NACDL ETHICS ADVISORY COMMITTEE

Formal Opinion No. 04-01 (May 10, 2004)

Introduction

The Ethics Advisory Committee of the National Association of Criminal Defense Lawyers has been asked by two Illinois Public Defender members about whether a conflict of interest has been created by their legally required disclosure to the court and the prosecutor of the client's stated intent to choke the prosecutor to death in court and then commit suicide, communicated to them by appellate counsel within the same public defender's office. The case is back before the trial court, and the inquiring lawyers are counsel of record.

As a result of the disclosure, the client has become uncommunicative with them about the case, told them that he no longer trusts them, and he has threatened to sue and file an ethics complaint against them for their disclosure.

It is the opinion of the Committee that: (1) this disclosure was required under Illinois law (and could have been disclosed by the lawyer in a permissive disclosure jurisdiction), (2) the current situation creates an actual conflict of interest and the appearance of impropriety, and (3) the lawyers must seek to withdraw without prejudicing the accused.[1]

Disclosure was required under Illinois law

When it comes to threats of serious physical violence made within the attorney-client relationship, Illinois is a mandatory disclosure state. Illinois Rule of Professional Conduct 1.6 provides:

> (a) Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

[1] Also issued today is NACDL Formal Op. 04-02 (May 10, 2004) holding that a client's serious threat to kill or seriously injure his or her lawyer is a waiver of confidentiality and the lawyer may disclose it to the authorities.

(b) A lawyer *shall* reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.

(c) A lawyer *may* use or reveal:

(1) confidences or secrets when permitted under these Rules or required by law or court order;

(2) the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b); . . . . (emphases added)

Thus, the lawyers had a duty under Illinois Rule 1.6(b) to make this disclosure if they reasonably believed that the client's threat was serious.[2] State rules on disclosure of threats of

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[2] *See* ABA Model Rules of Professional Conduct Rule 1.6, *Comment* ¶ 6 (2003 ed.):

> Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

Under Illinois Rule 1.6(c), the lawyers also had the discretion to disclose, and that discretion is not subject to reexamination. ABA Model Rules of Professional Conduct, *Preamble* ¶ 14 (2003 ed.); ABA Model Rules of Professional Conduct, *Scope Note* ¶ 14 (2003 ed.). Both references are not included in the Illinois comments.

The Preamble to the Illinois Rules of Professional Conduct also provides:

> The policies which underlie the various rules may, under certain circumstances, be in some tension with each other. Wherever feasible, the rules themselves seek to resolve such conflicts with clear statements of duty. For example, a lawyer *must disclose,* even in breach of a client confidence, a client's intent to commit a crime involving a serious risk of bodily harm. In other cases, lawyers must carefully weigh conflicting values, and make decisions, at the peril of violating one or more of the following rules. Lawyers are trained to make just such decisions, however, and should not shrink from the task. To reach correct ethical decisions, lawyers must be sensitive to the duties imposed by these rules and, whenever practical, should discuss particularly difficult issues with their peers.

violence vary widely. Some jurisdictions follow ABA Model Rule of Professional Conduct 1.6(b)(1) (2003 ed.) which provides that "A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: [¶] (1) to prevent reasonably certain death or substantial bodily injury; . . . ." (emphasis added), but some use "shall." The former are discretionary disclosure states, and the latter are mandatory disclosure states, and Illinois is one of them.

For cases requiring disclosure, *see, e.g., In re Marriage of Decker,* 153 Ill. 2d 298, 180 Ill. Dec. 17, 606 N.E.2d 1094 (1992) (lawyer had to disclose a client's threat of child abduction because the communication was not privileged); *In re Gonnella,* 238 N.J.Super. 509, 570 A.2d 53 (1989) (threat communicated to attorney about having co-defendant's counsel killed was not privileged; motion to quash grand jury subpoena denied); *Henderson v. State,* 962 S.W.2d 544 (Tex. Crim. App. 1997), *cert. denied,* 525 U.S. 978 (1998) (in child kidnapping case, defendant drew maps of location of grave site and gave them to her lawyer who was compelled to disclose them in the interest of protecting against death or serious bodily injury).[3]

For cases permitting disclosure, *see, e.g., Purcell v. District Attorney for Suffolk County,* 424 Mass. 109, 676 N.E.2d 426 (1997) (lawyer permitted to disclose the client's intent to commit arson, but it was held that it had to be done in such a way as to not unduly prejudice the client); *People v. Fentruss,* 103 Misc.2d 179, 425 N.Y.S.2d 485 (Dutchess Co. Ct. 1980) (finding no breach of confidentiality and a waiver of privilege where an attorney's friend called the attorney and explained that he had just killed someone and was going to kill himself, but agreed that the police should be called, and the attorney caused the information to be disclosed so the police were summoned); *Hawkins v. King County,* 24 Wash. App. 338, 344, 602 P.2d 361, 365 (1979) (disclosure is permissive, "unless it appears beyond a reasonable doubt that the client has formed a firm

