



**PennState**  
Dickinson Law

Penn State Dickinson Law  
**Dickinson Law IDEAS**

---

Faculty Scholarly Works

Faculty Scholarship

---

6-1-1994

## Testing Trial Advocacy: A Law Professor's Brief Life as a Public Defender

Gary S. Gildin  
gsg2@psu.edu

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/fac-works>

---

### Recommended Citation

Gary S. Gildin, *Testing Trial Advocacy: A Law Professor's Brief Life as a Public Defender*, 44 *J. Legal Educ.* 199 (1994).

This Article is brought to you for free and open access by the Faculty Scholarship at Dickinson Law IDEAS. It has been accepted for inclusion in Faculty Scholarly Works by an authorized administrator of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

# Testing Trial Advocacy: A Law Professor's Brief Life as a Public Defender

Gary S. Gildin

Having taught trial advocacy for the past fourteen years, I embraced the novel opportunity to test firsthand the techniques we offer in the classroom by serving my sabbatical as an assistant public defender in Cumberland County, Pennsylvania. Over the course of five trials and more than fifty hearings, I endeavored to make effective use of those advocacy skills that I had urged upon some 2,000 students. Except for the not wholly unexpected need to adapt to the idiosyncracies of individual judges, Professor Mauet's fundamental techniques generally could be directly (if not always successfully) employed in the courtroom. There was one aspect of the litigation process, however, that no textbook, lecture, simulation, or videotape could ever convey: the client. In my semester as a public defender, I was confronted with an array of defendants whose plight defied reliance upon classic trial advocacy skills.

In the perhaps vain hope that my experiences can assist other teachers to prepare their students for the real-life vagaries of trial advocacy, this article attempts to categorize types of clients the criminal defense lawyer is likely to encounter. It then offers modest suggestions for training the advocate to address the problems posed by each class of clientele.<sup>1</sup>

## The Defenseless Client

My first client, whom I initially found totally befuddling, displayed what ultimately proved to be a not atypical profile—the client with no discernible defense.

Having impressed upon legions of students that nothing in law is clear, I could not believe that there was no viable defense to lodge on behalf of fifty-five-year-old Lewis Stone. Mr. Stone had been caught leaving a grocery store

Gary S. Gildin is Professor at the Dickinson School of Law.

I am grateful for the privilege of working beside Chief Public Defender Taylor P. Andrews and a team of assistant public defenders who, every day, generously shared their experience and wisdom. I am forever indebted for the education they conferred.

1. To avoid betrayal of client confidences, I have changed the names of the clients and some other factual details.

with a five-dollar steak visibly protruding from underneath his shirt. He then had given a complete and uncoerced confession admitting that he had stolen it. Having an illustrious history of convictions for retail theft, Mr. Stone was now facing a felony charge. Under a standard-range sentence dictated by Pennsylvania's sentencing guidelines, a conviction would render him a long-term resident of one of the state's correctional facilities.

Seeing no immediate defense on the facts, I turned my attention to the constitutional doctrines relied upon with occasional success by the defendants in my criminal procedure course. My quest proved fruitless. Where was the raw material that would induce the jury to decide following the opening statement, if not during jury selection, that Mr. Stone was innocent? How was I to cross-examine unbiased eyewitnesses possessed of an unerring ability to perceive, recollect, and discuss the events in question?

Having gleaned that most criminal cases are resolved by plea bargaining, I set off to visit the district attorney in the faint hope that she perceived some weakness in the case which would induce acceptance of a plea to a misdemeanor. I was able to extract one concession: she agreed to remain mute at sentencing.

With guidance from my boss, I turned my attention to an aspect of persuasion generally not addressed in trial practice courses—sentencing advocacy. The worst fate suffered by defendants found guilty in the Case Files of trial advocacy courses is the bruised ego of the student advocate; there is no occasion for the loser to attempt, at sentencing, to minimize the consequences of the jury's guilty verdict. But for the Mr. Stones of the world for whom a guilty verdict is a foregone conclusion, the sole opportunity for advocacy lies at sentencing—either formally following trial, or informally in plea negotiations with the prosecution.

