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6 Stetson J. Advoc. & L. 121 (2019)

The Special Advocate

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I. Introduction

121. Traversing through life as a criminal defense attorney is often difficult for a multitude of reasons. For instance, the criminal defense attorney represents individuals in a system that has resources at its disposal,³ and ample time to prepare the case prior to prosecution. The criminal defense attorney is also on the reactive side of justice, receiving facts and preparing a defense using information gathered after the incident.⁴ Further, the criminal defense attorney has to prepare the client for the sentence usually following criminal prosecution.

122. The work of a defense attorney is made even more difficult as a public defender: where caseloads are high; resources and compensation are low; and clients distrust the court-appointed attorney. In addition, the public defender is required to know a broad

1 Alisha Marie S. Nair is an Assistant Federal Defender for the Middle District Of Florida. Mrs. Nair has dedicated her career to providing a voice for those who are often unheard. She dedicates this article to her husband, Arjun, and daughter, Janet. Loving a defender who gives her all to clients can be a daunting task.

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3 Phyllis E. Mann, *Understanding the Comparison of Budgets for Prosecutors and Budgets for Public Defense*, [NAT'L LEGAL AID & DEF. ASS'N](#) (Feb. 9, 2011).

4 Toni Messina, *Criminally Yours: Prosecutors vs. Defense Attorneys — Who's Got it Worse?*, [ABOVE THE LAW](#), (July 18, 2016).

range of laws,⁵ handle an overload of cases,⁶ serve as a counselor⁷ for atypical life circumstances, and represent individuals accused of heinous crimes without choice of case or client. Whether serving as defense counsel for indigent or wealthy clients, one thing remains constant — Advocacy!

A Time to Kill

123. It would appear that when John Grisham wrote *A Time to Kill*⁸ he understood that advocacy does not always mean searching for a way to get the accused “off.” Advocacy is more akin to connecting through soul searching. A criminal defense advocate is daunted with the task of discovering the humanity in their client, looking past their acts, and presenting that humanity to others in a relatable fashion. Grisham makes it clear that advocacy is sometimes fighting against the system. This type of advocacy demands a special advocate. One who does not fear being vulnerable in front of peers, or the community at large to change, or challenge the way people are tried and convicted. This type of advocate transcends the typical definition of an advocate being a “person who publicly supports or recommends a particular cause or policy.”⁹

124. When I think of a good advocate, I always vividly recall my first time watching the closing argument scene in *A Time to Kill*.¹⁰ Since that time, I have watched the clip at least a dozen times and each time my heart races when Matthew McConaughey’s character, Jake Brigance, stands inches away from the jury telling the story of his client’s daughter, Tonya Hailey. Mr. Brigance described the most innocent of human beings placed in the vilest situation imaginable.

125. This is a story about a little girl walking home from the grocery store one sunny afternoon. I want you to picture this little girl. Suddenly a truck races up. Two men jump out and grab her. They drag her into a nearby field and they tie her up and they rip her clothes from her body. Now they climb on. First one, then the other, raping her, shattering everything innocent and pure with a vicious thrust in a fog of drunken breath and sweat. And when they’re done, after they’ve killed her tiny womb, murdered any chance for her to bear children, to have life beyond her own, they decided to use her for target practice. They start throwin’ full beer cans at her. They throw them so hard that it tears the flesh all the way to her bones. Then they urinate on her. Now comes the

5 MODEL R. PROF’L CONDUCT 1.1 (Am. Bar Ass’n 2018).

6 Phil McCausland, *Public Defenders Nationwide Say They’re Overworked and Underfunded*, [NBC NEWS](#) (Dec. 11, 2017).

7 MODEL R. PROF’L CONDUCT 2.1 (Am. Bar Ass’n 2018).

8 JOHN GRISHMAN, *A TIME TO KILL* (1988).

9 *Advocate*, [MERRIAM-WEBSTER](#).

10 *A TIME TO KILL* (Warner Bros. 1996).

hanging. They have a rope. They tie a noose. Imagine the noose going tight around her neck and with a sudden blinding jerk, she's pulled into the air and her feet and legs go kicking. They don't find the ground. The hanging branch isn't strong enough. It snaps and she falls back to the earth. So they pick her up, throw her in the back of the truck and drive out to Foggy Creek Bridge. Pitch her over the edge. And she drops some thirty feet down to the creek bottom below.

