

MAKING A MURDERER



by
George
Tragos



and
Peter
Tragos

Many doctors don't like watching TV shows that take place in a hospital or depict the ins and outs of the personal relations and struggles that doctors go through as they may be unrealistic, damaging to the aura that surrounds doctors or damaging to the profession. We lawyers, on the other hand, can't get enough of legal TV shows. We love laughing at the inaccuracies, laughing about some of the comical things that actually do happen when practicing law and feeling sad about the accurate depiction of many injustices that occur in our judicial system.

No legal drama is more current right now than the documentary series *Making a Murderer*. However, so many articles have been written about the evidence that was left out, the theories of who did it and the pounding of a fist for someone saying there is no way Steven Avery or Brendan Dassey committed these crimes. That's not what we are going to talk about in this article, so if you're looking for a theory of how to

get these men you feel are innocent out of prison, you can go ahead and stop reading. Instead, we want to take a look at this documentary from the perspective of a client, an attorney and the judicial system as a whole.

THE CLIENT'S PERSPECTIVE

Clients want to feel like they are an attorney's only and most important client. While they obviously realize this is not true, it is also not an unreasonable thing for them to think and feel. And as an attorney, we should want them to feel they are our only and most important client, especially for an attorney who practices criminal defense. A criminal defense attorney deals with the life, liberty and pursuit of happiness of each and every one of their clients. When a client is arrested and charged with a crime, they are looking at jail time, probation, fines and the stigma of a criminal record. This can affect their job prospects, their families and their

freedom. Therefore, it should be every criminal defense attorney's goal to make their client feel like his or her case is the only and most important case they have.

In *Making a Murderer*, on the other hand, you see that in Steven Avery's initial case where he was wrongfully convicted and exonerated, as well as Brendan Dassey's case where he was charged and convicted for the murder of Teresa Halbach, that they wanted to, but did not feel like, their attorneys' only and most important client. Many articles we've read about this stated that this is the cruel reality of low income and uneducated citizens because of their inability to afford a private defense attorney. There is some truth to that, as you see when you compare the court-appointed lawyers or public defenders in this documentary with the two private attorneys Steven Avery was able to retain in his case for the Teresa Halbach murder. Dean Strang and Jerome Buting are portrayed as much more capable and much more skilled than any of the court appointed attorneys.

The documentary even made it seem like Steven Avery was their only and most important case, because they were not only doing TV interviews for this case, but they were also traveling and staying in what seemed to be a hotel room or some venue outside of their hometown, and outside of their main office. In the documentary you often saw them working at Steven Avery's house or at some unknown location that was obviously not a law firm. The reason that private defense attorneys can make clients feel this way, and sometimes court appointed attorneys or public defenders cannot, is not based on the skill of the attorney, but is oftentimes based on the workload of that attorney. Private attorneys can pick and choose their cases and are able to spend the time and resources necessary on each case when the time comes for them to buckle down and go all in on the case. On the other hand, court appointed attorneys and public defenders sometimes are forced to take more cases than they can handle. Something many people outside

the legal community don't know is that many of the nation's greatest criminal defense attorneys got their start as a public defender or as an attorney who took court appointed cases. Today some of the best criminal defense lawyers we know are public defenders or court appointed lawyers. So again, it is not that these attorneys are incompetent or uneducated, it may merely be that they are a victim of their own circumstances. The client's perspective in this documentary is that the private defense attorneys do a much better job putting together a defense than any of the public defender or court appointed attorneys.

When we watched this documentary and thought about it from a client's perspective, our first thought is in the realm of criminal defense you get what you pay for. Steven Avery spent in the neighborhood of \$240,000. In addition to the money, Mr. Strang and Mr. Buting are now traveling the country speaking about this case and have garnered fame and respect based on the work they put in on a case they lost. So again, from a client's perspective it's not always about winning and losing, but it's about having a fair defense and feeling like your case is important. This documentary showed that Steven Avery was provided with a fair and competent defense, whether or not the prosecution and law enforcement action was fair, however, is another question.

