

# To Save a Mocking Bird



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by *Wayne Gross*

**D**uring more than a decade of work as a federal prosecutor, my primary focus was on putting away criminals. It was only toward the end of my tenure in the U.S. Attorney's Office that I began to see things from the perspective of those on the other side.



*Wayne Gross*

Five months ago, I joined a large private firm, Snell & Wilmer, which opened its West Coast white-collar, criminal-defense practice, in addition to complementing its complex business litigation practice. In quick order I began representing people charged with various federal offenses, running the gamut from a high-profile celebrity charged with tax fraud to a psychiatrist charged with illegally prescribing medications. While I'm still in

the process of completely appreciating the significant transformation that has taken place, I thought fellow lawyers — especially those who have also considered switching sides — might appreciate my initial perspective.

## Life as a Prosecutor

On my first day as a federal prosecutor in 1990, I was handed a training manual that contained the following quote from the late Justice Robert Jackson, who was chief U.S. prosecutor at the International Military Tribunal at Nuremberg:

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitivity to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

I remember being struck by that quote; it nicely captured some of the most important qualities a

prosecutor should possess, qualities that the fictional Atticus Finch of "To Kill a Mockingbird" would possess were he a prosecutor.

Nonetheless, my prosecution work, particularly in the early days, wasn't always the epitome of humility. As a young federal prosecutor, I tended to be extremely aggressive at both trial and sentencings, utilizing the discretion bestowed upon me to often seek the maximum authorized penalty. My view of crime back then was that the world was divided into two camps — good guys and bad guys — and those in the latter category deserved to be treated harshly. And I became quite good at making defendants appear in their very worst light, which was quite effective at securing convictions and lengthy sentences. As I became more seasoned, however, I became more cognizant of the fact that many defendants, despite having committed crime, weren't inherently bad people; they had certainly made mistakes, and sometimes bad ones but, particularly in the case of drug crimes, were typically committed in environments where such conduct was rampant.

Once I began seeing defendants as human beings rather than as dehumanized evil-doers, my concept of how to treat them changed dramatically. Although I still vigorously sought to convict those defendants who went to trial, I

became much more flexible in plea bargaining and much less aggressive at sentencing. I paid attention to whether defendants appeared to be sincerely contrite and, if so, sought to provide such defendants with less time behind bars and greater opportunities to rehabilitate. But it wasn't until I became a defense lawyer myself that I fully understood and appreciated the point of view of the target of an investigation.

## Life as a Defense Lawyer

Literature and movies frequently portray the criminal defense attorney as hero. The Gregory Peck character in "To Kill a Mocking Bird" comes to mind. In the fictional account, Atticus Finch, a lawyer in a small Southern town, comes to the aid of Tom Robinson, an African-American man charged with raping a white woman. In one famous line, Atticus tells his daughter, Scout: "If you just learn a single trick, Scout, you'll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view, until you climb inside his skin and walk around in it." Despite providing Robinson with exceptional advocacy, Finch was unable to secure an acquittal from an all-white jury that consisted of town residents who attempted previously to storm the jail to lynch Robinson.

Robinson, not willing to see whether Finch could overturn the conviction on appeal, thereafter escaped from confinement only to be killed while fleeing.

I recall my parents, upon learning of my interest in going to law school, commenting on how wonderful it would be for me to be like Gregory Peck in his best movie. My desire back then, however, was to be on the other side. From the time I first thought about going to law school, I wanted to prosecute bad guys. I had grown up in a tough neighborhood and empathized with crime victims. It took me more than a decade to begin to appreciate the advice of Atticus Finch.

While the public perception of prosecutors is based almost entirely upon what they do in court during public hearings and trials, their most important work — the decision whether and whom to prosecute — is made behind closed doors before charges are filed. Indeed, grand jury investigative work, one of the most unfettered exercises of power in our political system, is required by law to be secret. At the Department of Justice, I took for granted the advantages such

secrecy affords the prosecution over the defense. As a prosecutor, I knew precisely what was being investigated, what investigative steps were being taken, and when official action, such as search warrants, arrests, and indictments, would occur. On the defense side, however, targets of investigations who have not been indicted, to the extent they even know that they're under investigation, often don't know much more than that.

Until I represented such targets as a defense lawyer, I hadn't yet climbed inside the skin of a target and therefore wasn't cognizant of the extent to which the unknown can strike terror in the hearts of not just the target but also his or her family. From the target's perspective, nothing is safe; his phones may be tapped, his home or business may be searched at any time, his best friend may be wearing a wire. The only sanctuary a target has during the investigative phase is the attorney-client relationship. It is the defense lawyer's role at this stage of the process to make sure that a target doesn't make matters worse for himself. For example, the lawyer should carefully explain the investigative process to the target in a manner that enables him to make intelligent choices. It is unwise, for example, for a target to engage in discussions with associates about items that may be under investigation because, among other things, such individuals may be working for law enforcement, or may do so down the road.

Additionally, a good defense attorney can help a target by finding out as much as possible about the nature of the investigation so that intelligent choices may be made regarding defense strategy and, if appropriate, interactions with law enforcement. For example, even sophisticated targets like Martha Stewart, who believe that they have little or nothing to hide, may not be doing themselves any favors by agreeing to talk with investigating agents or prosecutors before knowing the full scope of what is being investigated and what risks they're taking by engaging in such direct discussions. Indeed, in Martha Stewart's case, talking with members of law enforcement prior to charges being filed actually bolstered the government's case against her. Usually, if it is appropriate to talk with law enforcement at all during the investigative stage, it is far preferable for the defense lawyer to do so.

Another key distinction between my former work as a federal prosecutor and my current work as a defense lawyer is resources. As a pros-

ecutor, I took for granted the massive resources that DOJ could bring to bear on the targets of my investigations. For example, in the investigation of the UCI Fertility scandal, a matter that I oversaw in the late '90's, I caused more than 100 agents to simultaneously execute search warrants on numerous locations. On the private side, clients in the real world (the fictional Finch represented Tom Robinson for free) foot the bill for the time and resources expended on their cases, which can get extremely expensive. Accordingly, it is critical that the defense lawyer not only provide the best legal representation possible, but also do so in a cost-effective way.

Finally, it is important for the defense lawyer, at the appropriate time, to convey to the prosecution that he or she, if called upon to do so, will try the case with the passion and vigor of the fictional Finch. The prosecutor should fear — or at the very least respect — the trial skills of the defense lawyer. I know from my own experience in supervising prosecutors that they, like all trial lawyers, hate to lose. And it is usually when they fear defeat that they are inclined to provide clients with the best possible plea offers.

In sum, I believe that, although my tenure as a private lawyer is just beginning, my evolution as a lawyer capable of providing private legal services really began during my years of public service in which I gained a much better appreciation of what the late Justice Jackson meant in his eloquent description of what it takes to be a good prosecutor. Nevertheless, the ultimate transformation did not take place until I became responsible for representing those on the other side. Only then did I fully appreciate the vital role that defense lawyers play in a system that, but for their services, could easily destroy a target. No matter how sophisticated or well-heeled a client, they need excellent representation no less than the fictional Finch's mockingbird needed him.



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