

LETTER TO A YOUNG PUBLIC INTEREST ATTORNEY

*Sean Kennedy**

I went to law school in order to become a public defender who did death penalty work. I'm not exactly sure why I was so focused on doing that type of work before I really knew anything about law, but it really was my sole motivation for becoming a lawyer. I think it has to do with experiences I had when I was growing up in Omaha, Nebraska.

There was a family in our parish who lost their oldest daughter in a brutal murder. I was in eighth grade and everybody at my school talked constantly about the murder. A man named Harold Otey broke into the apartment of the oldest daughter very late at night to steal her stereo. When she awoke, Otey repeatedly raped, stabbed and strangled her. According to the local lore, the victim was in so much pain during the stabbing that she eventually begged Otey to kill her. I doubt this last detail is true, but we believed it as adolescents.

Otey was represented by an inexperienced lawyer. The state was represented by the most experienced homicide prosecutor in Nebraska. Otey was convicted of capital murder and sentenced to death. The family of the victim spent years waiting for the execution to occur. After extensive post-conviction proceedings, Otey was

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executed. Supposedly, Otey was very calm during the three jolts and smoke rose from his left leg. The victim's mom told the press, "It's over now and we're all very relieved." By the time of the execution, however, everybody in the victim's family had alcohol problems and was estranged from each other.

The same year of the Otey murder I was confronted with the other side of this issue when my friend Tom, who lived four houses down, was arrested for murder. I remember hearing a reporter on the radio say that Tom had hidden in the bushes at a park and ambushed a very young girl and started stabbing her. When the girl's teenage babysitter intervened, Tom fatally stabbed her and fled. I couldn't believe my friend would do something like that. It was an extraordinarily brutal and utterly senseless murder by a juvenile with no criminal history whatsoever. There was a manhunt to find him.

After Tom was arrested, my mom made a plate of food and told me to bring it to Tom's family. I didn't want to go. I remember standing in my friend's family kitchen and watching his mom, normally very reserved, sob uncontrollably. At trial, my friend's lawyers conceded that he killed the victim. They argued that his asthma medication caused him to act without knowledge of what he was doing. Tom was convicted of murder and sent to prison, and I never saw or heard from him ever again.

The next year I entered an all-boys Jesuit high school, where we studied and debated many social issues, including the death penalty. The teachers encouraged us to consider careers that would advance social justice and this is when I began to want to be a public defender. I took classes on the death penalty in law school and worked on a capital habeas case as law clerk. My interest in the Otey case never waned, and I followed it through the execution, which was a huge event in my hometown because powerful people had strong feelings on both sides of the issue.

I joined the Federal Public Defender's Office (FPDO) in Los Angeles in 1992. I have been a public defender for eighteen years and I have never regretted that decision. I believe in the work so deeply that it is difficult for me to reduce it to words. Nevertheless, the purpose of this letter is to give advice to young law students and lawyers who might be considering doing this work, so here is my best attempt:

- 1) Don't let people who have never done this work tell you

it is too negative. When I was a student at Loyola, some professors and many students told me that being a public defender would be “depressing” because of all of the poverty, mental illness, and sadness in our clients’ lives. Later, when I became involved in hiring decisions at the FPDO, I often heard of judges advising their clerks that being a deputy federal public defender would be depressing because “they lose all the time.” I can’t deny that I have lost many cases, but my experiences at the FPDO have been just the opposite of negative or depressing. The people at the office are smart, interesting, and indefatigable. The work is incredibly meaningful and uplifting. As a public defender, you do confront a lot of poverty, mental illness and sadness, but you also are trying to do something about it. You probably will lose many jury trials or appeals, but you will also learn to define victory in ways other than the number of cases won.

2) Focus on your presentation, rather than the result. Every public defender learns quickly that the better lawyer does not necessarily win. When the stakes are high—and the number of long mandatory-minimum sentences and death penalty-eligible cases seems to increase every year—it is understandable why a public defender would become paralyzed by fear of what will happen to the client if she loses the case. Some fear or apprehension is healthy because it will motivate you to keep working to find a defense or fine-tune the more difficult parts of your examinations. But preoccupation with what a jury or three-judge panel might do is a lose-lose situation. You can control how you present the case; you can’t control what the jury will do. Worrying about the latter is time and energy taken away from what you can control. Your time will be better spent preparing the best trial or oral argument you can.

3) Focus always on what your client wants out of the representation—not what you want out of it. Lawyers usually gravitate toward the public defender’s office because they want to act on their deeply-held beliefs about

poverty, race, or social justice. I certainly did. The chance to stand up for your beliefs is one of the best parts of being a public defender, and one should relish the clients and cases that let you do that. But there will be cases and clients that are really hard: the white supremacist charged with hate-crime murder has a right to representation just as much as any other client; the client who wants to cooperate with the prosecution and testify against his own friends and family in order to reduce his sentence has every right to do that, and the last thing he needs is disapproval or judgment from his own lawyer; a death row inmate has every right to tell the lawyers who fought tooth and nail to vacate his death verdict that he's disappointed with the result because he had hoped for a complete reversal—not life in prison in lieu of death. A private lawyer can turn down a client whose positions are offensive, but a public defender is there to defend every person in need, regardless of what he or she thinks of that client or that case. The point is to help the client achieve his or her legal goals, not to make us feel good about what we do.

4) Remember that you are lucky to do this work. Sometimes lawyers who have recently joined the FPDO focus on what they sacrificed to become a public defender: they may have left a job with much higher pay at a prestigious law firm or clerked for a federal judge, which is seen as the first step to becoming a powerful lawyer or government official. People who came from these positions received a lot of affirmation and respect for their career choices, which is not often the case when one becomes a public defender. Anybody who has done this work has been asked, "How can you defend those people?" Even clients will say they want a "real lawyer," not a public defender. It is understandable why someone in this situation would focus on what he or she gave up. But the opportunity to do meaningful legal work and help people in need is really a privilege, not a sacrifice. I have never met any lawyer who was a deputy federal public defender who didn't think that was the best job he or she ever had. I have received more

from this work than I have given.

5) Don't be too hard on yourself if you make mistakes. Public defenders take on the worst cases: the facts and the law are against us; resources are always stretched; emotions run high, especially in the high-stakes cases; and the death penalty utterly changes the nature of the litigation. The public defender often stands alone in the courtroom as he or she does not always cooperate with the other players, who are all working together to reach a common goal. Our own clients may be suspicious of us or skeptical of our abilities. All of this direct and indirect negative feedback makes it easy to question one's professional judgments. Maybe you made the mistakes you are being accused of—maybe you didn't. Either way, you are trying to help people in need under impossible circumstances. You can forgive yourself for losing the trial or appeal that you think you should have won. And don't be afraid to admit you blew a case.

That is not to say you should wash your hands of all mistakes, especially if those errors implicate effective assistance of counsel. What I mean to say is that it is impossible not to make mistakes in this work and that you shouldn't be discouraged by your own human frailty. One of the reasons that I like to litigate post-conviction cases dealing with ineffective assistance of counsel is because I, myself, have made so many serious mistakes that I understand how and why trial lawyers can render ineffective assistance under the circumstances defenders confront. Even lawyers who care a great deal about their clients can make mistakes.

In my opinion there is no way a person who has not been a public defender can truly understand the challenges or rewards of the job; only experience on the job can produce that understanding. But there is camaraderie within the community of public defenders and former public defenders which fosters a support system that will help you deal with the flood of complicated problems that will come your way.

Sincerely,

Sean Kennedy