

DISCUSSION*

JAMES JACOBS, MODERATOR**

JAMES JACOBS: I think it is only fair that Professor Guggenheim be afforded some time for rebuttal.

MARTIN GUGGENHEIM: I am amazed by the reactions of the defense attorneys here to my claims. I am also quite sorry to hear them. Contrary to a suggestion that I have some hostility or lack of respect for defense attorneys,¹ it's only because I consider them family that I used the first name basis in the paper. I am a defense attorney. Prosecutors and judges are people I work with and against, but I've never been either one. I have the highest respect for defense attorneys; I have the highest respect for the problems which they face, but I don't think we can wish them away. I'm struck by the fact that the academics here are saying that there's a real problem in representing the indigent criminal defendant, and that the people working in the field respond with an academic answer: defense attorneys may never breach duties to clients, and therefore they don't.²

Second, I am also disappointed to hear such a simplistic response. It really doesn't do much good to recite the rules and simply remind us that they require client control of significant litigation decisions. We must acknowledge the enormous influence that lawyers have in the decisions clients make.³ In most cases, what lawyers say to clients and fail to say to them, and what lawyers emphasize play a controlling role in what clients do. We can't pretend otherwise.

Finally, the notion that judges and prosecutors do not take into account relationships with defense attorneys when they make decisions is simply wrong.⁴ Unfortunately, Ms. Bamberger has found it necessary to defend her agency's methods. I was not criticizing Legal Aid attorneys in New York City. I never mentioned New York City as the prototype of the problem. In fact, in towns where there are only ten judges and fifteen prosecutors the problem is exacerbated. I didn't expect a rebuttal to my claims to be based on the

* This discussion is in response to the paper presented by Martin Guggenheim. The paper written by Charles J. Ogletree and Randy Hertz was submitted after the colloquium.

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1. *Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?* 14 N.Y.U. REV. L. & SOC. CHANGE 46 (1986) (Remarks of Phyllis Skloot Bamberger) [hereinafter cited as *Effective Assistance*].

2. *Id.* at 44-45.

3. *But cf. id.* at 48 (Remarks of J. Vincent Aprile II) (emphasizing controlling role of client in litigation decisions).

4. *Id.* at 43 (Remarks of Phyllis Skloot Bamberger).

manner in which a particular office operates. I don't think it contributes to the discussion to focus on one office.

JAMES JACOBS: Are there comments or questions?

AUDIENCE COMMENT: My name is Lou Aidala of the New York City Criminal Bar Association. One possible solution to the ethical problems raised has not been addressed, namely utilization of members of the private bar. The private bar has a certain independence from judges and prosecutors that public defenders may not have. A defendant may perceive the institutional defense attorney as part of the same system which is trying to convict and incarcerate her. Furthermore, a public defender may fear losing her job, if she resists institutional pressures. In contrast, a private attorney, because of her independence, can perhaps better withstand the pressures that may exist.

BARBARA UNDERWOOD: I don't really think you have addressed the problem. A private attorney who litigates frequently in the criminal system frequently has the same problem as an institutional public defender. She has regular relationships with judges and prosecutors which must be maintained, and she is therefore subject to the same pressures as public defenders.

If the private attorney litigates infrequently, then the institutional pressures are lessened, but not because the attorney is in private practice. An infrequent litigator may be free of institutional lawyers' problems. But she loses the advantage that an experienced frequent litigator offers a client: knowledge of how the system works.

J. VINCENT APRILE II: In Kentucky, we don't have full-time public defenders; we make contracts with private attorneys. These attorneys are confronted by an incredible ethical dilemma when they argue an indigent criminal defendant's case before the same judge who is presiding over a civil liability case involving a claim for fifty thousand dollars. They don't want to endanger the success of the civil litigation by raising objections on the defendant's behalf in the criminal case which might irritate the judge. For a criminal case, the most a Kentucky public defender will be paid is one thousand dollars. In addition, judges are already somewhat hostile to a defendant's situation.

AUDIENCE COMMENT: My name is Jabar Abdul Karim, and I'm with the Suffolk County Conference on Juvenile and Criminal Justice. My first question addresses the hypothetical involving the off-color remark made by the judge in chambers.⁵ What is the difference if the remark is made about a lawyer's client in chambers or in open court?

PHYLLIS SKLOOT BAMBERGER: You raise a very good point. It involves the whole law of recusal. If a comment by a judge is made in open court, in front of the jurors, counsel would be remiss not to move for a mistrial in order to

5. Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13, 17 (1986); see also *Effective Assistance*, *supra* note 1, at 45-46 (Remarks of Phyllis Skloot Bamberger).

protect his record. The judge should be alerted to what he has done, so that he can declare a mistrial or, if he chooses not to, the issue is preserved for appeal. Now, if the comment is made in chambers, it is difficult to force the judge to recuse himself, because the standard is actual, not potential, bias. If the judge says, "Well, I'm not biased, I can treat this man or woman fairly," you're likely not to get relief. The best way to proceed in that situation is to watch the judge for anything which may indicate that his bias is being reflected in either his decisions or his remarks to the jury. Then you can provide a basis for telling the judge that he should grant the motion for the recusal or you make a record for appeal so that the appellate court can consider the matter.

