

# LAW AND CONTEMPORARY PROBLEMS

---

---

Volume 58

Winter 1995

Number 1

---

---

## FOREWORD

ROBINSON O. EVERETT\*

Recently I served on a nine-member committee appointed by Chief Justice Rehnquist to study and report on the rendition of legal services to indigent defendants in federal criminal trials. At one of the first meetings of the committee—whose establishment was mandated by Congress pursuant to the Judicial Improvements Act of 1990<sup>1</sup> and soon came to be known by the name of its chairman, District Judge Edward C. Prado<sup>2</sup>—the suggestion was made that some distinguished legal periodical be requested to organize and publish a symposium on the right to effective assistance of counsel, as that right has evolved during the three decades since the Supreme Court's decision in *Gideon v. Wainwright*<sup>3</sup> and the enactment of the Criminal Justice Act.<sup>4</sup>

To me, *Law and Contemporary Problems*, the originator of legal symposia, appeared to be the natural choice to perform this important task. When I transmitted the Committee's request, not only was it enthusiastically accepted, but also—perhaps not unforeseeably—I was asked to serve as special editor of the symposium that would be published. Fortunately, we have been able to assemble here articles from persons with great insight into the major issues that are being confronted in the continuing effort to assure that the constitutional right to the effective assistance of counsel is a reality and not merely an aspiration.

---

Copyright © 1995 by Law and Contemporary Problems

\* Professor of Law, Duke University School of Law; Chief Judge, U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces), 1980-90.

1. Pub. L. No. 101-650, S 318, 104 Stat. 5116-17 (Dec. 1, 1990).

2. Judge Prado describes the work of the committee in his article in this symposium. Edward C. Prado, *Process and Progress: Reviewing the Criminal Justice Act*, 58 LAW & CONTEMP. PROBS. 51 (Winter 1995). The reporter for the Committee was Professor Charles J. Ogletree, Jr., who also has an article in the symposium. Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81 (Winter 1995).

3. 372 U.S. 335 (1963).

4. Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. S 3006a (1988)).

The publication of this symposium comes at an especially opportune time. Thirty years have passed since the Criminal Justice Act of 1964 was first implemented, and it is appropriate to determine what progress has been made during this period in guaranteeing the right to counsel in federal criminal trials. Moreover, Congress and various state legislatures—with significantly changed memberships as a result of the November 8, 1994 election—are now taking a fresh look at some programs intended to enhance the right to counsel. For example, the funding of post-conviction defender organizations, formerly known as death penalty resource centers, is in jeopardy. A subcommittee of the House Appropriations Committee wishes to terminate appropriations for this program; and some state legislatures and governors are also attempting to terminate its funding.

The *American Bar Association Journal* has recently called attention to some other topics related to the right of counsel. In its March 1995 issue, the cover story, entitled “The Jagged Edge,”<sup>5</sup> concerned a Marine captain who, by misrepresenting his qualifications, was certified to perform duties as a prosecutor and military defense counsel in violation of the Uniform Code of Military Justice<sup>6</sup> and thereafter defended many service members without ever having been licensed as an attorney. Subsequently, in the cover story for its July 1995 issue, the *Journal* raised some fundamental questions about the current system for appointing and reappointing federal public defenders.<sup>7</sup> The nature of these questions—which also were a major subject of consideration by the Prado Committee—can be readily inferred from the article’s title, “Unequal Loyalty,” and from this summary which appears on the *ABA Journal*’s cover:

Tova Indritz is a casual, plain-spoken lawyer who was widely expected to be reappointed as a federal public defender. But she wasn’t. To her admirers, she was punished for caring more about her clients than the courts where she practiced. To her critics, she got what she deserved for antagonizing federal judges.<sup>8</sup>

The questions about divided loyalty raised by the failure of public defenders to obtain reappointment are, of course, not unprecedented. For example, in some assigned counsel systems, there are claims that judges have used appointments as patronage, or because of favoritism for political cronies or former law clerks, or to reward attorneys who, in representing indigents, do not file too many motions or enter too many pleas of “not guilty.” Indeed, when Fred Bennett, one of the contributors to this symposium, was not reappointed after many years of distinguished service as a federal public defender in

---

5. Lincoln Caplan, *The Jagged Edge*, 81 A.B.A. J. 52 (Mar. 1995).

6. 10 U.S.C. § 827(b) (1988).