At this juncture opportunities for advocacy abound. In the case of Mr. Stone, my preparation for the sentencing involved the mundane task of gathering letters of support from a psychologist and a clergyman. While supplying no cognizable defense to the charges, the letters suggested that Mr. Stone would profit more from treatment than from incarceration. No sophisticated advocacy skill was involved either in gathering these letters or in using them to argue for a mitigated sentence. Instead, my pitch at the sentencing hearing was but a commonsense explanation why incarceration, particularly for the length of time suggested by the sentencing guidelines, would be inappropriate and counterproductive. Somewhat begrudgingly, the trial judge agreed.

Sentencing advocacy is perhaps even more crucial at the plea-bargaining stage, particularly where mandatory sentencing guidelines deprive the judge of all discretion. If the defendant's activities can be linked to drug or alcohol dependency, the district attorney may be persuaded to agree to a treatment program in lieu of imprisonment.<sup>2</sup> Even where the prosecutor refuses to

2. Sometimes the defendant will be less amenable: one of my clients opted to remain in jail despite entry of a plea that authorized his immediate release to an in-patient drug rehabilitation facility.

consent to diversion, advising the defendant to enter a treatment program voluntarily while awaiting trial may benefit him at sentencing. Again, the skill entailed in this sort of advocacy has nothing to do with law but has everything to do with affording proper representation of the client who has no defense.

### The Client Who Can't Be Put on the Stand

As vexing as the defenseless client is the accused whose defense cannot be thoroughly placed before the jury because of a prior conviction. Law school programs do equip aspiring advocates with the conceptual tools to represent such a defendant: the presumption of innocence, the defendant's constitutional right not to testify, and the prosecution's burden of proving guilt beyond a reasonable doubt are bedrock principles that can be mustered. There is a vast divide, however, between legal precepts and reality.

Harold Kelly, accused of knowing receipt of stolen property, was prepared to testify he was unaware that the property he admittedly possessed had been stolen. Regrettably, the price of relating his story to the jury would have been introduction of his prior burglary convictions.

I drew upon the advocacy conventions that over the years I had proffered to my students. During voir dire, I explained the legal protections afforded anyone accused of a crime and attempted to extract a promise from the jurors to apply these tenets as they scrutinized the prosecution's case against Mr. Kelly. The jurors were reminded of their pledge during my opening statement and closing argument, and for the fourth time in the judge's charge.<sup>3</sup> My admittedly biased assessment of the evidence was that the prosecution plainly had failed to meet its burden of proving, beyond a reasonable doubt, that Mr. Kelly knew that the property had been stolen. The jury disagreed. The case exemplified the futility of relying upon incantations of presumptions of innocence and burdens of proof, and the imperative of offering the jury a competing defense theory of the case. But what is the theory to be when the defendant cannot testify and has no witnesses to support his claimed defense?

It is settled lore that a factual theory of the case must not only present a cogent story of what happened but should offer further explanation, consistent with the jurors' commonsense expectations, of *why* the events occurred. Upon reflection, I realized that a legal theory of the case resting principally on the prosecution's inability to satisfy its burden of proof also should propose *why* the prosecution had failed to garner the evidence a jury would expect if the defendant were guilty.

In Mr. Kelly's case, the arresting officer had absolutely no knowledge of how Mr. Kelly came into possession of the stolen property and essentially conducted no investigation once he discovered that the property was stolen. Would the jurors have been more amenable to finding the Commonwealth's proof inadequate had they been persuaded that the officer could have and

3. Some of my colleagues, obviously wiser than I, advised against seeking an instruction from the court detailing the defendant's right not to take the stand on the ground that the instruction served only to remind the jury that the defendant had not testified in his defense.

should have done more—or at least done something—to find out how the defendant came to possess the stolen goods? Absent a factual hook on which to hang its understanding of the burden of proof, the jury was left to choose between assessing the evidence against empty legal formalisms and assessing the evidence against the only human placed before it, the defendant. Not surprisingly, the jury chose to evaluate the defendant and, not hearing him speak in his defense, found him wanting.

