



FORMAL OPINION 95-1

By the NACDL Ethics Advisory Committee

QUESTION PRESENTED

Whether a prosecuting attorney as county attorney under state law may be involved in the management oversight of a public defender's office?

DIGEST

Ethically and constitutionally, a prosecuting attorney should not be involved in any management oversight of a public defender's office. Criminal defense lawyers are constitutionally mandated to be professionally independent, and giving a prosecuting attorney the opportunity to be involved in the management oversight of a defender's office violates that independence. There is an inherent conflict of interest in such a relationship. Finally, the appearance of impropriety requires that prosecuting attorneys have no such role.

Opinion

The Ethics Advisory Committee has been presented with an issue which arose in a personnel dispute in a state public defender's office. This public defender's office which contacted the committee has a public defender who is selected by the board of county commissioners for a term which is the same as the prosecuting attorney. The board of county commissioners also has complete fiscal control over the public defender's office. Also, the public defender shall report annually to the board. Finally, the prosecuting attorney is the legal advisor to the board of county commissioners, and the prosecuting attorney has a role in county management.¹

In the situation presented, the local prosecuting attorney was consulted by the county administrator in his role as "county attorney," and lawyers on the staff of the public defender are concerned that the prosecutor's role will violate the professional independence of the public defender's office.

I. Ethical Rules

A. Rules of Professional Conduct

1. Confidentiality

Rule 1.6(b)(1), Model Rules of Professional Conduct provides that "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. . . ."²

As stated in Comment to Rule 1.6, ¶5:

The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct.

Finally, constitutional requirements of the Sixth Amendment right to counsel, and, here, the Fifth Amendment privilege against self-incrimination, may determine how the rules are to be construed.³

2. Administration of a legal services organization

Rule 6.3 also provides that:

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization services persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participation in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

B. Code of Professional Responsibility

1. Confidentiality

DR 4-101(A-C) of the Model Code of Pro-

fessional Responsibility provides as follows:

(A) "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely detrimental to the client.

(B) Except when permitted under CR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

* * *

2. Administration of a legal services organization

There is no provision of the Code similar to the Rules on this subject. A violation of Rule 6.3 would be conduct prejudicial to the administration of justice because of the effect on the rights of the indigent criminally accused.

II. Discussion

The NACDL Ethics Advisory Committee believes that prosecuting attorneys are constitutionally and ethically barred from acting as attorneys to advise or represent a defender services organization for several reasons:

A. Professional independence of criminal defense lawyers and public defenders

The Supreme Court has long stressed the professional independence of criminal defense lawyers. It is a constitutional mandate under the Sixth Amendment's provision for the right to counsel.⁴ The Court said in *Polk County v. Dodson*:

First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, *see Moore v. United States*, 432 F.2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(B), ABA Code of Professional Responsibility (1976).¹¹

11. . . . The rule is "mandatory in character," and a lawyer who violates it would be subject to "disciplinary action" by the Iowa courts. . . . *See Sanchez v. Murphy*, 385 F.Supp. 1362, 1365 (Nev. 1974) ("the personal attorney-client relationship established between a deputy [public defender] and a defendant is not one that the public defender can control. The canons of professional ethics require that the deputy be "his own man" irrespective of the advice or pressures of others. A deputy public defender cannot in any realistic sense, in fulfillment of his professional responsibilities, be a servant of the public defender. He is, himself, an independent officer.

Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. This Court's decision in *Gideon v. Wainright*⁵ established the right of state criminal defen-

dants to be "guiding hand of counsel at every step in the proceedings against [them]."⁶ Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.⁷ *Dodson* concerned whether the action of a public defender in conducting a criminal defense is "state action" under 42 U.S.C. § 1983, and the Court concluded that it was not. In a case involving prison medical care providers being "state actors," *West v. Atkins*,⁸ the Court elaborated some about *Dodson* in distinguishing between public defenders and prison medical care providers as state actors:

While performing his duties, the public defender retains all of the essential attributes of a private attorney, including, most importantly, his "professional independence," which the State is constitutionally obliged to respect. *Id.*, at 321-322. A criminal lawyer's professional and ethical obligations require him to act in a role independent of and in opposition to the State. *Id.*, at 318-319, 320. The Court accordingly concluded that when representing an indigent defendant in a state

