RESPONSE*

PHYLLIS SKLOOT BAMBERGER**: I note that Professor Guggenheim's hypotheses, as articulated today and in his written paper,[1] indicate that the judge and the prosecutor exert their so-called forbidden pressure upon defense counsel. But I also note that his criticism of the prosecutor and the judge for exerting this pressure is non-existent. He appears to lay the burden of overcoming the resulting violations of the constitution and of ethics solely upon defense counsel, rather than upon a common understanding by all members of the process that the dilution of the rights of an individual defendant is absolutely inappropriate and unconstitutional.

Professor Guggenheim first assumes that institutional defenders will trade off the interests and rights of one client in favor of another, in the face of actual or perceived pressure by judges and prosecutors—pressure made possible by the institutional lawyer's regular and repeated appearances in court.[2] These charges against defense counsel and the institutional defender are serious ones, but they are misconceived, and I'm glad that I have the opportunity to correct this misconception.

Second, Professor Guggenheim makes his assumptions based on what he defines as the reasonable conduct of the institutional defender. That is, he believes that a defense lawyer can appear reasonable to the judge or prosecutor only when he makes decisions that dilute his client's rights. From these two assumptions, we derive two sets of questions. First, what is undiluted representation; can an institutional defender, as a hypothetical matter, provide undiluted representation; as a practical matter, in an individual case, can an institutional defender give undiluted representation?

The second set of questions deals with being reasonable. Is it tactically smart, in a particular case, to anger the judge? If the institutional lawyer pleases the judge, will the judge think better of him, and is such conduct appropriate? May the defense lawyer do favors for the prosecutor?

An institutional defense lawyer has and does provide what I call "complete" representation to his client. Further, I submit that the private, institutional defender system, particularly the one I know best—the Legal Aid Society—can most effectively provide the structural basis for insuring com-

---

* Eds. Note: Normally it is the policy of the *Review* to use female pronouns for the third person singular when the pronoun is used generically. However, at the time these remarks were accepted for publication, this policy was not mandatory.

** Chief of Appeals, Federal Defender Unit, Legal Aid Society of New York.

1. Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13 (1986). This response is directed only towards the paper by Martin Guggenheim. The paper by Charles J. Ogletree and Randy Hertz was submitted after the colloquium.

2. *Id.* at 13-14.

plete representation. With respect to being reasonable, I suggest that a reasonable, tactical decision, on the part of an institutional defense lawyer, has nothing to do with the dilution of representation. Rather, it has to do with the defense lawyer's creative intellect and the ability to make the best strategic decisions on behalf of each client, considering only that client at all times.

The pressure to trade off interests is one of many that face lawyers. I suggest to you that lawyers frequently come under financial pressure. The client with private retained counsel pays for specific tasks that the lawyer performs or for a specific number of hours. Is the lawyer to do other work, if that is necessary? My office is not infrequently visited by distinguished retained counsel, who claim to have weak cases, seeking to know how we can be appointed to handle a client's case on appeal in both civil and criminal matters. I must confess that I sometimes wonder if distinguished trial counsel's analysis of the merits of his client's case on appeal has anything to do with the fact that his client has exhausted his financial resources.

Further, the financial pressure to trade off one's clients exists as well for the individual counsel assigned by panel or under the Criminal Justice Act.[3] What about the lawyer whose very livelihood may depend upon being assigned by judges to handle cases? Can that individual lawyer resist the judge's pressures to act against a client's interests or resist actions which will make the judge think well of him. What about public defenders, including federal public defenders, who are appointed to their positions by the judges before whom they appear on a regular basis?

I suggest to you that private institutional defender services, such as the Legal Aid Society of New York City, are the best defender agencies for providing undiluted services to a client. The hiring process insures that the lawyer is not only skilled but is also interested, committed, and aware of the obligations to provide undiluted services to the client. The training program is very extensive and addresses the practical problems of appearing before specific, individual judges and against particular prosecutors. There is supervision in the courtroom. The trial of a felony case may be undertaken only by an attorney certified to have proper experience to handle such cases.