126. The imagery transferred the innocence of ten-year-old Tonya to her father, Carl Lee Hailey (Samuel L. Jackson), who sought vengeance for the brokenness that was unrepairable.

127. Discussing representation of fictional character, Carl Lee Hailey in *A Time to Kill*, I breakdown how advocacy develops from the creation of the relationship, through the termination of the representation. My position is that in order to advocate criminal matters at the level seen in *A Time to Kill* one must: determine the needs of their client; determine the audience; consider and explain all potential outcomes to the client; and finally accept the outcome of the case.

II. Needs of the Client

128. In order to provide competent advocacy by determining the needs of the client, there needs to a personal relationship with the client that develops from the creation of a client/advocate connection, as exemplified by Jack Brigance in *A Time to Kill*. The best ways to meaningfully connect with your client come from verbal and non-verbal communications.

Verbal Communication

129. In criminal defense, conversations are typically limited to the case, littered with minimal discussion about hope for a positive outcome. The facts of the case are usually stacked against a client with all the evidence pointing towards guilt. Communication becomes more difficult when the client is awaiting trial in custody surrounded by other individuals with similar bleak outlooks on life. Thus, when thinking of the best way to connect, talking solely about the case or issues that a client is facing is not ideal. Connecting comes from learning who your client is as a person — learning what a typical day was like, learning about their family, learning about their circumstances. Sometimes it is about laughing about a personal, embarrassing moment for the advocate that lets the client know you are human too.

A Time to Kill and Verbal Communication

130. Although it was clear that Carl Lee Hailey killed the two men in cold blood, less clear was the reason why he could not accept a plea of guilt. However, as the connection between Mr. Brigance and Carl Lee Hailey grew, the reason became clear.

131. The scenes of connection progress from the initial conversation with Mr. Brigance speaking with Carl Lee Hailey over the phone, recalling the prior representation of a loved one. Then transforms to Carl Lee Hailey inside of the holding cell at the jail talking with Mr. Brigance as he stands outside of the bars. Finally, it transcends to Mr. Brigance entering the holding cell and conversing with Carl Lee Hailey on a personal level. The development of their relationship gets deeper each time, allowing Mr. Brigance to learn more about Carl Lee Hailey and his needs as a client. For example, Carl Lee Hailey was unable to provide the entire retainer fee to Mr. Brigance. From the outset it appeared Mr. Brigance was only concerned with receiving payment, but after learning that Carl Lee Hailey was unable to provide support for his family because he was locked in a jail cell awaiting trial, the conversation shifted. Mr. Brigance agreed to receive payment whenever, and however, Carl Lee Hailey was able to pay. Mr. Brigance's agreement to continue representation without knowing when Carl Lee Hailey would be able to pay created a trusting bond between the two men. That bond developed into Carl Lee Hailey working to obtain payment from the NAACP for Mr. Brigance's representation as well as obtaining money from the church for his family. Without Carl Lee Hailey verbally expressing his needs and lack of ability to pay, the bond may have never materialized.

Verbal Communication in the Real-World

132. Typically, a criminally accused client has the ability to make a determination as to whether to go to trial, or enter a guilty pleas.¹¹ The exception to this rule exists where an individual has diminished capacity.¹² After receiving competent advice from counsel, or guardian ad litem,¹³ the accused makes the final determination whether to go to trial. The two potential outcomes usually hinge on the client's needs. For example, take a young woman attending college at a local university, charged with a felony drug offense for possession with intent to distribute a controlled substance. The young woman receives, and signs for a package for her significant other at their shared apartment. Unbeknownst to the young woman, the package contains cocaine, there is evidence of her accepting three separate packages on prior occasions, and the government has a witness who will testify that the young woman knew her significant other was a drug dealer.

11 MODEL R. PROF'L CONDUCT 1.2 (Am. Bar Ass'n 2018).

12 MODEL R. PROF'L CONDUCT 1.14 (Am. Bar Ass'n 2018).

13 *What is a Guardian Ad Litem?*, LEGAL AID.

133. If the young woman enters a plea of guilt or goes to trial and is convicted of a felony drug crime, she loses the ability to receive federally funded financial aid for her tuition.¹⁴ However, if she engages in plea negotiations with the government to cooperate, she could enter a plea of guilty to a misdemeanor. This would allow her to keep her federally funded financial aid. Under these circumstances, even though the young woman proclaims her innocence, she may or may not wish to risk going to trial and being found guilty of a felony. The young woman's needs are to continue receiving federally funded financial aid, and to remain in school so that she can complete her education and eventually become self-sufficient.

