DIVIDED LOYALTIES: MUSINGS ON SOME ETHICAL DILEMMAS FOR THE INSTITUTIONAL CRIMINAL DEFENSE ATTORNEY

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INTRODUCTION

When I was preparing for admission to the bar, friends of mine who had recently been admitted prepared me for my fateful meeting before the Character and Fitness Committee. They told me that I would surely be asked a major ethical question and that all I had to say was that I would never commingle my clients' money with my own.

If only it were so simple. This rule, however wise it is, is relevant only if you have cases involving money. Well, upon graduation, I started working for the New York City Legal Aid Society, Juvenile Rights Division, representing indigent clients accused of crimes. There was no need to worry about *mixing* money: there was no money involved in the first place!

In my world of practice—criminal law— there is a different major rule of ethical conduct; it is to give undiluted loyalty to your client.[1] A lawyer should never split loyalties between clients and never concern herself with more than one client when there is a potential to dilute loyalties.

In one direct sense, institutional attorneys—staff attorneys who work full-time for an office representing clients assigned to them by the court—rarely, if ever, breach this injunction.[2] If two defendants are charged in the same indictment with committing related crimes, the potential for a conflict of interest is apparent. As a result, most lawyers will agree to represent only one of the defendants and request that the court assign a different lawyer to the other one.[3] But on a different level, it has been my experience that institutional lawyers are often forced to consider the interests of one group of clients while making tactical decisions about the representation they will provide other clients.

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1. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980) [hereinafter cited as MODEL CODE] ("A lawyer should exercise independent professional judgment on behalf of a client."); *id.* at EC 5-1 (recommends that the lawyer exercise professional judgment "solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."); *id.* at Canon 7 (lawyer must carry out such loyalty "zealously within the bounds of the law.").

2. *See, e.g.*, Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 950 (1978).

3. *See* MODEL CODE, *supra* note 1, at EC 5-14 to EC 5-19.

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These problems are not unique to institutional lawyers.[4] I choose to describe them in that context for two reasons. First, my tenure as an attorney with the Legal Aid Society made me acutely aware of the joint and several responsibilities shouldered by such lawyers. Second, two special factors exacerbate the ethical tensions inherent in the practice of the institutional lawyer: the very high caseloads of the staff attorney and the fact that the attorney works with (and against) the same cast of characters over an extended period of time. While the attorney who represents clients in different counties may come up against the same judge or the same prosecutor once a year at most, the staff attorney assigned to the same two or three courtrooms typically works with the same people over a long period of time in a sustained, even intimate, way. It is this lawyer and her problems that I wish to examine.

I
BACKGROUND

In exploring some of the ethical dilemmas confronting the institutional criminal defense lawyer, I limit my focus to the conscientious, diligent lawyer. My thesis is that the most dedicated and loyal defense attorney representing a large number of clients is faced with significant built-in conflicts of interest that cannot help but affect the way she conducts business.

Most commentators focus on the problems that result from the enormous caseloads of institutional attorneys.[5] There is, of course, built into these high caseloads an inherent conflict of interest that observers have recognized.[6] An attorney's decision to work extra hard on one case has the inevitable effect of limiting the amount of time she can devote to her other cases. A claim can well be made that an attorney with the suffocatingly high caseloads typical of staff attorneys in large metropolitan areas is incapable of providing adequate assistance of counsel for more than a very few of her clients simply because of limited time and energy. Lawyers cannot intelligently engage in plea bargain-

4. For a view that privately retained defense attorneys confront many of the same difficulties discussed in this paper, see Comment, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys,* 50 TEX. L. REV. 60 (1971). For a contrary view, consider the following argument by a private defense attorney in Chicago:

> "A particular Assistant State's Attorney is unlikely to handle more than a half-dozen of my cases during a single year. If I am on good terms with this Assistant, I can go to him with every one of these cases, make my pitch, ask for a favor, and probably persuade him to give every last one of my clients a break. A public defender may be on equally good terms with the prosecutor. He may even have been the prosecutor's law school roommate. But he just cannot do that with fifteen cases a day."

Alschuler, *The Defense Attorney's Role in Plea Bargaining,* 84 YALE L.J. 1179, 1223 (1975) (quoting Sam Adam).