7. Lincoln Caplan, *Unequal Loyalty*, 81 A.B.A. J. 54 (Jul. 1995).

8. I perceived some irony in the failure of Tova Indritz, the federal public defender in New Mexico, to be reappointed after thirteen years of meritorious service in that position. She had been a vigorous opponent of recommendations by the Prado Committee to remove from the judiciary the power to appoint and reappoint federal public defenders. An additional irony is that, although the ABA has promulgated Standards for the Defense Function which require separation of the judiciary from defense services, the ABA gave no support to the recommendation of the Prado Committee that federal judges not be directly involved in overseeing federal defenders.

Maryland, there were claims that the vigorous advocacy that he encouraged on the part of attorneys in his office had annoyed some judges and thereby caused the loss of his position.

Claims that assigned counsel have not represented their clients effectively because of divided loyalty are familiar to me because of my own experience with the military justice system. For many years, the military commanders who appointed courts-martial and referred charges to those courts for trial also appointed the prosecutors and the defense counsel. Because the commander who convened a court-martial could in various ways greatly affect the future career of the appointed defense counsel, many accused service members doubted that their lawyers could represent them vigorously. In order to eliminate this widespread perception, the Air Force and the Army in the early 1970s created independent trial defense services, which were designed to shield military defense counsel from any kind of command influence.<sup>9</sup>

Issues concerning the scope of the right to counsel have recently been posed in several highly publicized trials—such as those of O. J. Simpson and the Menendez brothers. For example, should defense counsel—whether privately retained or court-appointed—seek to advance their client’s cause by holding press conferences or leaking information to the press? Also, to what extent does obtaining a fair trial depend on the resources of the defendant?<sup>10</sup> In turn, if having the resources to retain skilled counsel is important in determining the outcome of a criminal trial, to what extent can the government deprive a defendant of those resources by forfeiture of the defendant’s assets?<sup>11</sup>

For a suitable perspective, the symposium begins with an article by Dean Gerald F. Uelmen, who takes the reader on a guided railway tour of the Sixth Amendment right to counsel,<sup>12</sup> making stops along the way to revisit such legal landmarks including *Nabb v. United States*,<sup>13</sup> *Powell v. Alabama*,<sup>14</sup> *Johnson v. Zerbst*,<sup>15</sup> *Betts v. Brady*,<sup>16</sup> and *Gideon*.<sup>17</sup> Near the end of the line, as it were, is the Supreme Court’s recent decision permitting government to reach

---

9. These military trial defense services are in many ways a model for providing effective representation to defendants. However, up to this point, the Navy has not placed its defense counsel in a separate defense service.

10. In this connection, I remember being present when a well-known defense attorney was asked whether he ever defended indigents and responded that *all* of his clients were indigent—either when he began representing them or when he finished.

11. In his trial, General Noriega was confronted by this problem since many of his assets were forfeited. See *United States v. Noriega*, 746 F. Supp. 1541 (S.D. Fla. 1990). Some recent United States Supreme Court decisions seem to have restricted forfeitures of assets and may have alleviated this problem for defendants. See, e.g., *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993); *United States v. A Parcel of Land*, 113 S. Ct. 1126 (1993).

12. Gerald F. Uelmen, 2001: *A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel*, 58 LAW & CONTEMP. PROBS. 13 (Winter 1995).

13. 1 Ct. Cl. 173 (1864).

14. 287 U.S. 45 (1932).

