The Defense Is Wary

Lawyers Fear That Proposed Curbs on Publicity May Impair Clients' Chances

2/14/66

By SIDNEY E. ZION

A lawyer's stock in trade may be his time, but he makes his money on second thoughts.

A growing number of criminal lawyers are having serious doubts about the various proposals that seek to curb prejudicial publicity in criminal cases. This would seem ironic, since all the proposals purport to achieve fairness for suspects and defendants—clients of the criminal lawyer. In general, the proposals would prevent the release to news media by prosecutors, policemen and court officials of such material as prior criminal records, confessions, scientific evidence and the results of lie detector tests.

(1) News Analysis

For years many criminal lawyers have clamored for such restrictions, claiming that "trial by newspaper" was damaging their chances of acquitting their clients before juries.

And so, when the Warren Commission suggested that something be done to remove the kind of prosecution-fostered atmosphere that would have faced Lee Harvey Oswald had he lived to be tried in the assassination of President Kennedy, there was general applause among criminal lawyers.

Now the American Civil Liberties Union and a committee of the American Bar Association have proposed that these kinds of restrictions be made binding.

Why are the lawyers now having second thoughts?

Mainly because the proposals would place the same sanctions on defense attorneys as on prosecutors.

Thus, defense attorneys would be effectively barred from making out-of-court statements designed to help their clients.

the bar association committee proposal for leaking prejudicial stories, have seldom been punished for physically beating suspects or psychologically coercing confessions out of them, even when the courts have charged them with such violations.

So what is beginning to concern defense lawyers is that if the bar association committee's report is accepted next year by the full association, and later is enacted by state bar groups and legislatures, it could have the opposite effect from what was intended.

That is, the sanctions might be used almost solely against defense counsel, muzzling them, while the prosecution was left virtually insulated from the rules.

Indeed, the American Civil Liberties Union report, issued last week, pointed up the problem. While placing the defense lawyers under the disciplinary sanctions of the bar, that report withheld decision on whether to advise the use of the contempt power against either the prosecution or defense counsel.

Harassment Feared

In reserving the question, the A.C.L.U. said in part:

"It is feared that sanctions on both prosecution and defense counsel would be used to harass the defense, especially in civil rights cases where pretrial publicity is often used as a precaution against kangaroo courts."

Moreover, an A.C.L.U lawyer conceded that many attorneys cooperating with the union in the South had strenuously objected to the provision that made them subject to disciplinary proceedings by local bar groups.

They argued that it would give segregationists a powerful hammer against them without any substantial offsetting benefits.

Jailing Possible

The sanctions proposed by the Liberties union and the American Bar Association are disciplinary proceedings by the ethics and grievance committees of the local bar associations. The A.B.A. plan would also give to the judiciary contempt powers over the lawyers, so they presumably could be jailed for "going to the papers."

While the sanctions would apply equally to prosecutors, defense lawyers are skeptical that they would be so enforced.

They contend that district attorneys have rarely if ever been disciplined by the bar or the courts in cases where they were held to have suppressed evidence.

"If they won't even slap a D.A. on the wrist when he has withheld evidence that might have led to an acquittal, what chance is there that he will be punished for leaking a story to a newspaperman?" one long-time criminal lawyer commented.

Moreover, experienced criminal lawyers scoff at the assumption that they have prejudiced—or could prejudice — a case in behalf of their clients. They note that the American Bar Association committee report — while supporting with statistics the assertion that the prosecution had sometimes prejudiced defendants—provided no corresponding proof with respect to defense lawyers.

The A.B.A. committee justified the curbs on defense attorneys on the ground that "it is inconsistent with the professional obligation of counsel for either side to resort to the media for public favor in a pending action."

The defense lawyers also assert that police officials, who could be held in contempt under

In the North, defense lawyers who represent unpopular clients or causes are particularly concerned about possible harassment.

Judge George Edwards of the United States Court of Appeals in Michigan said recently that "the hazard" involved in the American Bar Association approach "lies primarily in the use of the Canon of Ethics."

Question of Sanctions

"If direct sanctions are attempted against the press," he wrote, "it can always fall back in any contempt case on the First Amendment. But lawyers, who are just as brave as newspaper reporters in confronting threats of prosecution, are not brave in relation to being cited for unethical conduct. And against such a threat the First Amendment may prove of no value at all."

The bar association report gives the courts contempt powers over the press in limited circumstances during the trial. The Civil Liberties Union approach rejects this.