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(emphasis added)

The Ethics Advisory Committee has informally consulted with criminal defense lawyers on this issue many times, and we advised them that the exercise of their discretion is as fundamental as whether the lawyer believed he or she could live with the consequences if the lawyer failed to disclose and the threat was carried out; *i.e.,* "what is your gut reaction to the client's threat?"

[3] *See also McClure v. Thompson,* 323 F.3d 1233 (9th Cir. 2003) (lawyer not ineffective for disclosing location of bodies because client gave implied consent by drawing map; possibility children were still alive was a compelling reason to disclose).

intention to inflict serious injuries on an unknowing third person.").[4] As stated in note 2, *supra,* in discretionary disclosure states, the exercise of that discretion is not subject to reexamination.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 (2000) states the general rule, and that section provides:

> (1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person.
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> (2) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client not to act. If the client or another person has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent the harm and advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.
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> (3) A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.

In this case, the trial public defenders made this sensitive disclosure because they justifiably believed the client's threat to the prosecutor to be serious and a clear and present danger based at least in part on the fact that the client had previously been previously convicted of assault on a bailiff (courtroom sheriff) and assaulting a DOC guard. In addition, it is uniformly held by state ethics committees[5] and commentators[6] that a client's serious suicide threat should be disclosed.

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[4] California apparently is a nondisclosure jurisdiction, considering the language of the California State Bar Act, California Bus. & Prof. Code § 6068: "It is the duty of an attorney to do all of the following: [¶] (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." *See* Kevin E. Mohr, *California's Duty of Confidentiality: Is It Time for a Life-Threatening Act Exception?* 39 SAN DIEGO L. REV. 307 (2002).

[5] *See, e.g.,* Conn. Op. 99-5; Ariz. Op. 91-18, at 3-4 n. 3 (citing opinions from Georgia, Alabama, and Virginia and relying on *People v. Fentruss, supra*).

[6] *See also* the following articles and books concerning the permissible disclosure of client threats of suicide and violence against others: Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics,* 80 IOWA L. REV. 901, 941 n. 222-25 (1995); Susan R. Martyn, *In Defense of Client-lawyer Confidentiality . . . and its Exceptions . . . ,* 81 NEB. L. REV. 1320, 1334 (2003); MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 103 (1990).

The creation of a conflict of interest

This disclosure, required by Illinois law because of the statement of the client, has created a conflict of interest between the counsel and the lawyers, and the lawyers now must seek to withdraw under Illinois Rule of Professional Conduct 1.16. It is necessary that they do so to promote the fair administration of justice, to support the ideal that the appearance of impropriety in the proceedings must be avoided, and to avoid an inevitable post-conviction claim that will lead to uncertainty in the result, should the client have to challenge the outcome of his case, which potentially will keep the case in court for years.

Lawyers have a high fiduciary duty and a duty of loyalty to the client, and a client is entitled to a lawyer he trusts because the client must divulge confidences to the attorney so the attorney can adequately defend. In NACDL Ethics Advisory Opinion, Formal Op. 02-01, at 15-16 (Nov. 2002), we discussed the importance of the attorney's duty of absolute loyalty and fidelity to the client starting with the historical basis of the duty of loyalty and how it underlies the duty of candor to the client and conflicts of interest (citing *Holloway v. Arkansas,* 435 U.S. 475, 480-90 (1978), and quoting *Stockton v. Ford,* 52 U.S. (11 How.) 232, 247 (1850),[7] and *Damron v. Herzog,* 67 F.3d 211, 214 (9th Cir. 1995)). *See also* NACDL Ethics Advisory Committee, Formal Op. 03-02 (Feb. 2003) (attorney's duty of loyalty and to prevent conflicts of interest prohibits lawyer from participating in a plea agreement where the client waives ineffective assistance claims against the lawyer).

Those opinions did not deal with the specific issues here, and the requirement of some states ethics rules mandating disclosure of serious threats of violence. This duty of loyalty sometimes must be subordinate to other duties of the lawyer where there is a greater public interest involved—here, the protection of human life from violence. Sometimes lawyers are required to do things for their clients or to their clients as a result of client actions that create distrust in the client.

