2008

Ethics in Criminal Advocacy

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CHAPTER 12

ETHICS IN CRIMINAL ADVOCACY

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It has been an interesting year for members of the ABA Criminal Justice Section Committee on Ethics, Gideon and Professionalism and for others interested in issues of ethics in criminal advocacy. It would be impossible to hit all the highlights, and any list is bound to be subjective, but here is ours.

I. CORPORATE CRIMINAL INVESTIGATIONS AND THE ATTORNEY-CLIENT PRIVILEGE

The saga continued. For the past three years, bar associations and other representative organizations have opposed Department of Justice ("DOJ") policy on corporate criminal investigations and prosecutions. The ABA Task Force on the Attorney-Client Privilege, on which the Criminal Justice Section is well represented, has been among those taking a leading role. A committee of the Section has also contributed on this issue closely. The key question is, what can DOJ fairly expect (or require) of corporations seeking credit for "cooperation" and, thus, lenient treatment. Among the types of "cooperation" by prosecutors that federal prosecutors have sought or encouraged at various times have been: (1) providing information otherwise protected by the attorney-client privilege or work product doctrine, such as notes of interviews made during an internal investigation; (2) firing employees who will not cooperate with the prosecutors; (3) refraining from joint defense agreements and other information sharing arrangements with individuals.

The District Court's opinions in *United States v. Stein*, the tax prosecution of KPMG representatives, have bolstered the bar's efforts to challenge DOJ policies that enable prosecutors to seek this kind of cooperation or reward it when it is provided, at the expense of the attorney-client privilege, the employees' right to indemnification of legal fees, and parties' right to pursue information unimpeded by the government. On July 16, 2007, relying on an earlier opinion, the court dismissed indictments against thirteen former partners or employees of KPMG, finding that prosecutors had violated their right to counsel by inducing KPMG not to pay their legal fees. Although the government's appeal is pending, it modified its prior policy by replacing its "Thompson Memorandum" with the "McNulty Memorandum," which places greater procedural and substantive restrictions of prosecutors involved in corporate criminal investigations. On January 4, 2007, Senator Arlen Specter introduced legislation which would further restrict DOJ, and a companion bill was introduced in the House of Representatives. Both bills are still pending, opponents of DOJ policy remain busy, and further developments can be expected. Stay tuned.

II. THE "UNITED STATES ATTORNEYS SCANDAL"

The past year saw congressional investigations, still ongoing, into whether DOJ, to serve the partisan political interests of the President and his party, have abused their power in several ways, including by prosecuting individuals for political advantage, and by firing U.S. Attorneys

who would not exercise their power in accordance with political objectives. The overall saga has been referred to as "the United States Attorneys Scandal" by the *New York Times* and others. What is objectively known is that seven U.S. Attorneys were fired and replaced by interim appointments without Senate confirmation (as permitted under a little-noticed Patriot Act provision that has since been repealed). Lack of clarity about who was responsible and the reasons for the firings led to resignations of high-ranking DOJ political appointees, including Attorney General Gonzales, who failed to answer questions to many Senators' satisfaction. The suspicion is that fired U.S. Attorneys failed to fulfill expectations prior to the 2006 elections that they would pursue corruption charges or other charges against Democratic candidates and those associated with them, refrain from pursuing those associated with the Republican party, or use their authority in voting rights cases and other matters to benefit Republican candidates. On the other side of the coin, some suspect that weak cases were brought by U.S. Attorneys (who were not fired) based on partisan considerations. The ongoing developments have earned a lengthy Wikipedia entry titled, more neutrally, "Dismissal of U.S. attorneys controversy."

III. THE DISBARMENT OF MICHAEL NIFONG

Durham Country District Attorney Michael Nifong, another Wikipedia entrant, lost his law license for misconduct in the so-called "Duke Lacrosse Case," involving sexual assault charges brought in 2006 against members of the Duke lacrosse team. Despite what turned out to be Nifong's failure to speak personally with the stripper who was the alleged victim, Nifong pursued the charges aggressively both in court and in the press. Even before Nifong withdrew from the case in favor of the state attorney general, who dismissed the charges for being utterly unfounded, the state bar commenced proceedings against Nifong. The initial charges for violating restrictions on discussing the case in the media were ultimately supplemented with more serious ones for withholding exculpatory material and making false statements to the court. In June 2007, after five days of hearings, the disciplinary committee sustained the majority of the charges and voted to recommend Nifong's disbarment. Rather than continuing to defend himself, Nifong surrendered his law license the following month, and, to complete the story, in August, the trial judge found him in contempt and sentenced him to a $500 fine and a day in prison, which Nifong then served.