AN ATTORNEY'S PERSPECTIVE

As attorneys who pride ourselves on ethics and hard work, two individuals stuck out to us. The first was Ken Kratz, who was the Special Prosecutor, District Attorney of Calumet County, Wisconsin, who prosecuted the Halbach murder cases. His recitation of Brendan Dassey's coerced confession in front of the media to taint any semblance of a jury pool that may have been available to Steven Avery and Brendan Dassey is unethical, embarrassing to the profession and unfortunately true in some cases. On the other hand, especially in our county, the bad apples are greatly outweighed by the great

prosecutors we are lucky to have. The nation as a whole, unfortunately, does include some bad apples like Ken Kratz. Our favorite part of the entire documentary, as sad as this sounds, is when Ken Kratz was subjected to the public ridicule of his sexting scandal and his fall from grace. We never like to see someone fail or struggle, but in this case we believe his injustices caught up with him.

The next individual in this documentary who made us sick was Lee Kachinsky. Mr. Kachinsky, whom we've read now is a judge, was more concerned with the media and his fame than he was with his client. We'd like to think it is not a common occurrence for criminal defense attorneys to hire investigators to coerce a second confession from their client. We've never heard this happening before in our industry and would like to think that he's not just a bad apple, but is an orange in the basket full of apples that are criminal defense attorneys. To compare him with the criminal defense attorneys we know would be an injustice, and inaccurate. The fact that he openly spoke about his client confessing and taking a plea deal not only hurt his client's case, but it was an embarrassment to the criminal defense attorney community. Again, this has nothing to do with the competence of Lee Kachinsky because of his court appointed status; this is a character issue and not a competence issue. Instead of working on a defense or attacking the prosecution's case (including a gold mine of coerced statements), he decided to get as much face time as possible in front of the camera. He was way too happy about the sad circumstances surrounding his client and it was a lesson on ethics all on its own.

While this documentary was obviously slanted toward Steven Avery and against the prosecution, these two individuals stuck out to us as despicable.

FROM THE JUDICIAL SYSTEM'S POINT OF VIEW

Many people think the confession of Brendan Dassey was coerced, the

conviction of Mr. Dassey and Mr. Avery was wrongful and the judicial system has ruined the lives of two men who did nothing wrong. While we agree that a criminal conviction and time in prison is a sad event, the judicial system does have checks and balances in place to protect the rights of citizens. There are many things a jury, and the general public, did not see that occurred in this trial. There are rules in place that keep certain facts and events from the jury for reasons that have been litigated, judged and legislated. Many times a jury will not see photographs because they are too graphic and would be used just to "inflame their passions;" some statements are not allowed in trials because their accuracy cannot be determined, and some evidence is often disallowed because its purpose is to trick or confuse the jury rather than to prove a relevant point. Often times the general public hates that these rules exist. They believe the jury should hear anything and everything that has some connection to a case or a defendant. The problem is these irrelevant or inflammatory facts can be used to take the jury's attention away from the law and relevant facts upon which they have to make their decision. Without protections such as these, anyone who has ever made a mistake in their past would continue to be convicted of it whether or not it had anything to do with their current situation. Additionally, without proving the accuracy of a statement, self-serving lies would be admitted into evidence from both sides which, again, could create an unjust outcome. As much as we disagree with the way these laws are applied at times, it is clear justice would not be served without them.

To think that we know the whole story based on a 10-hour documentary would be ignorant. Everyone is entitled to their own opinion, obviously, but we will never know everything that occurred and everything that the lawyers, judges and law enforcement knew about this case.

Additionally, the fact that this documentary insinuated that these convictions were wrongful does not mean

that an appellate judge or post-conviction attorney has what is necessary to overturn these convictions. A seemingly coerced confession (which was available at trial) does not mean an appellate judge should overturn a conviction which was the result of many other factors and pieces of evidence. In fact, if such evidence existed, our guess is these cases would be overturned and America as a nation, we are sure, would rejoice. There are procedures and rules in place that at times can seem unfair and many of the general public does not like, but without them our judicial system would fall apart.

