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Ethics in Criminal Advocacy

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CHAPTER 14

ETHICS IN CRIMINAL ADVOCACY

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This has been a remarkable year for significant public focus upon ethics issues in criminal advocacy. Cases involving individual prosecutors and defense lawyers as well as institutional issues in the criminal justice system have made headlines. Other issues percolate within the legal community. The ones we have chosen to include below are those that have particularly piqued our interest this year.

I. THE "UNITED STATES ATTORNEYS SCANDAL"

In September, 2008, after lengthy investigation, Glenn Fine, Inspector General (IG) of the Department of Justice (DOJ), and Marshall Jarrett, Director of DOJ's Office of Professional Responsibility, released a 358-page report finding that the process leading to the discharge of nine U.S. Attorneys was "arbitrary," "fundamentally flawed," and "raised doubts about the integrity of the Department's prosecution decisions."

In December 2006, Attorney General Gonzales fired the nine U.S. Attorneys and replaced them by making interim appointments without Senate confirmation under a then-existing Patriot Act reauthorization provision. Dubbed the *U.S. Attorneys Scandal* in the New York Times, Congress undertook investigations that focused upon whether the Department of Justice and the White House used the U.S. Attorney positions for political advantage. Allegations were that some of the attorneys were targeted for dismissal to impede investigations of Republican politicians and that some were targeted for their failure to initiate investigations that would damage Democratic politicians or hamper Democratic-leaning voters.

The IG's report contained "substantial evidence" that party politics drove a number of the firings, and the IG released a statement that Attorney General Gonzales had "abdicated his responsibility to safeguard the integrity and independence of the department." The report did not resolve questions about higher White House involvement in the firings. It said it could not do so due in part to the refusal by a number of White House officials to cooperate and the White House's refusal to turn over relevant documents.

The day after the IG's report was publicly released, Attorney General Michael Mukasey appointed a special prosecutor, Nora Dannehy, to decide whether criminal charges should be brought against former Attorney General Alberto Gonzales and other officials involved in the firings. Apparently, Dannehy will have more investigative authority than DOJ's Inspector General and Office of Professional Responsibility. Stay tuned.

II. CORPORATE CRIMINAL INVESTIGATIONS AND THE ATTORNEY-CLIENT PRIVILEGE

After more than four years of controversy over DOJ's policy on providing leniency to potentially indictable corporations in exchange for their "cooperation" with corporate criminal investigations, the Second Circuit upheld District Court Judge Lewis Kaplan's dismissal of criminal tax-shelter fraud charges against 13 former employees of KPMG, an accounting firm. In *U.S .v Stein*, the Circuit found that the remedy was appropriate for the prosecutors' interference with the defendants' constitutional right to counsel.

KPMG had advanced fees to individual employees in connection with the government's investigation into the promotion of illegal tax shelters. The government, pursuant to DOJ's then-existing Thompson guidelines, informed KPMG that paying legal fees for its employees would be taken into account negatively in the decision as to whether the company would be prosecuted. KPMG then capped and ultimately terminated the fees to the employees.

In a repudiation of the government's position, the Circuit ruled that the government "unjustifiably interfered with defendant's relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment." The late August, 2008 ruling came shortly before DOJ announced a revision of its guidelines for the investigation of corporate crimes. In these changes, the government explicitly provides that the prosecution in assessing a company's cooperation is not to consider whether the company has advanced fees to employees.

Other aspects of the new DOJ policy remain controversial, especially its guidance regarding information subject to the corporation's attorney-client privilege. Although the policy on its face is more protective of privileged information than previous policies, critics argue that corporations will still be under pressure to disclose privileged material in order to obtain leniency. Federal legislation has been sought to provide more assured protection. The ABA Task Force on the Attorney-Client privilege continues to play a key role on behalf of the ABA in advocating for the preservation of the attorney-client privilege in corporate criminal investigations. Whether a new Attorney General or a new Congress will bring about further changes in 2009 remains to be seen?

III. GUANTANAMO DETAINEES: ETHICS ISSUES FOR PROSECUTORS AND DEFENDERS

On January 21, 2009, President Obama signed his first executive order which mandated the closure of the Guantanamo Bay detention camp within a year. The President ordered the prosecution to move for a 120 days stay of all military commissions. In all cases but one, the continuance request was granted. On February 5, 2009, Army Col. James Pohl, the Chief Judge at the Guantanamo Bar war crimes court refused to heed the request for detainee al-Nashiri and has scheduled proceedings in that case. While criticizing the military commissions, the Administration has yet to announce its plans for prosecution of certain detainees. It has yet to propose a plan for repatriation or securing safe haven for other Guantanamo detainees.

