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From the Bench

Assuring Effective Assistance of Counsel

by William W. Schwarzer
United States District Judge, Northern District of California

A criminal defendant has a constitutional right not only to the assistance of counsel, but to *effective* assistance. *Powell v. Alabama*, 287 U.S. 45 (1932). If a defendant is denied that right, his conviction can be reversed on appeal or overturned by a habeas corpus petition. Recently, appellate courts have begun to scrutinize the performance of trial counsel more closely, tightening the standards for effective assistance.

Overturning a conviction for ineffective assistance of counsel is costly both to the defendant and to society. The preferable place to guarantee a defendant's rights is in the trial court. To assure effective assistance of counsel, trial judges can be expected to take an increasingly active role in criminal proceedings.

Federal courts used to reject attacks on trial counsel's performance unless it was so ineffective it reduced the trial to a farce or mockery. In the last ten years, however, most courts of appeals have begun to demand more: a performance within the range of competence expected of attorneys in criminal cases. *United States v. Decoster*, 624 F.2d 196 (D.C. Cir. 1979) (en banc); *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979). No one yet knows whether this standard will require average performance—halfway between the best and the worst—or whether trial counsel will be measured against a mythical top half, third, or quarter of the criminal defense bar.

Even with this more rigorous, although still ill-defined standard, it is not easy to reverse a criminal conviction. Most courts of appeals require the defendant to show that his counsel's shortcomings prejudiced his case—that counsel's errors affected or probably affected the outcome. *See United States v. Decoster, supra; Cooper v. Fitzharris, supra.* Nor is error-free performance expected of trial counsel. *Cooper v. Fitzharris, supra.*

In addition, a federal court will not overturn a state court conviction if the judgment can be sustained on independent state law grounds. This rule produces peculiar results when trial counsel incompetently fails to comply with state procedural rules, such as by failing to object to inadmissible evidence in a timely fashion. The violation of state procedural rules provides an independent state ground for upholding the conviction, barring review of the error caused by counsel's incompetence. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Thus, while trial counsel's performance is subjected to exacting review, a criminal defendant faces substantial obstacles before obtaining relief. This situation creates problems for the administration of justice. It diminishes the predictability and stability of the legal process. Otherwise valid verdicts are upset because counsel's performance is later found wanting. At the same time, some defendants' rights to effective assistance of counsel are impaired because the defendants cannot obtain meaningful relief on appeal.

Performance Standards

Only trial courts can solve these problems. The trial judge can best protect a defendant's rights and the public's interests by taking action before irremediable damage is done. Appellate courts have recognized the trial courts' responsibility for maintaining proper standards of performance by attorneys representing defendants in criminal cases. *See, e.g., McMann v. Richardson*, 397 U.S. 759, 771 (1970).

To carry out that responsibility trial judges will, as time goes on, take

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an increasingly active part in criminal proceedings to assure adequate performance by both prosecutors and defense attorneys. Judges will intervene increasingly in several areas.

First, judges will probably place greater emphasis on pretrial conferences. The longer the case has proceeded, the harder it is to remedy counsel's inadequacy. Consequently, judges will look sooner and more closely for early warning signals of incompetence or neglect. To determine if counsel has prepared the defense adequately, judges will be concerned with whether counsel has located and interviewed critical witnesses, whether he has sought discovery of exculpatory materials in the prosecutor's possession and of other helpful evidence, and whether he fully understands the legal and factual issues and the applicable substantive and evidentiary law.

Second, trial judges will seek more actively to prevent the prosecution from using improperly obtained evidence. For example, the judge is likely to inquire on his own motion whether a defendant's confession was voluntary. *United States v. Powe*, 591 F.2d 833 (D.C. Cir. 1978); *Grieco v. United States*, 435 F.2d 677 (7th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971); *United States v. Taylor*, 374 F.2d 753 (7th Cir. 1967).

Third, the trial judge can be expected to inquire *sua sponte* whether one attorney can properly and effectively represent two or more defendants in a single case. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Glasser v. United States*, 315 U.S. 60 (1942); *Cuyler v. Sullivan*, 100 S.Ct. 1708 (1980).

Fourth, if the defendant shows dissatisfaction with his counsel, the judge will probably hold a hearing on the grievance. *United States v. Woods*, 487 F.2d 1218 (5th Cir. 1973); *United States v. Young*, 482 F.2d 993 (5th Cir. 1973); *United States v. Morrissey*, 461 F.2d 666 (2d Cir. 1972).

Once the trial begins, the problem becomes more complex. The judge cannot and should not second-guess the tactical and strategic decisions counsel must make constantly. Nor should the judge compensate for inadequate counsel by taking over the questioning of witnesses. On the other hand, the judge should not be passive. He should carefully observe trial counsel's conduct, demeanor, and degree of apparent preparation to determine whether the lawyer is making decisions intelligently, if not correctly—that is, to determine whether competent counsel might make the same decision. *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). For example, if the defendant has a string of prior convictions admissible for impeachment purposes, the trial court probably will question counsel's decision to have the defendant testify.

Cannot Intrude

Assuring adequate representation in connection with a guilty plea is perhaps the trial judge's most difficult task. The judge cannot go behind the guilty plea to examine the advice on which it was based. He cannot intrude into the confidential communications between attorney and client. *Tollett v. Henderson*, 411 U.S. 258 (1973); *McMann v. Richardson, supra.* Yet nowhere is the quality of advice more critical. Therefore, the judge should at least inquire sufficiently to determine whether there is a fully adequate factual basis for the plea, whether there are any valid defenses, whether the plea was induced by adverse, but inadmissible evidence, and whether the defendant is misinformed about any critical aspect of the case.

For the most part, the trial judge's intervention in these various aspects of the case will be limited to alerting counsel to problems, suggesting points for his consideration, or perhaps admonishing him. But, if counsel seems unequal to the task, the judge has other alternatives. He may direct the association of competent trial counsel, appoint advisory counsel, or in extreme cases bar counsel from further appearance. *United States v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *United States v. Rogers*, 471 F. Supp. 847 (E.D.N.Y.), *aff'd sub nom. United States v. Raife*, 607 F.2d 1000 (2d Cir. 1979).

In the course of time, judicial intervention will bring profound changes to criminal trials. No longer will the judge be a passive, neutral umpire calling balls and strikes. He will become an active participant, assuring that both sides perform competently and effectively.

This new judicial role will require changes in trial practice. Rulings at trial will acquire a new dimension as the court considers not only what the law permits but what is necessary to assure the defendant a fully adequate defense. Convenience and expedition will be subordinated to the necessity of exhausting procedural steps reasonably necessary for an effective defense. Shortcuts will be suspect; making a record will be imperative.

Will these changes doom the adversary process? Judge Leventhal has warned that wide-ranging inquiry into defense counsel's conduct could undercut the fundamental premises of the trial process and tear the fabric of the adversary process. *United States v. Decoster, supra.* I disagree. The adversary system works properly only when each side is represented by counsel able to make the strongest statement of his client's case. Without that, neither judge nor jury can be depended on to make a fully informed decision.

Competent representation for each party is fundamental to the optimal functioning of the adversary process and to the fair administration of justice. The trial judge bears a direct responsibility to see that such representation is provided. *See* Schwarzer, *Dealing With Incompetent Counsel —The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980). The ABA Standards for the Administration of Justice so state: "The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial."

I believe trial judges can discharge this obligation in a manner fully consistent with the integrity of the attorney-client relation and the traditional independence of the bar. Those values must be guarded, but, like the adversary process, they are only a means to the end of achieving justice, not the end themselves.

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