15. 304 U.S. 458 (1938).

16. 316 U.S. 455 (1942).

17. 372 U.S. 335 (1963).

attorney's fees through forfeiture laws.<sup>18</sup> Indeed, in that case the dissenting opinion noted the restriction that this holding might impose upon the availability of counsel for defendants charged with certain crimes. Dean Uelmen speculates that, with the departure from the Court of the last justice who ever tried a criminal case—Justice Thurgood Marshall—the train may be reversing its direction as the right to counsel of a criminal defendant is dismantled.<sup>19</sup> Dean Uelmen's concerns seem to be confirmed by the Supreme Court's recent decision in *Nichols v. United States*.<sup>20</sup> There the Court severely limited *Baldasar v. Illinois*,<sup>21</sup> which had held improper certain uses of prior uncounselled misdemeanor convictions for sentencing enhancement purposes.<sup>22</sup> Under *Nichols*, an uncounselled misdemeanor conviction may now be used to convert a subsequent misdemeanor conviction into a felony with a possible prison sentence.<sup>23</sup>

In his article, Professor Fred Warren Bennett<sup>24</sup> discusses the implications of the Supreme Court's recognition in *Ake v. Oklahoma*,<sup>25</sup> that the assistance of experts may be needed both before and during trial as part of the Sixth Amendment right to counsel.<sup>26</sup> He suggests that, in modern practice, a criminal defendant denied expert assistance due to a trial judge's "miserly" reading of precedent cannot be said to have had an adequate defense or to have received effective assistance of counsel.<sup>27</sup> Bennett advocates the promulgation of clear and generous standards by which a trial court should determine an indigent defendant's right to expert services.<sup>28</sup>

Several articles in the symposium discuss systems for delivery of defense services in criminal trials. Certainly the system used can affect the independence of the defense lawyer and the perception of that independence. Likewise, it can affect the costs incurred in assuring adequate representation of indigent

18. *Captin & Drysdale Chartered v. United States*, 491 U.S. 617 (1989).

19. Uelmen, *supra* note 10, at 27-29.

20. 114 S. Ct. 1921 (1994).

21. 446 U.S. 222 (1980).

22. I was interested to see the practical impact of *Nichols* in my own city of Durham, North Carolina in connection with the practice of appointing lawyers for first time drunk driving offenders. The local practice had been to appoint lawyers under such circumstances because of the possibility of severe punishment in the event of future convictions. However, recently a lower court judge proposed to change this practice—and thereby save attorneys fees otherwise paid to counsel for indigent defendants—because he concluded that a first-offender would not be sent to jail and therefore had no constitutional right to counsel. John Stevenson, *DWI Practices Under Scrutiny*, THE HERALD-SUN, Jul. 9, 1995, at B1.

23. *Nichols*, 114 S. Ct. 1921.

24. *Toward Eliminating Bargain Basement Justice: Providing Indigent Defendants with Expert Services and an Adequate Defense*, 58 LAW & CONTEMP. PROBS. 95 (Winter 1995).

25. 470 U.S. 68 (1985).

26. The repudiation of the *Frye* test in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993) has broadened the opportunity for the admission of expert testimony and thereby has increased the need for defense access to experts. Certainly the O.J. Simpson trial has enhanced public awareness of the significant role that may be played by experts in a criminal trial.

27. *Id.* at 137-38.

28. *Id.* at 138

defendants. Obviously, concerns about costs have mounted as crime rates grow exponentially and the criminal justice system becomes increasingly complex for many reasons—such as use of sentencing guidelines, greater dependence on capital punishment as a deterrent, and more reliance on expert testimony.