The long awaited decision to close Guantanamo Bay detention camp follows years of international censure of the treatment of the alleged "enemy combatants." Prior to President Obama's actions, this year's Guantanamo litigation, discussed below, continued to raise fundamental questions about the rule of law and the role of prosecution and defense counsel.

In June, 2008, after six years of challenges to the government's denial of habeas corpus relief to Guantanamo prisoners, the Supreme Court ruled in *Boumediene v. United States*, a historic 5-4 decision, that the detainees have a constitutional right to habeas corpus to challenge

their detention. *Boumediene* was the culmination of years of litigation and legislation regarding the right to judicial review of detainees' claims. In 2004, the Supreme Court in *Rasul v. Bush* rejected the government's argument that detainees had no right of access to federal courts and ruled that the detainee habeas cases could be heard pursuant to the federal habeas statute. Subsequently, Congress attempted to overturn that decision by the Detainee Treatment Act (DTA) and subsequently the Military Commissions Act (MCA) that eliminated habeas jurisdiction for any "enemy combatant" in U.S. custody. The MCA created a limited review proceeding in the Court of Appeals of the District of Columbia for an individual to challenge the military's classification as an "enemy combatant."

Boumediene decided that those portions of the MCA that attempted to circumvent access to federal courts to challenge the lawfulness of the detention were unconstitutional. The court did not address the constitutionality of military commissions. The government has proceeded with fifteen such commissions.

Since the inception of these military commissions, lawyers and human rights organizations have complained of fundamental flaws in the process. These include interference with the lawyer-client relationship and the admissibility of hearsay evidence and evidence obtained by coercion or torture. Critics also complain of the inability to adequately defend the cases due to such factors as the inaccessibility of critical evidence and the inability to share some evidence with the client.

Soon after the decision in *Boumediene*, the military announced additional military commissions and in August, 2008 began its military commission against Osama Bin Laden's former driver, Salim Hamdan. Tried before a panel of six senior military officers whose names were not made public, Hamdan was convicted of providing material support for terrorism and acquitted of the more serious charge, conspiracy to provide material support. The trial and its results were criticized as the product of a fundamentally flawed system with critics noting that even if Hamdan had been acquitted, he could be held in prison for the rest of his life.

Among the fundamental ethical issues raised in military commission representation is *pro se* representation by clients who may be suffering from mental illness or otherwise have diminished capacity, in great measure, as a consequence of their treatment at Guantanamo. In the Ramzi Binalshibi military commission, the detainee told the military judge that he resented his lawyers' assertions that he had a mental illness and sought to represent himself. In response, the lawyers argued that the conditions of detention raised serious questions about the client's ability to stand trial and requested an inspection of notorious Camp 7 where some of the "high value" detainees are held. In late October 2008, military Judge Ralph H. Kohlmann broke new ground by ruling that defense lawyers may inspect the premises. This visit will be the first by any defense lawyer to the lockup facility. Further motions are sure to follow.

The Guantanamo cases have equally focused attention on prosecutorial ethics. In September, Army Lt. Col. Vandeveld, the prosecutor in the military commission against Mohammed Jawah, resigned. In a highly publicized turn of events, he filed a declaration that the "slipshod, uncertain 'procedure'" for affording defense counsel discovery resulted in suppression of exculpatory material. He decided that his "ethical qualms" led him to believe that he could not longer serve as prosecutor in the Commissions. He testified that he went from being a "true believer" to someone who felt truly deceived and that the military facility at Guantanamo "deprived the accused of basic due process and subject the well-intentioned prosecutor to claims of ethical misconduct."

A week after the explosive Vandeveld resignation, the US Air Force and the Department of Defense announced that it was conducting independent investigations as to whether Brigadier

General Thomas W. Hartmann abused his power as Legal Adviser to the military commission's Convening Authority. The Defense Department probe is based upon allegations that in 2007, Hartmann intervened into operations of the prosecution, pressuring prosecutors to initiate charges against the detainees suspected of the being the most senior members of Al Qaeda.

It is unclear whether the military commissions will continue in the Obama administration. [Ed. Note: They have been halted for 120 days to consider the next step.]