134. If an advocate were not to communicate with this young woman in a meaningful way, like Mr. Brigrance, then there would be no way of knowing she values ensuring her financial aid, which necessitates only having a misdemeanor on her record. Knowing this crucial piece of information allows an advocate to better tailor their representation to the individual client. This not only results in a more acceptable outcome for the client, but can leave an advocate with a sense of peace knowing they did the best they could for the client, with the client's overarching objective in mind.

Non-Verbal Communication

135. As stated above, connecting is done through communication, but not all communication is verbal. Dr. Albert Mehrabian discerns that at least 55% of communication is non-verbal.¹⁵ Meaning that it is not necessarily the words spoken that relay messages of connection. Non-verbal communication can be broken down into four different categories: aesthetic; physical; signs and; symbols.

136. Aesthetic communication occurs through creative expression; including the arts.¹⁶ The term a picture is worth a thousand words is coined from the communication that is drawn from art. The artist allows the viewer to pull the individual meaning from the picture without forcing their personal meaning upon the audience.

137. Physical communication includes the personal expressions made by individuals. For example, the universal gesture of a physical expression smile indicates that an individual is happy or expressing a state of happiness. However, the individual smiling may not actually feel happy. The perception to others viewing the smile is happiness. Alternatively, a frown signifies unhappiness. In physical communication, the giver of the communication is directing the meaning to the audience.

14 *Students with Criminal Convictions Have Limited Eligibility for Federal Student Aid*, [FEDERAL STUDENT AID](#).

15 Albert Mehrabian, *SILENT MESSAGES* 43 (1971).

16 Eric Newton, *Art as Communication*, [1 The British J. of Aesthetics](#) 71 (1961).

138. Like physical communication, signs are also give direction. The signs typically have a universal meaning that directs the audience how to receive the message. Conversely, symbols can act as either giver-directed or receiver-driven. Symbols such as cars, jewelry, and clothing can indicate financial status.¹⁷ The non-verbal communications that are most effective for an advocate are eye contact and touch.

139. It is hard to find a conversation between Mr. Brigance and Carl Lee Hailey where Mr. Brigance is not making solid eye contact with his client, showing a sign of respect to Carl Lee Hailey, at a time where he was receiving little from the public. By doing so, it only furthered Mr. Brigance gaining trust from his client, allowing him to become a more effective advocate.

140. As for touching, Mr. Brigance never hesitated to shake Carl Lee Hailey's hand, or to be in close proximity with his client. By not hesitating, Mr. Brigance communicated to his client that he valued him as a person, and was not going to treat him as anything less. As a result, it was easier for Carl Lee Hailey to connect to Mr. Brigance, because in Carl Lee Hailey's mind there was no difference between himself and Mr. Brigance.

141. Eye-contact is most effective when communicating with clients simply because in America looking a person in their eyes is a sign of respect. It can also be a sign of trust, meaning that the person is telling you the truth when looking you in their eyes. For example, in the Senate Judiciary Committee hearings¹⁸ for Brett Kavanaugh,¹⁹ Senator John Kennedy²⁰ requested that Mr. Kavanaugh look him in the eyes and swear that he did not commit the acts. Regardless as to your belief in whether Mr. Kavanaugh committed the acts, it is apparent that the eye contact for Senator Kennedy in conjunction with the verbal affirmation was necessary, before Senator Kennedy would believe Mr. Kavanaugh's response.

142. Touch is also an important component of non-verbal communication because it draws a connection between individuals.²¹ If you decline to touch an individual, conclusions are drawn from the person's perspective as to why you refrain from touch. Instead of the person listening to your words they are spending time sorting out why you refuse to touch them. For instance, a crucial moment occurs when an advocate first meets with a client in a jail setting and the client reaches out to shake the advocate's hand. How the advocate responds will likely dictate the relationship between advocate and client.

17 Albert Mehrabian, *SILENT MESSAGES* 1–8, 14–16, 25, 42 (1971).

18 *Judiciary Committee Releases Transcripts of Kavanaugh Interviews*, [SENATE JUDICIARY COMMITTEE](#) (Sep. 26, 2018).

19 *Brett Kavanaugh*, [BIOGRAPHY](#).

