

'Marcia Clark Investigates' Offers Entertainment, But Not Impact

One of the things I love the most about being an attorney is that moment when a stranger or new acquaintance finds out about my occupation. When someone learns that I am a practicing attorney, the next question is always “What type of law do you practice?”

And then it goes one of two ways...

Returning readers know that I solely practice criminal defense. When your average layperson meets a criminal defense attorney, my experience shows that their response is either “How can you defend criminals!?” or some form of excitement mixed with a question about their personal, family’s, or friend’s quasi-criminal issues.

So, as I was recently visiting a new dentist for a routine cleaning, the hygienist engaged me in common conversation. In between spit-suctions, I answered her occupational inquiry by informing her that I practice criminal defense. Lucky for me in my captive state, she responded with excitement as opposed to disdain. She wasn’t excited because she had the opportunity for some free legal advice, though. She was excited because she and her husband had started watching the A&E series *Marcia Clark Investigates The First 48*.

There's A Difference Between an Investigator and an Attorney

Now, I hadn't seen the show at that time, so I was genuinely interested in what she had to say. By her account, she enjoys the series because it depicts Clark investigating high-profile cases and discovering evidence that was never presented to the prosecution or to a jury. As we talked about the method and means employed by Clark to discover the new tidbits, one thought kept going through my head: Hindsight is 20/20.

Don't get me wrong: Marcia Clark definitely has plenty of bite to back up her bark. Not only was she an established prosecutor, but she also spent just as much time as a defense attorney. That's a balanced bag of experience. But with that experience has to come the acknowledgement that prosecuting and defending crimes is some of the hardest work in the business. It's easy to play back-seat driver. It's even easier to play Monday-morning quarterback.

Investigating and advocating, while sometimes related, are still two very distinct duties.

Legal Commentary Can Be A Good Thing

But there is a time and a place for legal commentary, and honestly, we are all probably better for it. Hell, you could argue I'm doing the same thing right now. I'm offering legal commentary in regards to someone else's legal commentary. Go ahead and track that trail down the epistemological rabbit hole.

But legal commentary can be a good thing. Under the ABA Model Rules of Professional Conduct: Preamble & Scope, attorneys have a professional responsibility to "further the public's understanding of and confidence in the rule of law and the justice system." There is nothing wrong with commenting on cases

in the appropriate manner and at the appropriate time. From everything I have viewed, I believe Clark is more or less furthering this goal.

There's an argument to make that she is undermining the "confidence in the rule of law and the justice system" but anyone with half a brain knows our system isn't perfect. It undoubtedly has issues that can and should be addressed. It's still the best one any society has come up with so far.

Attorneys should point out the system's flaws, but in the appropriate context. I guess that's one of the largest critiques I have: The series runs the possibility of relaying a false impression to the general public. Sadly, none of us in the trenches are blessed with some sort of omniscient knowledge that affords us all the facts all the time. If we were, there would be no innocent people in jail, and justice would always be served hot and ready.

That's not the world we live in, though. As much as attorneys pride themselves on their legal analysis, logic, and deductive reasoning, they are only human.

Mistakes happen. Life-altering decisions have to be made in the moment. Gut instincts must be followed—especially in jury trials.

It's Not Wrong Just Because Another Attorney Would Have Done It Differently

And that's the hardest part of advocating for someone charged with a crime: You are entrusted with that person's life and liberty. That real-life human being is trusting you to use your education, your experience, and your common sense to come up with the best defense. Your client is trusting you to make the right call at the right moment. But try as hard as you may, you still lose sometimes.

When I first started trial work, I took my lumps (and I still do, just like any other trial attorney who doesn't cherry-pick the cases taken to jury). After a tough loss, an older, wiser attorney once told me that 100 different attorneys can try the

same case 100 different ways. Now that I have a few more notches in my belt, I believe that with all my heart.

And to her credit, Clark seems to acknowledge that sometimes evidence simply doesn't make it to the jury. Whether it is something overlooked, something that was kept out by a judge, something viewed from the wrong perspective, or something that was simply a strategic decision on behalf of the attorney, juries don't always get all the facts. Regardless, they usually get the end result correct.

I've had to call into question other attorneys' strategies while working on criminal appeals and post-conviction applications. It's part of the job. I face the same scrutiny as well every time I try a case. I know that if I lose, some appellate attorney will be waiting to point out every perceived mistake they think I made. It's the nature of the business, and it goes both ways.

Still, ineffective assistance of counsel is always judged by the standard set forth in *Strickland v. Washington*. Usually, it all comes down to trial strategy. It's a variance on what that old attorney told me years ago: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

Experience-Based Strategy Isn't the Be-All and End-All

That thought, in conjunction with the series, brought me to a recent U.S. Supreme Court case regarding ineffective assistance of trial counsel. On May 14, 2018, the high court decided *McCoy v. Louisiana*. Robert McCoy was charged with murder. The prosecution wanted him executed because of the accusations. McCoy wanted to deny the accusations. McCoy's attorney wanted to save his life. McCoy and his attorney couldn't get on the same page as far as the best way to coordinate those goals.

The trial court in that case allowed McCoy's attorney to admit his client's guilt in hopes that he could convince the jury to spare his client's life during the punishment phase. It's an admirable defense, and it's definitely not the first time someone has employed it. Apparently, that wasn't the defense McCoy wanted, though.

His attorney, using his experience and professional judgement, went against his client's wishes and conceded guilt in hopes of showing the jury that McCoy's mental and emotional issues led him to commit the murders. The jury found McCoy guilty and sentenced him to death. The Supreme Court held that "the Sixth Amendment guarantees a defendant to choose the objective of his defense," even if it flies in the face of counsel's experience-based view of the case and trial strategy.

Strategy is organic. Sometimes you don't use evidence that is available because it confuses your defense. Sometimes you don't use evidence that is available because it opens up more risk than benefit. Sometimes you don't use evidence because you simply never knew about it. Sometimes it's simply a strategic call—no more, no less.

The A&E series fails on that human aspect. Clark could focus so much more on her background and explain to the viewer how and why, in her experience, the system works the way it does. With a solid budget, it's possible she could even help fix some broken cases.

New Evidence Can Change the Game — For the Defendant

Hopefully Clark makes me eat my words. I seriously mean that. If she uncovers evidence that is eventually used to exonerate someone, then hot damn. However,

from the episodes I saw, it seems the focus of the series is mostly on cases that resulted in acquittals. The Casey Anthony episode is telling.

There, Clark finds evidence that was not presented to the jury. It's arguably evidence that could have removed some of the reasonable doubt in the minds of the fact-finders. Viewers have to come to grips with the reality that the discovery really doesn't matter. Casey Anthony was acquitted of the murder of her daughter. No new evidence will change that. We have constitutional protections against double jeopardy. There are always arguments for a new trial after acquittal based on "dual sovereignty" issues, but those situations rarely occur in practice.

It would be much more satisfying to see her "investigate" cases where she has the potential to uncover new evidence which could assist someone who is wrongfully convicted. The only way to find something is to look for it. The justice system won't allow the prosecution another bite at the conviction apple, but it will allow a defense attorney to present evidence in certain situations that could reverse a conviction. Until the series focuses its attention in that direction, it's nothing more than entertainment.

By Adam Banner