5. *See* Lefstein, *Keynote Address: Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?,* 14 N.Y.U. REV. L. & SOC. CHANGE 5, 6 (1986).

6. *See, e.g.,* Alschuler, *supra* note 4, at 1206-55. Professor Alschuler describes several areas of conflict including plea bargaining, discovery, delay tactics, judge-shopping, and going to trial (which occupies more of a harsh judge's time and thereby limits his opportunity to sentence by giving him fewer cases).

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ing, for example, until they have conducted an investigation into the facts of the case to determine the strength of the prosecution's case and the potential for mounting a defense. If lawyers are unable to give their cases this individualized attention, it is difficult to understand how they can zealously represent their clients. More importantly, it is difficult to understand how they can satisfy the constitutional obligation[7] to provide effective assistance of counsel.[8]

But even if such high caseloads do not violate the clients' sixth amendment rights to effective assistance of counsel, they impose on the lawyer divided loyalties of virtually insurmountable proportions. The problem is one which institutional lawyers frequently prefer to ignore. In my opinion, it is pervasive and insidious and, paradoxically, it affects most of those lawyers who care the most about their cases and who work hardest in their clients' defense.

I do not intend to develop an extended theory of ethical dilemmas or how to solve them. Instead, I have chosen to paint a scene—one which I hope is not too unrealistic—which depicts some of the ethical problems that may arise from an institutional lawyer's typical caseload. My focus is not on the individual characters or the cases themselves, but on the interactions between defense attorney, prosecutor, and judge.

II
THE CASES

Let's call our lawyer Warren. Warren works works eighteen hours a day in a large metropolitan public defender's office. He never ceases to worry about the eighty cases which comprise his average daily caseload. Let's examine several of Warren's pending cases in order to get an idea of the complexities of his practice. In each of these cases, Warren has completed most or all of the work that needs to be done. Also, unless otherwise noted, in each case, the judge and prosecutor are the same: Judge Rehnquist and Ms. O'Connor, respectively.

In one case, Warren represents a client accused of burglary. The client has a long record of burglary convictions and has been in prison for six of the last eight years. She is charged with a felony, and if convicted, she can reasonably expect a sentence of ten years. The police had entered the client's apartment and found some jewelry taken in a recent burglary. The critical issue in the case is whether this search was legal.

At the hearing on Warren's motion to suppress the evidence, the police officer testified that she knocked on the door and the defendant invited her in to search the apartment. The client, however, testified that when she opened the door, the officer handcuffed her and searched the apartment, not bothering

7. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

8. *See* United States v. Cronic, 466 U.S. 648, 654 (1984); Strickland v. Washington, 466 U.S. 668, 686 (1984); *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

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to ask for any consent. The search was without a warrant. From these facts it should be clear that the case will turn upon whichever witness Judge Rehnquist finds more credible. The Judge reserves decision and the case is pending.

In a second case, Warren represents a man accused of rape. Early in the case, Warren informs Ms. O'Connor that his client has an alibi defense and can produce the alibi witness. After interrogating the witness, who happens to be the defendant's girlfriend, Ms. O'Connor informs Warren that she will investigate the case further and tell Warren her position within a few weeks.

As fate would have it, the girlfriend is killed in an automobile accident one week after meeting with the prosecutor. The result of the accident is that if Ms. O'Connor decides to prosecute the case to trial, Warren's client has lost his alibi witness and Warren cannot corroborate his client's claim of innocence. Since his prospects of winning at trial are too small, Warren must plea bargain with Ms. O'Connor and try to make a fair deal.

In another case, Warren represents a college student accused of shoplifting. The client is an aspiring lawyer and has no previous criminal record. The store at which she was arrested has a policy of vigorously prosecuting shoplifters because it has a high loss rate due to theft.

In the jurisdiction in which Warren works, cases may be adjourned in contemplation of dismissal when either the prosecutor or the judge recommends such a disposition. Such an adjournment puts the case on a suspended docket for one year; if, within that time, the accused is not rearrested, the case is automatically dismissed. Judge Rehnquist's unvarying policy is to defer completely to the prosecutor's recommendation with respect to such adjournments. In other words, if the prosecutor agrees to the adjournment, it will be granted. If she does not agree, the case will be prosecuted.

