SYMPOSIUM

Limitations on the Effectiveness of Criminal Defense Counsel: Legitimate Means or "Chilling Wedges?"

FOREWORD

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> Recent experience has required more aggressive prosecution of society's fight against the mounting evils of crime. We commend both vigorous prosecution and all legitimate means in aid of this laudable task. This, however, does not mean that society can afford a "no holds barred" approach to law enforcement lest the "solution" engender faults of an equally serious nature.[1]

A lawyer owes ethical obligations not only to the lawyer's client, but also, as an officer of the court with a duty to uphold the Constitution, to the legal system. These ethical obligations are especially urgent in the area of criminal law, where the liberty and perhaps the life of the defendant are at stake as well as the vindication of the victim's rights. In this situation, when emotions run high on both sides, the prosecutor and defense counsel can easily cross the line between ethical and unethical conduct in an attempt to "win at all costs"— never mind whether justice is served. This Symposium examines some of the ethical dilemmas that defense counsel may encounter.

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[1] United States v. Klubock, 832 F.2d 649, 658 (1st Cir. 1987), *vacated,* United States v. Klubock, No. 86-1413 (1st Cir. May 1, 1987) (order granting rehearing en banc, which withdrew the panel's opinion and vacated its judgment); *see also* United States v. Klubock, 832 F.2d 664, 665 (en banc) (Torruella, C.J.) (stating that the half of the en banc panel voting to affirm the district court also "abide[d] by the majority panel opinion").

The Symposium reprinted below was held on March 1, 1988, at the University of Pennsylvania. It was sponsored by the *University of Pennsylvania Law Review,* the Center on Professionalism at the Law School, and the Law School Council of Student Representatives. Support for the Symposium was also provided by the Law School's Alumni Society. The Symposium offered an exchange between private practitioners, government attorneys, and academics.

Section one addresses the issue of when the government may subpoena defense counsel to testify before a grand jury. The prosecutor typically will be seeking information pertaining to client identity, fees, or future criminal activity of the client. The danger of subpoenaing defense counsel is that it "drives a chilling wedge" between counsel and client. This is so not simply because the rules of professional conduct discourage,[2] and sometimes prohibit,[3] an attorney in a case from being a witness in that case, but also because of its deleterious impact on the attorney-client relationship, especially the client's willingness to communicate with the attorney.

Section two concerns investigating criminal defense counsel suspected of criminal wrongdoing. Everyone agrees that attorneys engaged in criminal conduct should be investigated and prosecuted, but overzealous investigation, employing modern crime detection techniques such as electronic surveillance, may intrude into the zone of a legitimate attorney-client relationship. There must be reasonable and adequate safeguards on investigatory techniques that balance the conflicting concerns of ensuring the sanctity of the attorney-client relationship while permitting the prosecution of unethical attorneys.

Section three considers the effect of *Nix v. Whiteside*[4] on the criminal defense practice. The papers examine the implications of perjurious testimony by criminal defendants on counsel's ability to present a zealous defense. Specifically, the issues discussed are: (1) how much knowledge must the attorney have before acting on the conclusion that the client's testimony will be perjurious; and (2) what should the attorney do in anticipation of client perjury or when the client commits perjury?

Finally, section four considers how various limitations on defense counsel may affect the defendant's sixth amendment right to counsel.[5]

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[2] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1987); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(b) (1980) *id.* DR 5-102.

[3] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1987); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(b) (1980) *id.* DR 5-102.

[4] 475 U.S. 157 (1986).

[5] *See* U.S. CONST. amend. VI.

The papers discuss the scope of the right and the impact of the federal fee forfeiture statute,[6] which requires defense counsel to forfeit any fee that came from the proceeds of a criminal enterprise.

In sum, the papers that follow are a significant contribution to the field of legal ethics. They recognize the importance of the attorney-client relationship as one of the cornerstones of our criminal justice system, while at the same time acknowledging the necessity of some limitations on the activities of defense counsel. How to achieve a proper balance of these conflicting concerns is the common theme of the debate that follows.

[6] Pub. L. No. 98-473, §§ 303-309, 98 Stat. 1837, 2044-53 (1984).