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> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

It is a fact of life of being a criminal defense lawyer. Here, the lawyers were required by Illinois law to disclose a threat of violence about another officer of the court. In a permissive disclosure jurisdiction, we believe that virtually all criminal defense lawyers would also disclose the threat, and the Committee has so informally counseled lawyers on the NACDL Ethics Advisory Committee Hot Line for years.

As a result of the required disclosure here, the client no longer trusts his lawyers. This is to be expected, and could not be avoided, but it is a product of the client's action. While the prosecution might respond[8] that a client does not have a right to a "meaningful relationship" with his lawyer, *Morris v. Slappy,* 461 U.S. 1, 14 (1983), this issue cuts far deeper—right to the heart of the attorney-client relationship and attorney-client trust—and it is of no fault of the lawyer.

The client's threats about ethics complaints and civil suits to the public defenders made the client adverse to the lawyers. Moreover, the lawyer's disclosure, required by law, made the lawyers adverse to the client. It could not be avoided because there was a higher interest involved.

Lawyer's personal conflict by threat of action against the lawyer

One conflict exists here between the personal interest of the lawyer because the client has threatened to sue and file a grievance against the lawyers.[9] Illinois Rule of Professional Conduct 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's . . . own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after disclosure.[10]

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[8] We do not concede that the government even has a right to participate in a hearing on a motion to be relieved because of a conflict of interest; indeed, we believe that the government should be excluded from such a hearing.

[9] It is not beyond the realm of possibility that the client may yet make a threat of violence to the lawyers if they stay on the case. *See* NACDL Formal Op. 04-02 (May 10, 2004).

[10] ABA Model Rule of Professional Conduct 1.7(a)(2) (2003 ed.) is written in terms of "a concurrent conflict of interest [which] exists if: . . . there is significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." The

A threat to sue the lawyer is a breakdown of the attorney-client relationship. *Mathis v. Hood,* 1990 WL 100869, *7 n. 13 (S.D.N.Y. 1990).[11]

A criminal defense lawyer has a duty to raise a conflict at the earliest possible time. *Holloway v. Arkansas,* 435 U.S. at 485-86 ("defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem."); ABA STANDARDS, *The Defense Function* § 4-3.6 (2d ed. 1991) (prompt action required to protect the rights of the accused). *See also id.* § 4-3.5(b) (prompt notification to the accused of possible conflict).

When raised pretrial, the burden of showing a conflict of interest is far less than when raised post-conviction. *Compare Holloway v. Arkansas, supra,* and *Cuyler v. Sullivan,* 446 U.S. 335 (1980) (possibility of conflict is sufficient if raised pretrial; post-trial, actual prejudice must be shown).

A lawyer cannot be expected to operate under a threat of suit or of a bar complaint, unless they are clearly frivolous, because they distract the lawyer and create distrust in the client's direction as well. For every decision the lawyer makes, the lawyer will worry about the collateral consequences. Just as bad, the client will always feel that the lawyer is operating under a personal conflict of interest.

We also understand and take into account the purely frivolous threats of suit and bar

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rules are not different in their application here.

[11] *Id.* n. 13:

> The American Bar Association Lawyers' Manual on Professional Conduct states:
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> > Clients' interests . . . clash with their lawyers' interests in their professional reputation as lawyers . . . when clients either sue or threaten to sue their lawyers for malpractice [or] file or threaten to file disciplinary charges against them . . . . More often it seems than in instances of business conflicts, these types of conflicts lead to the lawyer's disqualification and, in criminal cases, to findings of ineffective assistance of counsel.

The opinion does not cite the section and page number of the ABA/BNA Lawyer's Manual on Professional Conduct.

See also United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998) (defendant's threat to sue counsel for malpractice evidenced breakdown of attorney-client relationship but was insufficient to create actual conflict of interest where defendant never carried out the threat).

complaints because they can be used to manipulate the system to attempt to disqualify counsel. The public defenders do not believe that this client is manipulating the system, but the client was serious about his threat of violence to the prosecutor and his complaints about the lawyers, although they feel that the complaints about them will fail, as do we. In this situation, then, the issue becomes one of appearance of impropriety and avoiding ineffective assistance claims. We have no doubt that an ethics complaint or a lawsuit against these public defenders will fail, but the client will suffer under the belief that his lawyers are complicit in his predicament. Allowing this belief to exist does not serve the fair and efficient administration of justice, and that alone is enough to require disqualification.