The case against the defendant is strong. Although there is no risk of her being sentenced to a prison term if convicted, she would have to reveal a conviction when applying to the bar. In this state, however, she would not have to reveal an arrest which was fully expunged. Warren's task clearly is to persuade Ms. O'Connor to recommend an adjournment in contemplation of dismissal in the face of a contrary desire by the complaining store.

In still a fourth case, Warren represents an eighteen year old male who was convicted of robbery after trial before Judge Rehnquist. Since his arrest, this client has turned his life around. Although he was on drugs at the time of the crime, he has completed a detoxification program and has stopped using drugs. The judge may choose to sentence the defendant as a young adult and perhaps impose no term of incarceration whatsoever. On the other hand, if sentenced as an adult, he is subject to a mandatory minimum sentence of fifteen years. The presentence report reveals that the defendant has a substantial record as a juvenile. It also confirms that he was dependent on drugs but has completely given up such use. Nonetheless, the report recommends sentencing as an adult. Sentencing will take place in two weeks.

These cases begin to give an indication of the discretion floating about the

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criminal justice system. My purpose, however, is not to focus on this discretion, but to look at the effect this discretion has upon the relationships among the professionals working together or against one another. The four cases described above are simply background to this exploration.

Consider for a moment, the huge impact of Judge Rehnquist's and Ms. O'Connor's decisions upon Warren's clients. In each case, whichever decision they reach is almost certain to control the outcome. In each case, the exercise of discretion is being properly used and, therefore, is not likely to present any appealable error. Indeed, our system of criminal justice depends on the use of such discretion. None of the choices will be visible to reviewing courts, yet Warren's clients are, in an important sense, at the mercy of the decisionmakers.

In another of Warren's cases, he represents a person in a drug conspiracy case which is currently on trial. In the middle of the lengthy jury trial, in a conference in chambers, the Judge makes a disparaging and injudicious comment about the defendant in the presence of both lawyers. If placed on the record and made public the comment would justify a mistrial or even the imposition of a sanction against the judge. Nothing that was said, however, plainly prejudiced the defendant. Warren asks for an adjournment overnight to consider whether to make the judge's comment public or to ignore it.

In one of Warren's new cases, his client is charged with sexually assaulting a six year old girl. He is factually guilty of the charge. At the first appearance after the arraignment, the prosecutor offers Warren a plea of sexual abuse, instead of sodomy in the first degree. Ms. O'Connor wants to eliminate the necessity of having to put the child through the trauma of testifying. In addition, she advises Warren that she is overworked this week, and if Warren makes her work on the case by filing any motions, she will withdraw her offer, and only accept a plea to sodomy in the third degree, a more serious felony. Ms. O'Connor also advises Warren that if the case goes to trial, she will be able to prove the charges beyond a reasonable doubt and her office will ask for the maximum sentence under the law.

The defendant has a history of arrests for sexual related crimes, although he has never been convicted. Warren is not certain that there is sufficient evidence to convict in this case. First, the amount of corroborating evidence which the prosecutor may have is unclear. Second, Warren does not know how good a witness the victim will make. He does know, however, that he must respond quickly to Ms. O'Connor's offer.

Ms. O'Connor, it should be noted, could have made the identical offer to any other defense attorney. It is not infrequent for defense attorneys to be threatened with elimination of a lenient disposition if a deal is not struck quickly before the prosecutor has to do much work in the case. The peculiar problem here is Warren's long-standing relationship with Ms. O'Connor. Is he truly free to ignore this relationship, and his dependency on her in other, perhaps more "worthy" cases, when he decides what to do? In speaking with

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his client, will these concerns color Warren's words? Will Warren advise his client that *Warren's* job will be made immeasurably easier if the client agrees to go along with the deal? Consider the possibility that Warren will advise the client to accept the offer even though Warren is unsure why he thinks it is a good idea to do so.

In still another case, Warren represents a person who is accused of fraud. The defendant denies any guilt, and all efforts to settle the case have been unavailing. The case has been set for trial and adjourned twice at the request of the prosecutor. The defendant has been in jail since his arrest seven months earlier.

