â Bill of Rights.Â (From the public domain.)Â Â When I joined the Maryland Public Defender's Office from a law firm serving financial institutions and transportation companies, something seemed very wrong: Conviviality was the game of the day in this particular county between a slew of prosecutors, criminal defense lawyers, and cops. It was similar to the conviviality that did not concern me so much, which was amongÂ courthouse personnel andÂ many judges together with the lawyers making appearances there; that spilled into the conviviality among prosecutors, cops and criminal defense lawyers. Â Who was missing from all this conviviality? My clients -- my clients whom too many prosecutors and cops and some judges and even some criminal defense lawyers would degrade, dehumanize, and disrespect. Most cops and prosecutors I speak with -- and probably plenty of judges -- assume my clients are guilty,Â and not just in the lawbook sense of guilty beyond a reasonable doubt, but guilty, period. I hear the frequent laughter of cops, prosecutors, and sometimes other criminal defense lawyers with defendants at the butt of their jokes. A late judge at a guilty plea settlement conference in his chambers (the conferences were only among lawyers; my client was waiting in the hallway) had a good belly laugh reading the criminal statement of charges: "Ha! He carried the crack rock under his tongue." The judge was talking as if my client was guilty as charged -- no chance the cops had it wrong -- and was having a good laugh at my client's expense; I concede that the judge then proceeded, as expected, to say there would need to be a sentence at the lower end of the sentencing guidelines if there were a guilty plea; under the circumstances, it would have been a fair sentence, all things considered. Â On another day in court, after my client's case was finished, a courthouse deputy sheriffÂ and the opposing prosecutor had a good chuckle as my bewildered client got handcuffed by the deputy for an alleged open warrant. Praised be the courtroom bailiff who later talked to me about it and decried turning such an arrest into an eagerly-awaited joke. Â A fellow public defender lawyerÂ once tried giving me an example of having good relations with prosecutors -- "Jon, we have to deal with these prosecutors every day" -- by praising a more experienced public defender lawyer for laughing with one of the most heartless-acting prosecutorsÂ about theÂ bizarre happenings allegedly involved in a theft case that had just finished. Â Suffice it to say, my bright-eyed and bushy-tailed idealismÂ of joining the public defender's office did not have such conviviality in mind. I probably was better suited to join the District of Columbia Public Defender Service, where I doubt much if any joint lunchgoing happens between public defender lawyers and prosecutors, who are employed by the same federal Justice Department that has given us such "leaders" as Alberto Gonzales, Ed Meese, and George Mitchell. Â Should IÂ exclude prosecutors and cops from my time at lunch and after-hours activities? The prospect is tempting. How would I feel about a client seeing me breaking bread with the same prosecutor or cop who is trying to get my client locked up, particularly in instances where I feel the prosecution is based on false evidence, an effort to obtain a disproportionately severe sentence, or a law that I feel should be stricken or heavily decriminalized in the first place (e.g., I want the legalization of marijuana, prostitution, gambling, criminal libelÂ and obscenityÂ and the heavy decriminalization of all other drugs)?Â It is essential to treat others on their own merits and not to stereotype. Certainly many of my favorite criminal defense lawyers have prosecuted, including Gerry Spence and my supreme trial law guru Steve Rench, who included prosecution work while in law school, who said he had no problem prosecuting unless it was the death penalty, and who once told me he prefers representing the underdog (see the name of this blog). Okay, then, how about if I tell prosecutors and cops who seem otherwise likeable and honorable that we can revisit whether to break bread together once they are no longer cops or prosecutors? Â Last week, an email went out to local criminal defense lawyers inviting them to a happy hour this evening (when I will be indisposed no matter what, although I would make an exception for a happy hour tonight with the likes of SunWolfÂ / La Loba, Tony Serra, or Charles Abourezk) with the county's prosecutors, and soliciting donations up to \$50 each to cover the prosecutors' drinks, pointing out that the newer prosecutors do not earn much (well, at least in their suffering economically, they might be able to transfer that to understanding the suffering of my clients). My first reaction, and continued reaction (which I have only shared thus far with another local lawyer, but now this blog entry shares it with everyone), was that it sounds fishy to be buying anything for prosecutors. First, paying for prosecutors' happy hour refreshmentsÂ creates dissonanceÂ in me as to my clients' role in the mix. That is right, no clients were invited to the happy hour.Â If I went to this shindig at a tapas restaurant two blocks from the county courthouse, I would think it a good idea to invite some of my clients, to humanize them (while assuring they do not discuss their cases), to respect them rather than having a private get-together withÂ the opponents of them and me, and to highlight that the business as usual of marginalizing criminal defendants is unacceptable. Second, I wonder how such purchases jibe with bribery statutes, even though I do not believe such behavior should be made criminal. Â On the other hand, maybe this gratis happy hour for prosecutors is a good idea, at least if all the defense lawyers drink near beer, virgin sangria and soda pop, while the opposition drinks scotch and Sams, ready to be arrested and prosecuted for drunk driving by the cops, who have a station just one quarter of a mile away. Do any fair trade laws or legal ethics rules prevent me from billing a premium for doing such defense, as a sort of fine for all the misery most prosecutors cause my clients? I doubt an arrested prosecutor would come to me instead of going to a former prosecutor. Then again, I have had ex-cops,

military folks, political conservatives and other so-called law-and-order people hire me. Â Certainly, it is important to know the opposition. However, I have no interest in paying for the opposition's drinks while getting to know the opposition, and I do my best to keep in mind how my clients would react to seeing me with a group of criminal defense lawyers and prosecutors at a happy hour.Â I would much more enjoy going hiking or canoeing with a client. Jon Katz.Â

Posted by Jon Katz in Criminal Defense at 00:00

Jon:

I can understand your position, but I respectfully disagree with most of your position. I understand the frustrating experiences we all have with the State's lawyers from time to time, but I think ad hominem attacks and the categorical labeling of them as "persecutors" and the "opposition" do violence to the force of your position as well as the profession to which we all belong.