### **The Vacillating Client**

I had expected surprise prosecution witnesses, failures of recollection from my own witnesses, even objections emanating from the bench (always, of course, sustained). I was entirely unprepared for the client who, unlike the inanimate defendants in the Case Files, seemed to change stories with whatever winds were prevailing.

The most dramatic example was Betsy Dennis, who stood accused of extorting hundreds of dollars by sending letters threatening physical harm to the complainant. Over the course of several interviews, Ms. Dennis steadfastly denied writing any note, much less receiving money from the victim.

While the prosecution presented its case, I quietly asked Ms. Dennis, seated next to me at counsel table, to write out the text of the extortion note just introduced by the district attorney. Even for one professing no expertise in graphology, the note left little room to question that Ms. Dennis's protestation of innocence was untrue. I slid the handwriting sample into my suitcoat pocket, deferring for the moment resolution of the evolving ethical dilemma.

As the prosecution announced it was resting its case, Ms. Dennis turned to me in tears and whispered, "I can't do this any more. I wrote the note and took the money." I mentally reviewed my ethical obligations. My first thought was that this was cruel revenge for having vexed my first-year students with the lawyer's trilemma.<sup>4</sup> My ethical dilemma was soon resolved: during a brief recess, Ms. Dennis volunteered her confession to everyone in the hallway.

There were less egregious instances of the vacillating client: the man who agreed to plead guilty, only to change his mind on the morning of trial; the accused who over the course of successive interviews recalled additional facts that alternated between compelling and condemning; the client whose wife was prepared to be the star defense witness one moment and in the next breath threatened to be the chief witness for the prosecution. In the dynamic representation of actual clients, new versions of the facts may descend without warning. To my knowledge, no trial advocacy tome has been written that can adequately prepare students or teachers for the twists and turns of the client's needs, desires, and recollections. Nor have my firsthand experiences provided any magical formula for coping with such surprises beyond the necessity of maintaining a poker face when adversity strikes at trial. But those of us who train young advocates should continually stress the self-contradictory

4. Monroe H. Freedman, *Perjury: The Lawyer's Trilemma*, *Litig.*, Winter 1975, at 26.

adage: expect the unexpected. And we should contrive little surprises in our training materials.

### The Client in Name Only

The most disappointing aspect of my foray into the public defense was my frequent inability to cultivate a bona fide relationship with my client. The fact that the public defender is foisted upon the defendant rather than voluntarily retained as counsel certainly degrades the attorney-client bond at the outset. The bond is further strained when conditions, largely beyond the control of defense counsel, make the defendant feel that his counsel is simply a cog in the machinery processing him towards incarceration.

Perhaps nowhere are the circumstances less fostering of a textbook attorney-client relationship than in preliminary hearings, which in Pennsylvania generally are held before laypersons elected as district justices. On a good day, defense counsel will have seen the criminal complaint before arriving at the hearing. Only on extremely rare occasions will counsel have spoken to the defendant before meeting him at the district justice's office.

Typically the district justices schedule hearings every fifteen minutes, although often multiple hearings are scheduled for the same time. In each fifteen-minute slot, counsel is expected to interview the client as to the facts of the case and as to circumstances that may be relevant to reduction of bail; prepare for the hearing; cross-examine the prosecution witnesses; argue why the Commonwealth has not established the elements of the crime; advocate for reduction of bail; and, assuming the defendant is bound over for trial, explain to the client the next stages of the process. Although fifteen minutes is woefully inadequate, the district justice, pressured by an overcrowded docket, continually sends emissaries to interrupt the initial client conference and urge counsel to act with greater dispatch. Most clients leave the preliminary hearing confused about what has happened and equally befuddled as to what comes next.