The case is scheduled for trial on Tuesday. As often happens, Warren has two cases scheduled for trial that week. Both of his clients are in jail pending trial. The fraud defendant, however, has been in jail two months longer than the other client. On Monday afternoon, Ms. O'Connor telephones Warren to inform him that she would like to adjourn the fraud case yet again. Warren knows that an adjournment will increase the chance that his other scheduled case will go to trial, while extending the pretrial incarceration time of his fraud defendant. Although the adjournment would improve the fraud defendant's chances for a later dismissal on speedy trial grounds, Warren has a difficult choice to make. The balance is complicated still further because Warren wouldn't mind doing Ms. O'Connor a favor.

Warren picks up a new case in which his client is charged with an assault. The victim did not get a very good view of the perpetrator and the defense has a chance of winning at trial. The defendant has a long criminal record of assaults. The case was being tried before Judge Brennan, sitting without a jury. The prosecutor, Ms. O'Connor, in the middle of her case-in-chief, provided Judge Brennan with information respecting the defendant's prior convictions for two minor, nonviolent crimes. Although not *per se* grounds for a mistrial, the Judge chose to declare a mistrial so as to maximize the defendant's rights.[9]

Warren believes that Ms. O'Connor strategically shared the information with the Judge, expecting a mistrial and thereby removing the case from Judge Brennan, who is known to be sympathetic to the defense. Such conduct, if proven, would justify dismissal of the whole case on double jeopardy

9. A defendant's prior criminal record can only be entered into evidence when relevant and when its relevance outweighs its prejudice to the defendant. *See* 2 A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 368 (4th ed. 1984). These two principles are satisfied in three narrow situations: (i) when the defendant takes the stand in her own behalf, the prosecution can impeach the defendant with her prior convictions. *Id.* at § 390; (ii) when a defendant introduces character witnesses in the defense case, it opens the door to the government's introduction of the defendant's prior record in cross-examination of the character witnesses and in the government's rebuttal. *Id.* at § 403; and (iii) in rare cases the government may introduce evidence of the defendant's prior convictions or prior bad acts to prove motive, intent, absence of mistake, or the identity of the perpetrator of the offense, *see, e.g.,* Drew v. United States, 331 F.2d 85, 90 (D.C. Cir. 1964). Under the facts given in the hypothetical, the prosecution's evidence of the defendant's prior convictions did not fall within any of these narrow categories and therefore was clearly inadmissible and prejudicial.

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grounds.[10] If, however, the disclosure was inadvertent, a mistrial would not justify dismissing the whole case and a second trial would not violate the double jeopardy clause.[11]

Warren's dilemma this time is powerful. Should he go through the effort of trying to prove deviousness on his adversary's part? What are the risks to their long-term relationship? Should he simply ignore the problem and hope that the case won't be retried? Should the probability of winning the double jeopardy motion be a factor in his decision or, owing undiluted loyalty to his present client, should he bring the motion even if he believes there is only a one percent chance of winning? Proving governmental misconduct may be possible, but it certainly will not improve the professional relationship between Warren and Ms. O'Connor. If Warren does bring the motion, and loses, how much has he damaged his capacity to represent effectively his other clients? His future clients? Maintaining good working relationships with adversaries and judges, while balancing delicately the need to represent each client with undiluted loyalty *and* being effective may be a good deal more difficult than it appears.

This sampling of Warren's cases gives us an idea of the complexities and interrelationships inherent in his job. We can now talk about what it means for one to have, or whether in any meaningful sense one *can* have, undiluted loyalty to any one client when representing scores of clients before the same courts and against the same adversaries week in and week out. Everybody involved understands well that working closely with people requires giving and taking, the paying of debts and being repaid.

Is it reasonable to expect Warren to care only about the current case when he appears before the same judge who holds in his hands the fate of another client? Is it humanly possible for Warren to separate out his mixed interests? Can he afford to zealously represent his client on trial when he is certain that his tactics will infuriate the judge who has to decide what sentence to impose in a pending case as well?[12]

Is it permissible for Warren to consider the positive effect his conduct will have on current or future cases if he does something which puts him in the judge's favor? Is it acceptable for Warren to add up points, and to cash in debts owed when necessary?[13] Can Warren reasonably expect Ms. O'Connor to be "reasonable" with him if he is never "reasonable" with her?[14] How does

10. No person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V; *see* United States v. Dinitz, 424 U.S. 600, 611 (1976).