John J. Cleary is especially qualified to discuss how defense services should be provided. In the 1960s, while he served as deputy director of the Ford-funded National Defender Project, he pioneered in establishing programs designed to enhance interest in the representation of indigent criminal defendants.<sup>29</sup> Subsequently, Cleary served as the Federal Community Defender in San Diego. In his article, he reviews the evolution of the right to effective assistance of counsel and the advent of compensated defense services; then he urges significant reforms, such as the total separation of public defenders from the judiciary.<sup>30</sup> Cleary emphasizes the conflict which is inherent in judicial oversight of defender services and the increased importance of independence from the judiciary in light of the tremendous expansion of federal jurisdiction over crimes; and he stresses that federal defendants must be accorded this independence in order to satisfy the mandate of the Sixth Amendment.

Of course, Cleary's view is not unique that "federal defenders must be recognized as an independent structure if they are to have true parity, both with their adversary, the federal prosecutors, and with the courts before which they practice."<sup>31</sup> For example, Circuit Judge Stephanie K. Seymour, a former Chair of the Judicial Conference's Committee on Defender Services, has observed:

Although it may have been wise to place the defender services program under the guidance of the judiciary in the program's infancy, logically the defense component of our criminal justice system should be as independent of the decision maker as is the prosecution. It is uncomfortable and a bit unseemly for the very judges before whom the criminal defense lawyer must try his or her cases to participate in the selection of that lawyer or to decide his or her compensation.<sup>32</sup>

As Judge Prado reports in his article, most of the members of his committee also believed that there are problems in the present system of oversight by the judiciary of the rendition of defense services in federal criminal trials.<sup>33</sup>

---

29. For several years during the late 1960s I was co-director of such a program, which provided summer internships for law students from Duke University, the University of North Carolina, and North Carolina Central University. These internships were intended to encourage the students' interest in protecting the right to counsel and to provide them experience that would be valuable in representing criminal defendants. At one point, we arranged for some of the law students to help prisoners prepare petitions for post-conviction review, but unfortunately we had to abandon this aspect of the program because of opposition from several sources.

30. John J. Cleary, *Federal Defender Services: Serving the System or the Client?*, 58 LAW & CONTEMP. PROBS. 65 (Winter 1995).

31. *Id.* at 70-71.

32. COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT, REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT, reprinted in 52 Crim. L. Rep. (BNA) 2265, 2287 (Mar. 10, 1993) [hereinafter COMMITTEE REPORT].

33. The only member of the Committee who was satisfied with the present extensive involvement of the judiciary in the appointment and reappointment of federal public defenders was the late Judge George Revercomb, who served as a district judge in the District of Columbia Circuit.

Currently, the appointment and reappointment of federal public defenders is made by the court of appeals for the circuit in which the defender serves. Policy at the national level is formulated by the Committee on Defender Services, which is composed solely of judges and reports to the Judicial Conference. Thus, the policy emanates from a committee of judges who meet only twice a year. In turn, the recommendations of that committee are considered by the Judicial Conference which usually meets only twice a year.

The members of the Prado Committee concluded that such a structure is not effective. Relying on the importance of maintaining the independence of defense counsel—and the perception of their independence—the committee recommended in its report to the Judicial Conference that the judicial involvement with defender services be sharply curtailed at every level.<sup>34</sup> Thus, at the national level, the Judicial Conference's Committee on Defender Services would be superseded by a Center created to manage defense services and to control the allocation of funds for such purposes. The governing board of the Center would be appointed by the Chief Justice, but the members of the Prado Committee disagreed as to whether that board should have any judges as members. A majority concluded that—at least initially—there should be some judicial representation on the board.<sup>35</sup> However, four of the committee's nine members were convinced that no judge should be allowed to sit on such a board.<sup>36</sup> Similarly the Prado Committee proposed that, at the local level, the appointment and reappointment of defenders be removed from the judiciary and placed in local boards—a system similar to that currently existing in New York, Chicago, San Diego, and elsewhere.