IV. DEFENDING GUANTANAMO DETAINEES: DIFFERING VISIONS OF THE LAWYER'S ROLE

The detention of alleged "enemy combatants" has raised various questions about the role of defense lawyers. At the outset, questions were raised whether it was even ethical for lawyers to attempt to defend the detainees, given the restrictions placed on them by the government. If lawyers cannot freely communicate with their clients and cannot meaningfully advocate on their behalf – in other words, if they cannot provide competent counseling, engage in competent information gathering, and provide zealous advocacy as contemplated by the conventional rules of ethics – is it ethical for them to participate at all? Many lawyers overcame these concerns, including lawyers from corporate law firms who undertook to represent Guantanamo detainees on a pro bono basis in order to help fulfill our profession's commitment to provide legal assistance to those most in need and to attempt to make the adversary process work in Guantanamo.

In January 2007, the Deputy Assistant Secretary of Detainee Affairs, Charles "Cully" Stimson, himself a lawyer, called his professional brethren's conduct "shocking." In a radio

interview, he invited their corporate clients to take revenge, stating: "I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms." The organized bar responded swiftly and vehemently, leading Mr. Stimson first to apologize and affirm his commitment to the principles of the U.S. legal system, and then to resign. (High-level resignations seems to be a theme in "this year in ethics.") Meanwhile, the government sought to place even greater restrictions on the detainees' private lawyers, further limiting their access to their clients and their access to secret evidence, suggesting that the lesson learned belatedly by Stimson about the importance of counsel in our adversary system of justice has not been universally assimilated.

V. OVERBURDENED CRIMINAL DEFENSE LAWYERS

Okay, this is not news – or at least not new. And their burdens may not compare to those shouldered by lawyers for the Guantanamo detainees. Even so, criminal defense lawyers in many parts of the country continue to be impeded from providing competent representation by under-funding and excessive case loads. For example, in July 2007, Knox County, Tennessee, public defender asked that his office be relieved from assignments in misdemeanor cases and threatened to withdraw from some felony cases to address under-staffing. To illustrate his office's difficulties, he pointed to a staff member with 60 cases set for trial, more than half of which were felonies. Similar problems were experienced elsewhere.

Judicial sympathy for public defenders' difficult conditions has not been universal. In August, a Kent, Ohio judge, John Plough, held a young public defender in criminal contempt for refusing to a defend an assault case to which the court had assigned him only 2½ hours earlier. The young lawyer complained that he lacked sufficient time to prepare. The judge countered that the lawyer had frittered away the lunch hour. To many, the case illustrates the wrong judicial response to the inadequacy of resources for criminal defense – namely, lowering the expectations for competent lawyering.

For their part, public defenders find themselves between a rock and a hard place. Recently, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion, Opinion 06-441, which sensibly concluded that having an excessive caseload is no excuse for depriving a client of "competent" and "diligent" representation, and that there is "no exception for lawyers who represent indigent persons charged with crimes." The ABA Criminal Justice Section continues to play a leading role in pressing states to improve appointed counsel systems, including by providing the necessary resources, in order to give meaning to the Sixth Amendment right to competent counsel and relieve public defenders of the untenable choice between refusing appointments and shortchanging clients.

VI. CODIFYING THE PROSECUTORIAL DUTY TO RECTIFY CONVICTIONS OF INNOCENT INDIVIDUALS

Finally, in a development in which our committee takes particular pride, the Council of the Criminal Justice Section has voted this year to propose that the ABA adopt amendments to the prosecutorial ethics rule, Rule 3.8 of the ABA Model Rules of Professional Conduct. The proposed provisions, based on similar ones adopted by the New York State Bar Association, would apply to prosecutors who learn of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which he was

convicted. Broadly speaking, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor would be required to disclose the evidence to the court and the defendant, conduct or instigate an investigation, and, if clear and convincing evidence ultimately established the defendant's innocence, seek to remedy the conviction. (Where the conviction was obtained in a different jurisdiction, the prosecutor would have to refer the evidence to the appropriate prosecutor or court of the relevant jurisdiction.)

The rule will codify what prosecutors regard as a minimal requirement. Prosecutors in the Section's leadership agreed that, in general, good prosecutors will follow up on new evidence in many situations where the proposed rule would not require it. At the same time, the Section's leadership agreed on the importance of codifying prosecutorial duties upon learning of possible false convictions, since the obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is a fundamental professional obligation of criminal prosecutors. Thus, we end on by applauding the Section's Council for contributing a very positive development to an otherwise challenging year.