I also suggest to you that Professor Guggenheim's assumption that defense attorneys and prosecutors repeatedly appear before an individual judge[4] is inaccurate. To my knowledge, there are eighty certified Legal Aid lawyers in the courts of New York City. There are twice as many district attorneys who prosecute felony cases. There are many judges and the caseload, as we all know, is quite heavy. The opportunity for an individual lawyer to appear before an individual judge with the same prosecutor on a regular enough basis that paired cases may be identified is virtually nonexistent. In fact, the only way to pair off cases for bargaining and dilution of rights is for the defense lawyer to highlight the two or three cases that can be traded off. A defense

3. 18 U.S.C.A. § 3006A (West 1985).
4. Guggenheim, *supra* note 1, at 3.

lawyer simply won't and can't do that. It is unconstitutional and a violation of ethics.[5]

Indeed, when attorneys at the Legal Aid Society are assigned to individual calendar parts, the structure of the private institutional defender provides the best way to prevent the dilution of rights and to assure complete representation. If the district attorney's office chooses to have a particular district attorney assigned to a particular judge on a regular basis, it is the private, institutional lawyer with backup from his supervisor, the attorney-in-charge, the attorney-in-chief, and, ultimately, the board of directors who can withstand actual pressure to trade off cases. The institutional structure of the private defender provides the basis for the resistance.

Now I turn to defense counsel's reasonableness. Reasonableness and dilution of rights are not synonymous. The reasonableness of defense counsel's behavior lies in his ability to agree with a judge or a prosecutor when his client's rights are unaffected or his client's rights are benefited. For example, in a great many cases, defense counsel are asked to stipulate certain facts. If defense counsel is satisfied that the information included in the proposed stipulation (for example, custody of the drugs in a narcotics case) can be established without calling in the prosecution witnesses who need to testify, he will normally stipulate. But when information is not clear and uncontested, as where the chain of custody is broken, the defense attorney simply cannot stipulate. She must act in each individual case to determine whether, without diluting his client's rights, it is reasonable to stipulate, to agree, or to accept the request of the prosecutor. No individual client can prevail over any other.

I'd like to go through some of the hypotheticals in Professor Guggenheim's paper. It is preposterous for a lawyer to believe that a judge will rule favorably on a credibility issue in one case, because in another case the lawyer gives up the right of a client.[6] A judge's credibility findings are based on his view of the witnesses.

In a situation in which the defendant has turned around, which was another of the hypotheticals in Professor Guggenheim's paper,[7] the defense counsel has an obligation to prove to the judge that the client has truly reformed, and there are resources to provide the basis for such a position. The lawyer should find a non-custodial program for the client to be in, prepare a sentencing memorandum to demonstrate to the judge the client's changed attitude, and create a legal issue so that the Appellate Division can rule on whether a particular sentence is fair. New York is unique in allowing review of sentences.

When a judge makes a derogatory, off the record remark about the client,[8] there is no ground for urging that remark as a basis for recusal of the

5. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 2.1 (1983).
6. *But cf.* Guggenheim, *supra* note 1, at 15-16, 19-20.
7. *Id.* at 16.
8. *Id.* at 17.

judge, unless the judge does something to affect the client's rights in open court which may affect the jurors. Watch the judge and make the motion for recusal, if the judge's behavior continues.

I'd like to conclude with one remark. Although it was not apparent from Professor Guggenheim's remarks here this morning, it is apparent to me from reading his paper that defense counsel is treated with disrespect. In the paper, the judge is called Judge Rehnquist and the prosecuting attorney is called Ms. O'Connor, but the defense lawyer is called Warren. Now, don't we think that Professor Guggenheim reveals his bias or lack of sympathy with defense counsel through this demeaning of defense counsel. I prefer to call my defense counsel Mr. Brandeis. He will defend his clients to the utmost, and respond with appropriate gusto, when he is advised by his elders not to defend for too long.

RESPONSE

J. VINCENT APRILE II*: I want to be fair to the professor and point out that I understood that his hypotheticals were intended to illustrate the problems that confront the defense attorney as an institutional person delivering legal services to indigents. It would be unfair to say those pressures don't exist. But the basic reason those pressures exist in the system is because defense attorneys too often assume some of the responsibilities of prosecutors and judges.

The job of a criminal defense lawyer, whether she is retained or publicly appointed and reimbursed, is to advocate. In every one of the examples in Professor Guggenheim's paper,[1] the defense attorney was asked to fulfill the role of the prosecutor or the judge. None of us, whether public defender or retained criminal defense attorney, should judge a client's situation and fail to act on the basis of that judgment. We must advocate.

Professor Guggenheim's first hypothetical is concerned with a defendant whose credibility is at issue.[2] In such a situation, the defense attorney should not stop to consider the effect this case will have on all her other cases. She has a duty to pursue her client's interest to the fullest extent, regardless of the effect that zealousness may have on other pending cases.