We have to agree that our judicial system is more difficult to navigate for a person who is uneducated and of low socioeconomic status. We think this is a fact, and a problem. However, it does not change the current rules in place, and it does not mean that every uneducated and low socioeconomic convict is innocent or was not provided a fair defense.

OUR THOUGHT ON WHETHER THE CONVICTION WAS WRONGFUL

We couldn't help ourselves; we have to put our two cents in on what we think about whether or not this conviction was wrongful. After viewing a small part of the evidence and facts in this case (the entire documentary from beginning to end, in addition to numerous articles written about what was left out) our gut tells us that Steven Avery had something to do with the murder of Teresa Halbach. However, as the rules in criminal courts in our nation stand, we do not believe the prosecution met its burden in proving

Mr. Avery and Mr. Dassey's guilt beyond a reasonable doubt. Therefore, if we were on the jury our vote would have been for not guilty. Again, just because our gut tells us that Mr. Avery is not innocent, does not mean that the prosecution proved his guilt. If we as citizens do not abide by the rules and laws of our land, it opens up avenues for innocent people to go to prison. We stand with Ben Franklin when he said, "That it is better 100 guilty persons should escape than that one innocent person should suffer."

With Brendan Dassey, on the other hand, we do not see how there was enough evidence to charge him with this crime, let alone convict him. The coerced confession was a sad reality of what law enforcement officers who don't play by the rules can do to an uneducated and impressionable individual. His conviction

was the toughest for us to watch. Again, we would like to believe in our judicial system and believe that there was a lot more evidence than we were able to see in the documentary, because based on what we saw, we just don't get it.

UPDATE ON AUGUST 15, 2016

This article was originally written in May 2016. Since then, a federal judge in Milwaukee has overturned Brendan Dassey's conviction on August 12, 2016. The faith we urged others to have in our judicial system has seemingly paid off. The judge cited the manner in which Brendan's confession was obtained as a main focus of his decision as well as the conduct of Lee Kachinsky. The system isn't perfect, but our country is one of checks and balances in hopes that if a mistake is made, there is a remedy. 🏠

GEORGE E. TRAGOS is managing partner of the Law Offices of Tragos & Sartes, P.L., and a Past President of FACDL. He received his B.A. and J.D. from Florida State University. With an "AV" rating by Martindale-Hubbell, he is listed in Florida SuperLawyers, Florida's Top Lawyers and The Best Lawyers in America in both white collar and non-white collar criminal defense categories. He has served as Chief of the Felony Division for the State Attorney's Office of Pinellas and Pasco Counties and Chief of the Criminal Division for the United States Attorney's Office Middle District of Florida. He also served as Lead Trial Assistant in the Department of Justice for the President's Organized Crime Drug Enforcement Task Force. He has served as a Commissioner to the West German Government and represented the United States in the courts of Switzerland. He resides in Clearwater with his wife Demetria, and has three children.

PETER L. TRAGOS graduated cum laude from Florida State University College of Law, where he was awarded the O'Ryan Law Firm Book Award for the highest grade in class in Constitutional Law I. He won a National Championship as a member of FSU Law School's Mock Trial Team and was given the award for best oralist while a member of FSU Law School's Moot Court Team. Since law school he has obtained a 10.0 superb rating with AVVO legal rating service and has been designated by the National Association of Distinguished Counsel in the top one percent. He chairs the Civil Section and the Technology Section of the Clearwater Bar Association and serves on The Florida Bar Traffic Rules Committee as well as belonging to various professional and civic organizations. He resides in Dunedin with his wife Whitney and their two children, Brooklyn and George.

30TH
ANNUAL
MEETING

JUNE 8-11, 2017 MANALAPAN, FLORIDA