11. *See* Illinois v. Somerville, 410 U.S. 458 (1973).

12. For a clear example of a judge threatening a defense lawyer with reprisals which extend beyond the particular case that angered the judge, see Alschuler, *supra* note 4, at 1240 n. 172.

13. "It is unprofessional conduct for a lawyer to seek or accept concessions favorable to one client by any agreement which is detrimental to the legitimate interests of any other client." 1 STANDARDS FOR CRIM. JUSTICE 4-6.2(c) (2d ed. 1980).

14. As Professor Alschuler has observed: "To be sure, I have seen public defenders mention past favors in seeking concessions for their clients. 'Come on, my friend,' a defender may

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he decide when to be reasonable and when not to? Does he discuss it with his client? In the drug conspiracy case, does Warren tell his client that although Warren could move for a mistrial, it would be better for Warren if he didn't ask for one? Does Warren ask his clients whether it is all right to forego a motion to dismiss because Warren has got to be reasonable with his adversaries in order to function successfully in court?[15]

Lawyers as creative professionals never let cases leave their minds. They're always thinking about who to call, what to investigate, who to talk to, what motion to make, and what argument or approach is most likely to win. That's how we engage in our practice. We never stop. We wake up in the middle of the night making notes. We can't forget when the prosecutor asks us for a favor that we recently asked her for one and that the request is pending. We can't forget when the judge asks us to do something that is not best for the present client, that the judge has the power to affect adversely another client in a pending case.

It is easy to try to wish away these problems by rationalizing that clients have final control over their lawyers' conduct and that lawyers are ethically bound to cede this control to their clients.[16] But this response denies the reality that lawyers possess an amazing amount of control when counseling clients. The root of the problem is that most counseling advice is based on unquantifiable factors like predictions of outcomes should cases go to trial. The danger, as I see it, lies in not truly knowing ourselves and our motivations as lawyers. The danger is that we may fool ourselves into believing that a particular result is best for the client, without realizing that we came to that conclusion only, or mainly, because it is best for us.

CONCLUSION

I promised at the beginning that I would not offer solutions to these ethical dilemmas but would only provide a background to deeper exploration by others. Let me offer two concluding observations, however. First, as overworked as the institutional lawyer may be, very often she is the best person to represent the accused. The institutional lawyer's familiarity with the personnel,[17]and her knowledge of which arguments work with which judges or adversaries, are invaluable. Every institutional lawyer can report personal experiences of watching experienced lawyers with stellar reputations making

say. 'I went along with you in that burglary last week. It's your turn to be reasonable.'" Alschuler, *supra* note 4, at 1211.

15. In one study, six of nine public defenders interviewed agreed with the following proposition: "A public defender should strengthen his relationship with the District Attorney's office over a series of felony cases by contending only major points in negotiations." Dahlin, *Toward A Theory of the Public Defender's Place in the Legal System,* 19 S.D.L. REV. 87, 98 (1974).

16. *See* MODEL CODE, *supra* note 1, at EC 7-7; *see also Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?,* 14 N.Y.U. REV. L. & SOC. CHANGE 48 (1986) (Remarks of J. Vincent Aprile II).

17. If the hypotheticals do nothing else, they should at least give a sense of the importance placed on the individual actors in our criminal justice system.

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fools of themselves and losing a case badly because the argument was the wrong one in that place and at that time. So, if the institutional lawyer is shackled with disadvantages, she is possessed of some extremely important advantages as well.

Finally, to emphasize the dilemmas identified already, let me say that in my experience there are two kinds of institutional lawyers who are doomed to be ineffective. First, there are the lawyers who do not care about their clients and do not work very hard to represent them. Second, there are lawyers who never give an inch. They fight over every detail, are never reasonable and never do favors for the court or their adversaries. Such lawyers may think that they are obeying the injunction to represent each client zealously and with undiluted loyalty, but they are sure to fail. After they have proven who they are to their adversaries and to the judges, nobody makes reasonable deals with them. Their clients always seem to be the losers.

The answer, clearly, lies somewhere between the two extremes. Precisely where it is I leave for others to develop.

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