For example, even if polygraph examinations may not be admissible in her jurisdiction, she should have her client polygraphed. If her client is polygraphed and passes, then she should ask the judge to consider the polygraph examination. Even if the judge refuses to consider it, the judge has read that the client has passed the polygraph examination. If the client passes the polygraph examination, a request should be made that the court order the arresting officer to submit to one. I can't predict or guarantee that these strategies would work or that the judge would rule in my favor. But I would know that I had advocated to the fullest of my ability, and I could rest confidently about that case and go on to tackle the rest of my cases. Having completed my responsibilities as a defense attorney, I have to step back and realize that I can't be the judge or the prosecutor.

In his paper, Professor Guggenheim also discusses a hypothetical in which a defense attorney knows that his client is guilty and wonders to what extent that knowledge should influence his advice to the client as to whether to plead guilty to a misdemeanor.[3] A defense attorney can never use her

---

* Assistant Public Advocate, General Counsel and Training Consultant, Kentucky Department of Public Advocacy.

1. Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13 (1986). This response is directed only towards the paper by Martin Guggenheim. The paper by Charles J. Ogletree and Randy Hertz was submitted after the colloquium.

2. *Id.* at 15-16.

3. The hypothetical was part of an earlier draft of the paper which Professor Guggenheim

knowledge of a client's guilt against that client. The attorney must step back and act as if she knew nothing. A lawyer can and should offer her best advice, expertise, and judgment to a client, but she must leave to the client the decision as to whether to plead guilty. A lawyer's clients may defer to her judgment, and they often do, but the client should do so with the full knowledge and understanding that her lawyer has investigated the case to the best of her ability. The client, then, will not perceive her attorney as using the knowledge the attorney has of the client's guilt as a vehicle for betrayal.

Several real ethical concerns for criminal defense attorneys are not addressed by Professor Guggenheim. For example, consider *Ake v. Oklahoma*,[4] which holds that indigents in capital cases are entitled to the assistance of a competent psychiatrist in preparing their defense, when sanity is to be a significant issue at trial. *Ake* illustrates a problem of institutional administrative control which public defender programs constantly face. What does an attorney do in a situation where the legislature gives the public defenders' office a set budget for expert witnesses, and the administrator of the office, who is also the supervisor for the trial attorneys, makes the decision for individual funding requests? Lawyers inevitably think about later clients' needs, and in the early part of the fiscal year, they adjust their requests accordingly. The attorneys' administrators worry about the same thing. When defense attorneys and administrators make eligibility determinations, they create their own conflicts of interest. Such decisions are for judges and legislators. Consideration of these issues by defense attorneys can only interfere with their efforts to give undivided attention to particular clients.

A second ethical issue arises within the capital punishment context. All administrators of public defender programs and public defenders say the same

---

delivered at the Colloquium. The hypothetical was as follows: Warren picks up a new case in which his client is charged with an assault on an elderly woman. The victim is in poor health and the strain of the legal proceeding is bad for her. The defendant admits his guilt to Warren in an interview. He is released after posting a bond of $1,000. As is his practice, Warren schedules an informal meeting with the prosecutor after he has interviewed his client.

The prosecutor, as luck would have it, is Ms. O'Connor. She frankly tells Warren that the complaining witness is old and frail, and, therefore, she will offer a deal. If the defendant pleads guilty to a misdemeanor, attempted petty larceny, the felony charges will be dropped. Ms. O'Connor is even frank enough to admit to Warren that the victim is considering a move to Florida for health reasons, and if the case is not disposed of within a few weeks, the prosecution may never be able to prove its case.

Warren has not made any formal motions for discovery. He and Ms. O'Connor know full well that he can delay the case for at least two months by making various pre-trial motions and undertaking an investigation. What is Warren to do? Is the answer obvious? On the one hand, the deal is a good one—a plea of guilty to a low misdemeanor for a client guilty of a serious crime. The proof of guilt is strong, but for reasons unrelated to the strength of the case, if the case is delayed for the normal length of time, there will almost certainly be no prosecution at all.

I am not as perplexed as Professor Guggenheim appears to be. No good defense attorney would ever advise her client to reject a plea to a misdemeanor charge, based on the hope that the complaining witness will not appear in court. There is always the possibility that the complainant will testify, and that the client will then be convicted of a felony charge.