IV. A PROSECUTOR'S APOLOGY IN JONBENET RAMSEY CASE

In a welcome action, Mary T. Lacy, District Attorney for the twentieth judicial district in Boulder, Colorado, sent a letter of apology to John Ramsey, father of JonBenet Ramsey, putting to rest any suspicion of the parents' involvement in the notorious "brutal and senseless" killing of their daughter. Lacy, who was not the District Attorney at the time of the killing, acknowledged that the new "scraping" methods to analyze DNA resulted in the presence of unexplained male DNA on the child's clothing. Lacy's letter said "to the extent that we may have contributed in any way to the public perception that you might have been involved in this crime, I am deeply sorry. No innocent person should have to endure such an extensive trial in the court of public opinion, especially when public officials have not had sufficient evidence to initiate a trial in a court of law. I have the greatest respect for the way you and your family have handled this adversity." The letter of apology might serve as a model for prosecution offices that, even if unintentionally, inflicted pain on suspects who are eventually cleared. Prosecutors are used to "confessing error" when they make procedural mistakes in court, but the erroneous investigative measures in cases such as this one take a far greater toll on innocent individuals' lives and may be far more in need of "confession."

V. LITIGATION OVER A CLANDESTINE RELATIONSHIP BETWEEN THE PROSECUTOR AND JUDGE IN A TEXAS CAPITAL CASE

In yet another publicized matter, death row inmate Charles Dean Hood sought habeas corpus before the Court of Criminal Appeals of Texas, because the judge and the prosecutor had an undisclosed romantic relationship at the time of his trial. Rumors had swirled around the courthouse for years but neither the judge nor the prosecutor ever disclosed their clandestine relationship. In June 2008 a former district attorney came forward and signed an affidavit stating that the affair was common knowledge in the prosecutor's office during the time of trial. Hood's attorneys now allege that the "damage to Mr. Hood's constitutional right to a fair and impartial tribunal" because of the relationship was "obvious and egregious." In early September, 2008, state court Judge Brewer ordered Judge Holland and Tom O'Connell to submit to depositions. Proceedings continue.

VI. WRONGFUL CONVICTIONS AND ATTORNEY-CLIENT CONFIDENTIALITY

In yet another of hundreds of documented wrongful convictions, Alton Logan was released after spending 26 years in an Illinois prison for the first-degree murder of a security guard at a McDonald's restaurant in Chicago. At his trial, three eyewitnesses identified him as the killer. Logan, his mother and brother all testified that he was asleep at home at time of the murder.

Chicago attorneys Dale Coventry and Jamie Kunz were instrumental in Logan's release, though for a unique reason: the attorneys knew that Logan was innocent because their client, Andrew Wilson, had confessed to them that he was responsible for the killing. Tormented by their silence, the attorneys convinced their client to let them reveal the information upon his death. Coventry and Kunz said they would have spoken up earlier if Logan had been given the death penalty. Released from prison in March, 2008 but subject to a new trial, Logan was finally exonerated in September, 2008 when all charges were dismissed by the Illinois Attorney General.

Aired in March 2008 in a *60 Minutes* television documentary, the story of the lawyers' dilemma sparked controversy and increased interest in the question of whether, and under what circumstances, there should be an exception to confidentiality obligations to permit revelation for wrongful convictions. The Logan story followed two highly publicized cases that raised similar questions one year earlier. In 2007, in North Carolina, attorney Staple Hughes faced a disciplinary charge for revealing a confidential statement by his deceased client exonerating his codefendant, Lee Wayne Hunt. In Virginia, attorney Leslie P. Smith revealed unethical prosecutorial conduct in preparing his client to testify falsely against his co-defendant Daryl R. Atkins. Smith's disclosure of the prosecutorial conduct after his client's death prompted a commutation of Atkin's death sentence to life imprisonment.

In response to these scenarios, the ABA Criminal Justice Section's Committee on Ethics, *Gideon* and Professionalism, which we co-chair, has debated whether the ABA should adopt an exception to the confidentiality rule (ABA Model Rules of Professional Conduct Rule 1.6) for lawyers who possess evidence that another is wrongfully convicted. The Committee is currently reviewing a proposal for a narrow exception to permit (but not require) disclosure of a deceased client's confidences to the extent that the lawyer" reasonably believes necessary to prevent or rectify the wrongful conviction of another." The Committee discussed the proposal at the August, 2008 annual meeting of the ABA and then invited the input of the National Association of Criminal Lawyers.

This work follows on the heels of the Committee's previous work in the development of Rules 3.8(g) and (h) of the ABA Model Rules of Professional Conduct, which the ABA House of Delegates adopted in February, 2008. In general terms, the new provisions call upon prosecutors following a criminal conviction to disclose and investigate new, credible and material evidence creating a reasonable likelihood that the convicted defendant is innocent of the crime of which he was convicted. Further, when the investigation results in clear and convincing evidence of the defendant's innocence, the provisions call upon prosecutors to seek to remedy the erroneous conviction. The Committee is now working to encourage state bar associations to endorse the new provisions and to encourage state courts to adopt them.