This assembly-line justice is repeated during arraignments and pretrial conferences; it was not atypical for me to represent twenty clients in one morning.<sup>5</sup> Client counseling consisted of whispered conversations in the lock-up (in the presence of fellow inmates), in the hallways, or at the bar while the judge simultaneously ran through a recitation of defendant's rights.

The instances when I felt satisfied with my representation and counseling were the handful of cases that proceeded to trial. The overwhelming majority of defendants who pleaded guilty, even when the ultimate disposition was quite favorable, felt that they had simply been led through the criminal justice system to a destination marked Guilty. Many directed justifiable frustration at the attorney, who seemed more foe than zealous advocate.

5. Ironically, the Supreme Court relied upon the "obsession for speedy dispositions, regardless of the fairness of the result," as a basis for holding that an indigent defendant is entitled to appointed counsel even for petty offenses where actual incarceration results. *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972); see also *Scott v. Illinois*, 440 U.S. 367 (1979) (no right to counsel in misdemeanor case where defendant is not sentenced to prison).

The defendant ever grateful for his attorney's good counsel is more common in fiction than in fact. Though the defense counsel's duties to the client may be clear in theory, in practice they become muddied, complex, inconstant, and at times adversarial. Students somehow must be trained to fight consciously and determinedly against the constant pressures of judges and other court functionaries who, concerned principally with controlling the docket, seek to pressure defense counsel into expedition. An attorney who acquiesces will leave the client feeling victimized rather than adequately represented.

### **The Innocent Client**

Thus far I have painted a rather dismal portrait of the public defender's clientele. The reward, of course, is the opportunity to represent the very person whom the structure and rules of the criminal justice system are designed to protect—the genuinely innocent client.

I came to my sabbatical quite clear on the theory that explains the role of defense counsel. Once a defendant enters a plea of not guilty, the prosecution is forced to override the presumption of innocence by proving each and every element of the crime beyond a reasonable doubt. Our system would rather find ninety-nine guilty persons innocent than wrongfully convict one innocent person. As a practical man, however, I approached my sabbatical with a certain skepticism. Would there be, in fact, truly innocent persons wrongfully accused of crimes?

Even discounting for the inability to shed the advocate's cloak, I found that the number of innocent defendants exceeded my expectations. Even when the police are acting entirely in good faith, they may lodge criminal charges without fully and carefully investigating all the circumstances of the crime. The probable-cause threshold for initiating criminal charges guarantees that there will be a certain percentage of persons charged who are, in fact, innocent.

Frankly, the most stressful moments of my brief career as a public defender were the trials of persons I was convinced were not guilty. Seldom have I seen anyone more ashen than a man facing a trial for a crime he insists he has not committed. Rarely have I felt so at loss for words as in trying to explain how it can be possible for an innocent person to confront a jail term. And never have I felt more satisfaction in my legal career than in watching a client walk out of the courtroom a free man.

\* \* \* \* \*

It is difficult in the context of a trial advocacy course to explain how, as a criminal defense counsel, one can maintain perspective and enthusiasm over years of representing clients who inspire little or no respect, affection, or trust. By the same token, it is impossible to convey to students the enormous responsibility and sense of satisfaction of providing the best possible defense to the truly innocent. And yet it is the teacher's duty to explore the criminal defense counsel's obligation to afford the same vigorous representation to guilty and innocent clients alike.

My sabbatical with the public defender's office has had a profound impact on my own teaching of trial advocacy. I am more convinced than ever that we must include basic skills of trial advocacy in the curriculum to equip students to provide effective assistance of counsel, whether as plaintiff's attorney, prosecutor, or defense counsel. And I think we must try harder to prepare them for the surprises, the frustrations, and even the despair that they will encounter when live clients replace the cadavers of the Case File.