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criminal proceeding, the public defender does not act under color of state law for purposes of Sec. 1983 because he "is not acting on behalf of the State; he is the State's adversary." *Id.*, at 323, n. 13.⁹

B. Professional independence in administration of a defender program

It is generally required that the system of administration of any defender program protect the professional independence of the program.¹⁰ RPC Rule 5.4(c) also provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."¹¹

C. Conflict of interest

It also seems that prosecuting attorneys have a conflict of interest under RPC Rule 1.7(b) and CPR DR 5-105 if they seek to act as an attorney for a defender services organization. The prosecutor's role as county attorney, however, plainly conflicts with the role of prosecuting attorney when the prosecutor does anything in regard to the defender's office. It would virtually destroy the attorney-client relationship between public defenders and their clients if it were to be learned by anyone that the prosecuting attorney is the apparent legal advisor to the public defender, whether true or not. Public defenders have a hard enough time gaining and keeping the respect of their clients without being forced into a situation where the client will tell everybody in jail or prison or on the street who will listen about how he was "sold out" because his public defender was really a "front" for the prosecuting attorney. The damage that could be done to the relationship between the defender's office and its clients would be irreparable and could lead to future ineffective assistance claims (whether valid or not) when inmates in prison learn about it.¹² It would definitely be harmful to the administration of justice to let such a relationship exist.

D. Threat to confidentiality

RPC Rule 1.6(a) requires that lawyers keep all "information relating to the representation" of a client confidential. Having a prosecuting attorney act as a county attorney for a defender services organization could give the prosecuting attorney information about cases and clients. Even redacted information about cases could violate confidentiality by providing the prosecuting attorney with the ability to determine things about cases. The NACDL Ethics Advisory Com-

mittee believes that prosecuting attorneys could deduce facts about cases and strategies from being involved in managerial actions involving public defenders and their cases. Defenders are cautioned to use extreme care in disseminating any information about a case for management purposes from which others could determine actions and strategies.

E. Appearance of impropriety

The appearance of impropriety is such a relationship is overwhelming. Although the "appearance of impropriety" standard of old CPR Canon 9 was repealed with adoption of the Model Rules, lawyers must still abide by that requirement.¹³ Therefore, the appearance of impropriety additionally disqualifies the prosecuting attorney from acting as a provider of legal or management advice to a defender's services organization. ■

NOTES

1. Specifically, under the state law at issue, the prosecuting attorney shall "[b]e legal advisor of the board of county commissioners, giving them his or her written opinion when required by the board or the chairperson thereof touching any subject which the board may be called or required to act upon relating to the management of county affairs. . . ."

2. The wording of Rule 1.6 varies from state to state more so than any other rule. Therefore, lawyers are cautioned to consult local rules.

3. See Scope Note ¶2.

4. *Polk County v. Dodson*, 454 U.S. 312, 321-22, 102 S. Ct. 445, 70 L. Ed. 2d. 509 (1981):

5. 372, U.S. 335 (1963).

6. *Id.*, at 345, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

7. See, e.g., *Gideon v. Wainwright*, supra; *Holloway v. Arkansas*, 435 U.S. 475 (1978). (bracketed material in original; footnote omitted).

8. 487 U.S. 42, 50, 108 S. Ct. 2250, 101 L. E. 2d 40 (1988).

9. Cf. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 678, 105 S. Ct. 2265, 85 L. Ed. 2D (1985) (concurring and dissenting opinion) ("The State also has a substantial interest in requiring that lawyers consistently exercise independent professional judgment on behalf of the clients.")

10. See, e.g., ABA STANDARDS, *Providing Defense Services*, Std. 5-1.3 (2d ed. 1980); NLADA, *Standards for Defender Services* §§ III, 1 & 4 (1976); NLADA, *Standards for the Administration of Assigned Counsel Systems* § 2.2(b) (1989).

11. Accord: CPR DR5-107(B).

12. Also, if a convicted client can show prejudice somehow resulted, the client could get a new trial or sentencing.

13. See, e.g., *First American Carriers, Inc. v. Kroger, Co.*, 302 Ark. 86, 787 S.W.2d 669, 671 (1990).