VII. OVERBURDENED CRIMINAL DEFENSE LAWYERS

This year is notable for the significant attention given to the longstanding systemic underfunding and overburdening of lawyers for indigent criminal defendants. Public defenders offices in at least seven states have refused to take on new cases or have sued to limit the number of cases they take on. State and local budget crises have exacerbated the problems.

In September, 2008 the state circuit court partially relieved the Miami-Dade Public Defender Office from future appointments in certain felony cases due to too many case assignments. Judge Stanford Blake acknowledged that the punishing "caseload of the felony

public defenders in the Eleventh Judicial Circuit . . . far exceeds any recognized standard for the maximum number of felony cases a criminal defense attorney should handle annually." The State appealed, arguing that defender offices must share the burden of falling revenues. The Florida Supreme Court sent the case to the appellate court. This case is being watched closely around the country.

This fall, the Maryland Office of the Public Defender announced that it will stop paying for private attorneys for indigent clients. That office hires private attorneys for $50 an hour when there is a conflict of interest in a case. The Office announced that the counties and judges would have to determine alternatives to adequate representation. Similar lawsuits are pending or lawyers have turned down cases in Kentucky, Minnesota, Maryland, Arizona and Tennessee.

On November 9, 2008, the New York Times published a lengthy front page article about the breakdown of public defense system in seven jurisdictions. The article accompanies an online powerful four-minute video that follows one public defender, Arthur Jones, as he attempts to triage his services.[1]

VIII. CONTEMPT PROCEEDINGS AGAINST DEFENSE LAWYER WHO REFUSES TO START A TRIAL WITHOUT ADEQUATE PREPARATION

Brian Jones, a diligent public defender, was held in criminal contempt for his refusal to proceed with a misdemeanor trial in Portage County Municipal Court because, as he repeatedly told the Court, he was totally unprepared and could not proceed without breaching his ethical duties. The day before trial, Mr. Jones was assigned to represent a misdemeanor defendant. Mr. Jones met with the client then informed the court that he could not be effective counsel without preparation. Jones secured a letter from his office explaining the need for additional time and offered legal authority to the court that advises against proceeding to trial unprepared. Nevertheless, he was ordered to proceed. When Mr. Jones indicated that he could not do so, he was held in contempt and taken into custody. His sentence of three-days' imprisonment and a fine was stayed pending appeal. Several ethics, criminal defense and public interest institutions filed an amicus brief authored by Jenner and Block as *pro bono* counsel, arguing that the fairness and reliability of the criminal justice system will be jeopardized if contempt power is utilized to punish an attorney for upholding fundamental ethical responsibilities.

On the last day of 2008, the state court of appeals issued an opinion overturning Jones's criminal contempt sanction. It found that under the circumstances, "effective assistance and ethical compliance were impossible as [Jones] was not permitted sufficient time to conduct a satisfactory investigation as required by" the disciplinary rules and the constitutional right to counsel. The court emphasized that criminal defense lawyers "must be given ample opportunity to prepare, investigate and discover the facts of the accusation" as well as "time to investigate witness testimony, the nature of the allegations, and . . . possible defenses."

IX. DEFENSE LAWYERS AND RULE 11 IN CAPITAL CASES

In *Archuleta v. Galatia*, the Supreme Court of Utah grappled with the application of Rule 11 to attorneys in capital cases. In that case, the State sought Rule 11 sanctions against defense lawyers for "repeatedly raising previously decided issues in subsequent challenges to a capital conviction." The post-conviction petition raised 120 claims of error some of which had been expressly rejected by the same court on direct appeal. The defense claimed that it was essential

to reprise the issues for purposes of preservation of error. The Court held that the defense lawyer's conduct did not warrant Rule 11 sanctions but it ruled that in the future, defense counsel must label the claims that are raised again for preservation purposes. Significantly, the court addressed its concern about the "diminishing pool of competent attorneys in capital cases." It noted " if in the future, we find that the unavailability of competent and willing counsel impedes prompt, constitutionally sound resolution in capital cases, we may be forced to hold that lack of such counsel is sufficient ground for outright reversal of a capital sentence and remand for the imposition of a sentence of life in prison without the possibility of parole."

The ABA continues to play a leading role in pressing states to provide necessary resources to insure that defendants are provided with constitutionally mandated competent counsel and that public defenders are not faced with the untenable choice of shortchanging clients or refusing representation.

Endnotes, Chapter 14

[1] http://video.nytimes.com/video/2008/11/08/us/1194829102125/the-thin-line-of-defense.html http://www.nytimes.com/2008/11/09/us/09defender.html?hp.