



Meeting the Moment Insight

Why Lawyers Being Free to Take Your Case Matters to You

The first thing we do, let's kill all the lawyers.

- Shakespeare, Henry VI, Part 2 (Act IV, Scene II)

Why did Dick the Butcher urge this to a usurper and would-be tyrant? Why kill the *lawyers* - and why do that *first*?

With their specialized knowledge, skills and status, lawyers are duty-bound to be their clients' loyal and zealous champions. Just as important, lawyers are duty-bound to the courts and the public to uphold the rule of law and advance the administration of justice. As stated in the preamble to the American Bar Association's Model Rules of Professional Conduct:

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

Lawyers' service in these roles is essential even to the integrity of our constitutional system because, without lawyers, the courts cannot function as a co-equal branch of the government. Lawyers can fulfill their duties only when they are free to take your case.

The lawyer's duty as your zealous advocate

Under the rule of law, the court system provides an orderly means for resolving disputes. In court, each side tells its story to the judge (or the jury), who then decides the case according to law. But in our complex society, telling an effective story is not easy for the average person. That's one reason why we need lawyers. The lawyer evaluates the facts of the client's case under the law and offers the best arguments in support of the client's position. When lawyers for both sides do this, they help not only their respective clients, but also the judge, who in reaching a fair decision relies on lawyers' honest presentations of the facts and law.

If you decide to challenge a traffic ticket and hire a lawyer to represent you in court, you expect the lawyer to put your best case forward and act in your interest only. As much as you expect the judge to be *impartial*, you expect your lawyer to be *extra-partial*: Your lawyer is your champion. Similarly, if you end up in court on a business dispute or a disagreement with your landlord, your lawyer must be motivated to advocate for you and you only - not have loyalties or interests opposed to yours that would weaken the lawyer's commitment to your case.

Lawyers know they must act as their clients' champions, and they scrupulously avoid conflicts of interest. For example, if you get hurt in a store with a slippery floor, a lawyer who regularly represents the store's owner might have divided loyalties. A lawyer might also have a *personal* conflict with your interests: perhaps the store owner you want to sue is the lawyer's brother-in-law. Regardless of the nature of the conflict, its presence might restrain the lawyer's advocacy on your behalf. The conflicted lawyer is ethically

precluded from taking your case and would decline to represent you. Fortunately, that lawyer is not the only good one available.

The lawyer's duties to the courts and the public

Because lawyers swear an oath to uphold and defend the US Constitution, lawyers are not just hired guns. They are *officers of the court*, duty-bound to advance the rule of law and protect the administration of justice. Even in presenting the client's case, the lawyer must be truthful and act in good faith. The lawyer can't lie or mislead the judge (or jury) about the facts and must present only supportable legal arguments.

Lawyers who work for the government - such as those who represent the Department of Justice, the Federal Trade Commission or the Securities & Exchange Commission - are a special case. Because these lawyers represent all the American people, they have a heightened duty to both the courts and to opposing parties to act in the utmost good faith. Historically, the courts have had such trust in the integrity of government lawyers that they have given them the benefit of the doubt by presuming that they are discharging their duties properly. This is called the *presumption of regularity*.

At the Department of Justice, for example, the prosecutors' credo heretofore has been to do the right thing, the right way, for the right reasons. At a minimum, prosecutors must be free to pursue only those cases where both the facts and the law indicate the likelihood of getting a conviction (a finding of guilt beyond a reasonable doubt) and sustaining that conviction on appeal. Equally important, the prosecutors must be free *not* to pursue others.

The prosecutor should be guided by the evidence - not by any ulterior motive or the desire to prosecute and convict particular persons. Were it otherwise - that is, were prosecutors motivated by anything other than the strength of the evidence under the law - we would be in a different system altogether, a system in which guilt or innocence is meaningless, a system in which the prosecutor would say, quoting Lavrentiy Beria (head of Stalin's Secret Police), "*Show me the man and I'll find the crime.*" In such a regime - which can only exist when prosecutors are *not* free to exercise sound professional judgment - there is no rule of law, but only the "law" of the ruler.

The consequences of constrained lawyer freedom

Lawyers help clients to assert their legal rights not only *versus* their fellow citizens, but also *versus* the government. This is true in criminal cases and in civil suits by government agencies against businesses, as well as in cases brought by citizens to vindicate and protect their civil rights. In our constitutional system, it is the Judiciary which prevents the Executive from exceeding its own authority. By bringing clients' cases to court, lawyers make it possible for the Judiciary to hold the Executive accountable under the law.

What if - due to outside pressure involving either the promise of reward (leveraging greed) or the threat of retribution (leveraging fear) - a lawyer refuses to take *any* cases of a certain kind? Now, this lawyer's freedom is constrained by a conflict which precludes representation of not only you, but anyone else with a case like yours, too. Should enough lawyers be similarly constrained, entire classes of cases and questions might not be brought to court at all, and the Executive's legal positions would escape challenge. This would gut the Judiciary's ability to restrain the unlawful exercise of Executive power and to protect our constitutional rights. In an end run around our constitutionally established separation of powers, the Executive would "win" by default. The Executive would then have unfettered use of its enormous power against political adversaries - or anyone else those with power might simply dislike.

This is why illiberal governments and autocratic leaders around the world and throughout history have attacked the rule of law by attacking lawyers. Dick the Butcher's idea - *The first thing we do, let's kill all the lawyers* - was a strategy for a traitor to overthrow the lawful government and seize absolute power. As the late [Supreme Court Justice John Paul Stevens observed](#), "Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government." And not just *any* step, but the *first* step. It isn't strictly necessary to kill the lawyers; restricting their freedom enough to neuter them will do.

Common Concerns

Q: What if a lawyer, as a matter of conscience, chooses not to represent a particular client or advocate in support of a particular position?

A: A lawyer certainly has the right to decline representations and indeed should decline any in which the lawyer's personal beliefs present a conflict with the client's position. A conflict based on one lawyer's personal conscience is very different from greed or fear-based conflicts between large numbers of lawyers, on the one hand, and whole classes of clients potentially adverse to the Executive, on the other hand.

Q: What if a lawyer accepts a case despite a conflict of interest?

A: The rules governing lawyers' professional conduct prohibit conflicts. Should a lawyer fail to recognize a conflict of interest or choose to ignore it, the lawyer would be subject to discipline by the state in which the lawyer is practicing.

Q: What is required in order to secure an indictment for a federal crime?

A: A federal grand jury may indict on a finding of mere *probable cause*. This is a far lower standard than what is required for a finder of fact (judge or petit jury) to convict, which is a finding of *guilt beyond a reasonable doubt*.

This overview was prepared by Heidi Massa, JD, a volunteer for LDAD's Meeting the Moment initiative.