4. 105 S. Ct. 1087 (1985).

thing: "If I start giving up death penalty cases, they will go to somebody who doesn't care. It's better that I have this conflict and that I wrestle with it than to have a capital case go to somebody who doesn't care." Should the administrator of a public defender program be able to reach down and say to an attorney, who is working with a client and who has done the investigation, that she is handling the case incorrectly? Must an attorney either follow the administrator's wishes or get off the case? If so, what happens if such a principle is accepted for institutionalized legal services and a well-meaning administrator of a public defender program is replaced by a person who thinks that only three motions should be filed in an appeal? Under those circumstances, an administrator who takes a defense attorney off a case creates an enormous conflict of interest for the particular attorney. Such a situation also illustrates an ethical nightmare for all who represent indigent criminal defendants.

RESPONSE

BARBARA UNDERWOOD*: The issues that we've been talking about, of trading A's interest against B's and of dealing with short-run versus long-run effectiveness in the criminal justice system, are important ones. However, it's a mistake to identify these issues solely with the institutional public defender. Professor Guggenheim observed that they exist elsewhere.[1] Nevertheless, the tenor of the discussion has been that these issues create a special and unique problem for public defenders. That is simply not true. It is a problem for anyone who is a frequent litigator in the system. The problem is not as pronounced when there are more actors in the criminal justice system. Thus, the public defender in a big city is not faced with as great a dilemma as a private litigator in a small town. In any event, the institution of the public defender provides advantages which outweigh whatever disadvantages may be associated with it.

Still, it's important to observe that the problem of trade-offs can't simply be wished away. At the extremes, when somebody is explicitly trading A's interest against B's, we can say it's unethical.[2] It simply ought not to be done. But there's no way to avoid the fact that a frequent litigator's effectiveness, in the future, is predicated upon the consequences of her present actions.

Phyllis Bamberger said earlier that there are acceptable and unacceptable accommodations.[3] She gave us an example of an acceptable one: stipulating to a chain of custody. Of course, a rigid or extreme notion of undiluted representation would require never stipulating to anything. After all, even if there's no dispute, the prosecutor might stumble or fail even though she has the evidence to prove the chain of custody. A critical witness might not show up. Or assume a prosecutor seeks an adjournment to which the defense attorney is indifferent. If the defense attorney is obstreperous and never consents to anything, there is always the chance that the prosecutor might stumble and if she stumbles, defense counsel can win.

With an extreme view of undiluted representation, a defense attorney could argue that it's in her client's interest never to cooperate with the prosecution. I don't think any lawyer would consider that to be an effective way to litigate.

---

* Chief of Appeals and Counsel to the District Attorney for Kings County, New York.

1. Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13, 14 & n.4 (1986). This response is directed only toward the paper by Martin Guggenheim. The paper by Charles J. Ogletree and Randy Hertz was submitted after the colloquium.

2. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8(b), 1.8(g), 2.2 (1983).

3. *Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE 45 (1986) (Remarks of Phyllis Skloot Bamberger).

One of the reasons it's not effective has to do with long-run versus short-run considerations. There are lawyers who make infrequent appearances in the criminal justice system, who can come in and be completely adversarial and unaccommodating. Sometimes it works for them. It cannot work over the long run, because it makes everybody else in the system unwilling to accommodate them. However, it can conceivably be effective in a particular case for a particular client. Therefore, every lawyer must be concerned about whether a particular accommodation can legitimately be justified, in light of the long-run implications of such action.

Prosecutors, of course, face the same dilemmas. The dilemmas may seem less acute and less interesting for a prosecutor, because she doesn't have the lawyer-client relationship that transforms the dilemma into a constitutional issue. However, prosecutors still agonize over whether to do everything that is possible in an adversarial mode to advance a particular case, or whether to accommodate a judge or a defense attorney in a particular matter, in the hope of building a working relationship.

The discomfort with trade-offs comes, in part, from the need to rely on favors at all. It's nice to have an idealized version of a legal system in which no one accommodates anyone. Everyone simply invokes rights, makes claims, and has them decided in some pure and neutral fashion. No favors are done; no accommodations are made; no discretion is exercised. Such a system is difficult to imagine, and probably impossible to create in the real world. In any event, it would be intolerable to live with. After all, the discretion that creates the context for these problems is the discretion which everyone wants to invoke, in a particular case. This is a currency which all institutional lawyers recognize—knowledge of the system and knowledge of each other. A lawyer's ability to invoke discretion is one of the things she offers her client, as well as one of the sources of the problem we're talking about today.

It seems that the problem here is exactly the one that Professor Guggenheim sets out: the problem of drawing limits. It is a problem which involves understanding the difference between accommodations and adjustments which are acceptable, in the interest of long-term effectiveness, and those which are not acceptable, because they undermine the representation of an individual client. This problem of line drawing is forever interesting and impossible to resolve.