

6-2002

## The Party Line

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### Recommended Citation

Moskovitz, Myron, "The Party Line" (2002). *Publications*. Paper 54.  
<http://digitalcommons.law.ggu.edu/pubs/54>

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## The Party Line

By Myron Moskowitz

### The Party Line

It happens to every criminal defense lawyer. At a cocktail party some Citizens learn that an Enemy of the People is present. They swarm around the culprit and launch the attack: "How can you represent those bums? How can you live with yourself, knowing that you are putting criminals back on the street to rape, pillage, and plunder decent society?" And worse.

I've heard the usual answers, and I've seen the usual result: A well-rehearsed, well-expressed explanation-and an audience wholly unconvinced. But there's a different tack to take, what I call the I Help Convict the Guilty approach. That should catch their attention.

**Skeptic:** "What? I thought you try to get the guilty off!"

**Lawyer:** "I do. But most of the time I fail. So you can sleep soundly-knowing that the defendant truly is guilty because I did my damndest to show he wasn't."

To underscore your point, give an example of a recent, vicious crime.

**Lawyer:** "If the police arrest someone for that crime, you'd like to see him convicted and punished, right?"

**Skeptic:** "Absolutely!"

**Lawyer:** "Suppose no one is willing to represent the guy, so he goes to trial by himself. The police and the prosecutor think he's guilty, so they don't show the jury and judge some evidence that might cast doubt on his guilt. He says he's innocent, but he doesn't know how to investigate the case or argue his points very well. He gets convicted and sentenced to a long prison term or even death. Are you comfortable with that?"

**Skeptic (weakening):** "I'm not sure."

**Lawyer:** "OK. Let's say this no-lawyer system goes on for a while. Before long some enterprising reporters look into these convictions and find evidence that some of these guys are innocent. Are you OK knowing there's even a 10 percent chance that our society will be imprisoning or killing someone who's innocent?"

Focus on the system, not the lawyer. The system punishes people only when a jury is convinced beyond a reasonable doubt that they are guilty. A skilled person must help the defendant raise reasonable doubt. That's the defense lawyer's role.

**Skeptic:** "I see your point, I guess. But aren't there times when you know he's guilty? How can you represent him then?"

The usual answer- "I don't decide guilt-that's for the jury"-doesn't work. A bit of honesty might help here.

**Lawyer:** "You're right. Sometimes I do know he's guilty-because the evidence against him is overwhelming. Since there's almost no chance he'll be acquitted, I advise him to plead guilty. And he'll be convicted. I do try to get the best deal I can for him, to shorten his sentence. But I don't control the sentence. That's up to the prosecutor and the judge."

**Skeptic:** "Don't you defend him at trial even though you know he's guilty?"

**Lawyer:** "Yes, on occasion. He might reject my advice, because he has the right to decide what to do with his life. Or I might advise him that the prosecution's case is weak, so we should go to trial. And sometimes I know he's guilty because he told me. I can't tell anyone he told me, because that's confidential. If it wasn't, he wouldn't tell me anything, and I couldn't do a good job of representing him."

**Skeptic:** "Don't you just use technicalities sometimes?"

The usual answer to this one is: "Technicalities? You mean our hallowed constitutional rights?" This is a tough one.

**Lawyer:** "Sure, I make the arguments, but they rarely work. Like you, judges and juries don't like technical arguments that would let a criminal go free-especially for a serious crime. And when they do work, it's usually because the cops or the prosecutor broke the law themselves rather flagrantly."

**Skeptic:** "So you're happy when your guilty client goes free?"

Tell the truth.

**Lawyer:** "I confess, part of me is happy. I like to win-at sports, at cards, and at trial. But like any citizen, another part of me doesn't like criminals roaming the streets."

**Skeptic:** "But you made that happen!"

**Lawyer:** "No, the police made it happen by screwing up their investigation, or the prosecutor made it happen by presenting a lousy case. All I did was tell the judge and jury how they screwed up. And I'm helping law enforcement convict more crooks in the future, because my victory showed them where they screwed up and how they should do it better next time."

After a few drinks comes the clincher:

**Skeptic:** "OK, OK, I guess someone has to do it. But why you? Weren't you smart enough to get a real law job?"

Sorry, reader-you're on your own.

Myron Moskowitz is a professor of law at Golden Gate University in San Francisco.