Significant effect of the appearance of impropriety standard

Several courts have held that the "appearance of impropriety" standard for conflicts of interest from Canon 9 of the Code of Professional Responsibility is still the law, even though it is a phrase which does not appear in the Rules of Professional Conduct. These courts have imported the "appearance of impropriety" standard of Canon 9 back into the Rules of Professional Conduct because the expression of that standard represents a fundamental ideal for lawyers and fidelity to clients that cannot be diluted or erased by a mere change in the rules. *See, e.g., First American Carriers, Inc. v. Kroger Co.,* 302 Ark. 86, 787 S.W.2d 669, 671 (1990). The subject of former Canon 9 "is a rock foundation upon which is built the rules guiding lawyers in their moral and ethical conduct," and it thus remains a part of the law even through the Code was superseded. *Id.,* 787 S.W.2d at 671.[12] Illinois has applied this standard in criminal cases. *See, e.g., People v. Lang,* 346 Ill. App. 3d 677, 282 Ill. Dec. 232, 805 N.E.2d 1249, 1255-57 (2d Dist. 2004). Other states and the military courts have applied the standard in criminal cases: *People v. Witty,* 36 P.3d 69, 73 (Colo.App. 2001) (disqualifying a prosecuting attorney); *State v. Loyal,* 164 N.J. 418, 753 A.2d

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[12] *Id.:*

> While Canon 9 is not expressly adopted by the Model Rules, the principle applies because its meaning pervades the Rules and embodies their spirit. It is included in what the preamble to the Rules refers to as "moral and ethical considerations" that should guide lawyers, who have "special responsibility for the quality of justice." This is why the principle applies here, and not because it was part of the Code.

1073 (2000) (public defender's prior representation of a significant prosecution witness in drug related homicide case created appearance of impropriety mandating a mistrial (not subject to double jeopardy), even though neither the witness nor the lawyer remembered the lawyer handled the prior case two years earlier; a per se rule); *United States v. Golston,* 53 M.J. 61, 66 n. 5 (2000).[13]

Also of significance, similar to *Loyal,* is *United States v. Oberoi,* 331 F.3d 44, 51 (2d Cir. 2003), which essentially adopted the appearance of impropriety standard in the Second Circuit. In that case, the federal defenders had previously represented a witness against their client, and the government procured a waiver of conflict from the witness. The federal defender moved to be relieved because it was clearly unbecoming for a lawyer to have to cross-examine a former client and the federal defender felt that the proceedings would not appear fair to the accused or the public. The District Court denied withdrawal, but the Second Circuit reversed. The lawyer's opinion on the matter was thus entitled to great weight.[14]

The appearance of impropriety here is real, and, in our judgment, it is sufficient in itself to require disqualification of the public defenders who were required to make the disclosure.

Avoiding post-conviction claims

Another reason for counsel to be relieved that supports the other two grounds for being relieved is the certain ineffective assistance claim that will be filed against the public defender's office if the client is convicted. Keeping these public defenders in the case will guarantee a post-conviction claim, will delay finality of the case, and will result in more work for the courts, the prosecutor, and post-conviction counsel. That counsels in favor of disqualification.

Disqualification of entire Public Defender's Office?

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[13] *Contra: Hart v. State,* 2003 WY 12, 62 P.3d 566, 571 (2003) (failure of rules drafters to have included appearance of impropriety standard means they intended to exclude it). Few courts, however, have rejected retention of the "appearance of impropriety" standard.

[14] The NACDL Ethics Advisory Committee provided an informal opinion in that case that ended up becoming a part of the federal defender's argument.

Because these two public defenders are conflicted out, the entire public defender's office is not per se disqualified under Illinois law because a public defender's office is not a "firm" under the conflict rules. *In re A.P.,* 277 Ill. App. 3d 592, 214 Ill. Dec. 299, 302, 660 N.E.2d 1006, 1009 (4th Dist. 1996). The question then is whether there is an effective method of creating a Chinese Wall to separate new, untainted lawyers brought into the case. Whether the entire public defender's office is disqualified is a matter to be addressed by the trial court on the proof presented at the hearing and whether the significance of the appearance of impropriety alone is sufficient to disqualify the entire office. We cannot pass on that.

Moving to be relieved

The public defenders should immediately move to be relieved under Illinois Rule of Professional Conduct 1.16, and care must be taken not to prejudice the accused before the trial judge in the moving papers (which may have to be filed under seal) or in disclosures made to the court, bearing in mind that the judge hearing the motion may be the trial and sentencing judge, and that fact may require an effort to disqualify the judge, too.[15] If the local procedure permits it, this matter should be addressed to an administrative or motions judge to avoid prejudicing the client with the trial judge.

[15] Depending upon how the situation unfolds, however, this may be a matter for successor counsel to deal with.