20 [John Kennedy, Senator \(R\) from Louisiana](#).

21 Cindy Lamothe, *Let's Touch: why physical connection between human beings matters*, [THE GUARDIAN](#) (Jan. 3, 2018).

143. No matter the form of non-verbal communication, a connection between client and advocate can be drawn. Connections can be drawn through acts as little as holding a client's hand before relaying difficult information when they have not had human contact in months, or through a smile to brighten a day. More times than not, a criminally accused client waits for the resolution of a case behind a jail cell. The cold concrete and steel benches offer no warmth. A kind gesture can go a long way in building a meaningful connection with a client that can lead them to sharing more information on their specific needs, and creating a more effective advocate in the process.

III. Audience

144. In a criminal matter, the audience will always be the judge. Whether it is the judge of the law (in the black robe at the front of the courtroom) or the judge of the facts (typically the jury in the box analyzing every aspect of the facts in search for the truth) the audience will always be the judge. After discerning the judge of your case you have to determine how best to present the information to the judge.

How Racism Impacted Mr. Brigance and his Jury Selection

145. *A Time to Kill* takes place in a small Mississippi town, where racist overtones persist. For example, Carl Lee Hailey and Mr. Brigance have daughters of similar age, but as the movie progressed, it was clear these two girls did not share similar experiences, and would have been ostracized if they spent time together, let alone played together. Even at the end of the movie, when Mr. Brigance shows up to Carl Lee Hailey's house for a barbeque, the racial tensions of the town are obvious by the looks on the faces of the barbeque guests when Mr. Brigance's family arrives.

146. The previous example was a more subtle representation of racism, however, the more blatant racism came from the depiction of the Ku Klux Klan (KKK) attempting to harm various members of Carl Lee Hailey's defense team, while subsequently helping to organize protests outside of the courthouse. The KKK is a hate group who has long been prevalent in the South, using scare tactics and violence to intimidate and harm minority populations.²² In *A Time to Kill*, the KKK organized cross burnings, attacks, and bombings in order for Carl Lee Hailey's defense team to withdraw willing, or withdrawal through incapacitation. Additionally, the KKK organized protests outside of the courthouse, reminiscent of segregation protests in the 1960s,²³ which boiled over to an all-out brawl by the end of the movie.

²² *Ku Klux Klan: A History of Racism*, [SOUTHERN POVERTY LAW CENTER](#) (Feb. 28, 2011).

²³ Alan Taylor, *1964: Civil Rights Battles*, [THE ATLANTIC](#) (May 28, 2014).

147. Mr. Brigance was well of aware of the rampant racism in the town, which is why his first motion was for a change of venue. Mr. Brigance knew a trial in the town would likely have an all-white jury, who would like nothing more than to sentence Carl Lee Hailey to death for killing two white men, and injuring a white police officer. However, Mr. Brigance's motion was denied, and was forced to have the case tried in the town. Unsurprisingly, the jury was all white. As a result, Mr. Brigance had to devise a new strategy on how to overcome, not only racism, but the gruesome details of the crime.

148. Mr. Brigance examined his audience, in this case the jury, trying to connect his client with the audience. The connection occurred in the closing argument scene where Mr. Brigance told the story of what happened to Tonya Hailey from start to finish, not skipping on any detail of her attack, which incited Carl Lee Hailey's actions. During this story, Mr. Brigance asked the jury to close their eyes, visualizing every scene Mr. Brigance was depicting. At the end of telling Tonya Hailey's story, Mr. Brigance asked the jury to open their eyes, and imagine if Tonya Hailey was white. By doing so, Mr. Brigance was able to get his audience to focus not on the race of the parties involved, but on the gruesome details of a child being raped. This tactic humanized Carl Lee Hailey in the eyes of the audience. If not for examining and knowing his audience beforehand, it is unlikely Mr. Brigance would have been able to come up with this strategy, leading to an entirely different outcome of the trial.

Race is Always a Factor

149. In reality, race is always at issue in a case.²⁴ This is true whether the client is of African American decent, Hispanic American or Caucasian American. The key to being an effective advocate is addressing the race issue in your case head on. There are instances where implicit bias issues are addressed in the voir dire questions prior to trial. The questions are used to determine whether the jurors have an implicit bias against the client based on deeply ingrained beliefs that individuals may not be cognitively aware exist.²⁵ Research has shown that Americans are naturally biased against others, making decisions based on those biases without realizing the bias.²⁶ The prolific way Mr. Brigance approached this race issue is just one tactical decision that makes individuals realize their bias. Once the bias is addressed, the person can implement safeguards to prevent from making decisions in accord with their bias.