I agree there is a problem. Too often, prosecutors seem to take the position that their officer is always truthful and correct and your guy is a scumbag. We know this, we've felt it and so have our clients. Too often, young prosecutors seem to see themselves as "the good guy" and us as the bad ones. Your position is simply the converse of that.

The problem is, well, let's call it Identity Representation. I see this in civil cases alot when lawyers take on the persona and (yes, in some cases) sins of their clients. It's an easy trap to fall into; does not the meaning of zealous representation compel us to do so? I have been in cases where I am being yelled at by another attorney for my client's infidelity! Apparently, that attorney assumed I should be penitent and responsible for those "sins of the flesh"; the fact is that I am not my client and I would want neither his marriage nor his problems. I'm paid to deal with them and help my client as well and ethically as possible. You may say that, if I approach a matter in this way, that I'm not as passionate an advocate. You may be right, but I can go home and not harbor hate for complete strangers at the end of the day; moreover, I come from a straightlaced, Catholic family, so reason is much more my strong suit!

I am not omniscient, nor omnipresent. I meet a client, much like a prosecutor meets an officer. I do not know them from Adam, do not have any way of knowing if I have a common bond or could trust them. (BEFORE YOU GO HIKING WITH THIS PERSON, ANSWER, "WOULD I LEAVE MY CHILD ALONE IN THE CARE OF THIS PERSON?"). I know that my epistemic position is limited, but I'm open to learning and exploring the facts (or the shadows of them). I am not accused of a crime, nor will I face jail time, though I sympathize and feel strongly that this is most likely not warranted. Would that all prosecutors engage in a similar epistimological exploration.

No one person has a monopoly on the truth, and throwing labels at the other only can work to further the rift between the two sides. I think meeting these people in a non-legal setting and realizing that we share many common values is an important thing for our sanity and our clients. This reminds me of the story of the Christmas cease fire in WWI where the Germans and British met and exchanged token gifts. After you understand that the other side has hopes, dreams, wives, husbands, etc., I think we can better work together toward more just conclusions and, selfishly, leave the hateful, spiteful baggage behind us.

Just my 2 cents,
Bill

Anonymous on Jul 25 2008, 09:39

Thanks, Bill, for you in-depth comment. I will take it to heart.

You've probably heard me say "persecutors" many times in person, but the word is not in this blog entry. I first heard it from a rather mainstream and good-natured federal public defender who is popular on the CLE circuit and always seems to say the word in place of "prosecutors".

Another very good natured and excellent criminal defense lawyer told me of his romantic interest in a prosecutor, but that he resolved to hold off until she was no longer a prosecutor, if the possibility were still there. I guess aside from the conflict of interest there, he spoke of how that would not look good to his clients.

I am ready to treat each prosecutor on his or her own merits. Contrast that to one of the best and most likeable local criminal defense lawyers, who feels that he gets screwed over by too many prosecutors (e.g., saying, "they withhold discovery that they are obliged to turn over") that he said he refuses to get together with them socially.

I believe very much in separating the sin from the sinner. However, I think that even the most well-meaning prosecutor cannot avoid causing unjust misery to criminal defendants from time to time. So, if I attended this happy hour, would I just be quiet and pretend I did not have all these concerns? I do not see the point in going if I were to remain silent on it.

Have a great weekend. Jon

Anonymous on Jul 25 2008, 12:20

having a drink with prosecutor not a problem if ur friends

but this organized drink club sounds a bit bizarre

we go to parties and socialize together(pros and def attys) but we all know each other from working in the courtroom

but i dont party with clients either

there is no rule-just do what u feel comfortable with!

Anonymous on Jul 27 2008, 07:40

I agree with Bill - realizing we have common values is essential. I'm a public defender, and much of my job is negotiating plea

agreements on behalf of my (often quite guilty) clients.

When I'm in those negotiations, I'm most often appealing to the DA's internal sense of fairness and proportionality. The more that they know they can trust my values, the better off my clients are.

Also, all I can ask of DAs is that they treat my clients as human beings - with families and feelings, rights and regrets. It's only fair that I remember DAs are human beings as well, and treat them accordingly.

Anonymous on Jul 28 2008, 08:22

I'm a state's attorney who's recently out of law school, and I tend to agree with Jon. There's nothing wrong with having a drink with opposing counsel, but I wouldn't pay for them just as I wouldn't expect that they would pay for me. (Unless of course we're friends from before litigation started and we talk no business.) Since I deal mostly with civil cases and white collar crime, not having defendants there isn't an issue because if anything, it'd probably just confirm my initial impression that they're rich and sleazy - something that if it was in court a defense lawyer could control for and minimize to a jury, but all bets are off in a bar. Even if you want a client there to humanize them, you can't be sure what they're going to say, especially when liquored up. Having said that, I do think that for defense lawyers, there is a benefit to socializing with prosecutors. In college, my friend's mom defended me in traffic court and got 6 points reduced to 2 - she was longtime friends with both the municipal prosecutor and local police chief.

Anonymous on Jul 30 2008, 10:26