AUDIENCE COMMENT: Secondly, Dr. Bamberger, if frequent litigators are given cases by the court and paid by the state, how can you then say that there is no collusion or compromising in the system, when both the defense and the prosecution are paid by the same source?

PHYLLIS SKLOOT BAMBERGER: Well, my position was that the institutional defender has to maintain the constitutional rights of a client and make strategic decisions which are beneficial, particularly to that client, without consideration of another client.⁶ My second point was that private institutional defenders (community defenders in the federal system), such as the ones in New York, Philadelphia, San Diego, and Seattle, provide defense services in the most independent way.⁷

My example of the Legal Aid Society, far from being defensive, was intended to show a particular type of defense service in which the independence of the individual lawyer can best be maintained. Because the Legal Aid lawyer is part of an agency which is separate from the government, it has a hierarchy of people which can support the lawyers in the pits who are making individualized, particularized decisions on behalf of one client. I suggest to you an example from my experience. As a very young lawyer, I made a motion which was denied, and the court's opinion indicated that I had not done something which I should have done in order to be more effective in my representation. I renewed my motion, after checking out the omitted fact. The judge called me on the phone and said, "Mrs. Bamberger, you get yourself up here right away, and you'd better bring your lawyer with you." Well, I was shaking in my boots, and I called the attorney-in-charge of the Legal Aid Society. He went with me up to the judge's chambers, and by the time we got to talking about the case, the judge had forgotten why he called me.

Now, I suggest to you that my job was not dependent on that judge's decision. I had independence and support from a fantastic hierarchy. I could have made five more motions on behalf of my client, and the judge could not have said anything about the diligence of my representation.

6. *Effective Assistance*, *supra* note 1, at 43-44 (Remarks of Phyllis Skloot Bamberger).

7. *Id.* at 44.

J. VINCENT APRILE II: There are major problems with public defender programs. For example, in one midwestern state, the chief public defender for each county is appointed by the trial judge, at whose whim and caprice the chief public defender and all of his staff serve. I was told by a judge, in one such jurisdiction, that defense attorneys filed only three or four motions in every case. He said that if lawyers filed any more motions they would lose their jobs.

AUDIENCE COMMENT: My name is Weldon Brewer. I'm either congratulated or blamed for causing the 1982 Legal Aid strike in New York City. The conflicts that Professor Guggenheim speaks of are rampant. But they are much more serious than his examples—some of which were fairly trivial—would indicate. For example, a judge is almost never willing to give you time to argue about the particulars and make your record; almost always, you're hurried in interviews with clients at arraignments. Only rarely can you consult adequately with a confused defendant about a plea offer. These are very serious systemic conflicts that occur daily for the institutional lawyer.

Ms. Bamberger says that institutional lawyers in the pits are supported by a hierarchical structure which defends against political forces.⁸ However, throughout the country, it's been the observation of public defenders and of professors, who are observing the criminal justice system, that the employers and administrators of those in the pits are more concerned with funding and with political perceptions than with what I think is necessary zealotry.⁹ If those administrators and their public defender programs espouse Professor Guggenheim's loose and unclear standard of cooperation and lessened zealotry, it would dramatically affect the way programs are run and seriously decrease the quality of representation to which we aspire.

Professor Guggenheim, how would you distinguish between overzealous representation, and collaboration with the court and the district attorney, which dilutes the quality of ethical representation?

MARTIN GUGGENHEIM: Well, I quite agree with your remarks, and I think they were better stated than mine. I was taking only a slice of the problems institutional defense attorneys face. The problem of limited resources, identified by Mr. Aprile,¹⁰ includes time. Time is our most precious resource, and if lawyers don't have the time to investigate, they're not doing a good job. Much of the remainder of the day will address this problem.

However, in this initial discussion, I have made a deliberate attempt to look beyond the problems of limited resources and to explore the problems that remain, by assuming that adequate resources exist. My primary observation is that lawyers who are perceived by their adversaries in courts as unrea-

8. *Id.* at 55.

9. *E.g.*, McConville & Mirsky, *Defense of the Poor in New York City: An Evaluation* (1986) (forthcoming).

10. *Effective Assistance*, *supra* note 1, at 48 (Remarks of J. Vincent Aprile II).

sonable will not receive the kind of breaks necessary for effective advocacy. If we don't recognize this, then we won't be effective most of the time.

BARBARA UNDERWOOD: I'd just like to make an observation, realizing that I'm the representative of prosecutors here. A number of the examples in Professor Guggenheim's paper and much of the discussion today have operated on the assumption that the prosecutor is either demanding of or responsive to favors. Prosecutors try to resist punishing a defendant for hostility generated by the behavior of her attorney. There is an ethical obligation to resist such action. Nevertheless, it's obvious that since the actors in the criminal justice system are human, there is a strong impulse to consider the attorney's behavior when dealing with the defendant. It would be foolish, I think, to suppose that that problem could be entirely wished away. Discretionary decisions are made at the margins all the time.