24 Peter A Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. 180 (2015).

25 *Implicit Bias: Is everyone racist?*, BBC NEWS (June 5, 2017).

26 Howard Ross, *Exploring Unconscious Bias*, DIVERSITY BEST PRACTICES (2008).

IV. Potential Outcomes

150. Analyzing the potential outcomes is the least extensive portion of advocacy for the advocate. It simply requires knowledge of the law and the judge.

Only Two Options

151. Mr. Brigance knew from the start the potential outcomes of Carl Lee Hailey's case, gas chamber or a successful insanity plea. Mr. Brigance did discuss the potential of a plea deal with Carl Lee Hailey, but upon learning the needs of his client, Mr. Brigance quickly ruled out the option of a plea deal that would see Carl Lee Hailey in prison for the rest of his life. With that, that potential outcomes for Carl Lee Hailey's case were easy for Mr. Brigance to analyze, because there were really only two options.

Real Life

152. In Federal Courts, sentencing most times lies solely in the discretion of the judge.²⁷ The art of plea negotiation serves to limit the exposure that your client will face during sentencing. For example, where a person is charged with possession of a controlled substance with intent to distribute, their potential exposure is twenty years in custody.²⁸ Consider however that an individual commits the possession with intent to distribute along with at least one other person on at least three different occasions. If the government wishes, they could charge the client with conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2 along with the three separate instances of the possession with intent to distribute. Thereby raising the potential exposure from twenty years to eighty years. Irrespective of guilt or innocence, or even if there is a potential legal defense, one might not wish to risk the exposure if the government is willing to negotiate a plea offer to only one count of possession with intent to distribute, limiting the exposure to twenty years. It is necessary to consider all potential outcomes when advising a client in advancing a legal theory that could harm the ability for a life outside of prison.

V. Acceptance

153. After drawing the connection with the client, determining your audience, and identifying the potential outcomes, an advocate must accept the client's decision. This

²⁷ Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 *J. Legal Stud.* 75, 77 (2015).

²⁸ 21 U.S.C. §§ 841(b)(1)(C), 841(b)(E)(ii) (2018).

becomes the hardest of the tasks. As an individual who is trained and skilled in the law, we like to believe we know what is best for others. Not wishing to risk the potential exposure or failing at convincing the audience of the humanity in your client, it becomes a scary endeavor to accept a path that is not in line with your advice. However, an advocate must accept the client's decision and realize that advocating is not about advancing your own personal interest but serving as a mouthpiece to your client's interest.²⁹

A Time to Kill

154. In *A Time to Kill*, the safest option for Carl Lee Hailey would have been to accept a plea deal. A plea deal would have insured he did not receive the death penalty. As much as Mr. Brigance would have liked to ensure his client's life being spared, it was not his decision to make. The path Carl Lee Hailey chose was not the easiest, but it was the path chosen, therefore it was up to Mr. Brigance to provide the best legal defense he could give his client's choice.

The Safest Route

155. An advocate cannot make a decision based on the safest route. The safest route will always be the result where you can guarantee the result. In criminal proceedings, an advocate can never guarantee a result from a jury trial. It is impossible to discern what parts of the trial will be important to the jury or what their decision will hinge on. Jury deliberations are done in private and members of the jury are not required to disclose their discussions, only their result(s).³⁰ Because it is impossible to guarantee a result from a closed deliberation, the safest route will be a plea.

156. As discussed above and in Carl Lee Hailey's circumstance, the decision is left with the client after receiving competent advice from counsel. The decision will be made taking into account the needs of the client coupled with the relationship between the advocate and client.

VI. Conclusion

157. To sum up the argument, it is not that an advocate knows what is best for the client; but it is that a special advocate takes the time to discern the needs of the client to provide options that will assist the client in making the best decision. Advocacy is not

²⁹ MODEL RULES OF PROF'L CONDUCT 1.3 (Am. Bar Ass'n 2018).

³⁰ FED. R. EVID. 606.

an innate skill, it takes time and patience to perfect. It occurs through trial and error. The practice of law is always developing so long as the advocate continues to engage in the practice.