As Judge Prado mentions in his article,<sup>37</sup> the Judicial Conference did not agree with these recommendations intended by his committee to enhance the independence of federal public defenders. Indeed, these recommendations were never submitted directly to Congress, for the Judicial Conference submitted its own report to the Congress and did not transmit the Prado Committee's report. Probably the Judicial Conference's position, which had been recommended by its Committee on Defender Services, was based on two premises.

The first premise is that judges are in an especially favorable position to evaluate the quality of representation. Unfortunately this premise sometimes induces disregard of the danger that a judge's effort to monitor the rendition of defense services may threaten the independence of defense counsel and produce a lack of confidence on the part of defendants. The second premise is that involvement of the judiciary with defense services is necessary in order to obtain

---

34. See COMMITTEE REPORT, *supra* note 32, at 2265.

35. I was a member of the majority and believed that, for several practical reasons, it would be desirable to allow some members of the judiciary to serve on the Board of Directors of the Center—at least until the transition had been completed from the present system. In my view, thereafter the power of the Chief Justice to appoint members of the Board would provide sufficient judicial involvement with the Center.

36. This minority consisted of the four members with personal experience as defenders.

37. Prado, *supra* note 2, at 62.

adequate funding for the program. Unfortunately, however, despite its best efforts, the federal judiciary has enjoyed only limited success in obtaining funding for the representation of indigent defendants. For example, since 1984 the judiciary has not succeeded in convincing Congress of the need to increase the compensation of panel attorneys in other than a few districts. Hopefully, even if the judiciary did not directly oversee defense services, it nonetheless would not abandon the cause of obtaining adequate funding for the representation of indigents in federal criminal trials.

Consistent with the traditional independence of federal judges, the Prado Committee discovered that substantial differences exist among federal districts in their systems for appointing counsel.<sup>38</sup> Some judges apparently emphasize involving as many members of the bar as possible in defending indigents; others rely on rotation of appointments among members of a panel of attorneys; and still others make some effort to match the experience of the attorney with the crime charged.

The system of appointments that I recall most vividly was one described by a magistrate judge who, in a 1992 hearing conducted by the Prado Committee, explained that in his district every member of the federal bar was on the list of appointed counsel and that, to avoid charges of favoritism in appointments, counsel was assigned on a strict rotation basis, except in capital cases. His description led me to imagine the problem confronted by a young, inexperienced lawyer in that district if assigned to defend a complicated drug or money-laundering case. As Judge Prado mentions in his article, his committee made recommendations intended to improve the assignment of counsel; and these recommendations were viewed favorably by the Judicial Conference.

Choosing the best system for delivery of legal services to indigent criminal defendants is as important a concern at the state level as at the federal level. Since the 1960s—when he headed a program in Boston funded by the National Defender project—Robert Spangenberg has studied such systems; and, in many instances, the Spangenberg Group has made recommendations to state legislatures and courts for improving their systems of delivery.<sup>39</sup> In their article, Spangenberg and Marea Beeman describe the structure and funding of the systems of delivery now in use at the state level, which include assigned counsel, contract attorneys,<sup>40</sup> and public defenders.<sup>41</sup> They warn against contract systems that permit unlimited case loads or make awards solely on a “low-bid” basis, both of which may raise constitutional issues as to the effectiveness of the counsel provided. Spangenberg and Beeman also suggest

---

38. Even in districts with public defenders or community defenders, it is necessary to use appointed counsel because of conflicts in cases involving multiple defendants.

39. Robert Spangenberg was a consultant to the Prado Committee, to which he submitted a report describing some of the systems used by states in providing for indigent criminal defenders.

40. North Dakota's use of contract attorneys is discussed in *Contract Counsel: A Different Way to Defend the Poor*, 6 CRIMINAL JUSTICE 24 (Spring 1991).

41. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31 (1995).

various reforms designed to enhance the efficiency and quality of defender services.

In reading the article by Spangenberg and Beeman, I noted that in some states the attorney who is assigned to defend the indigent at trial carries through the appeal, while in others there is a separate appellate defender's office. Cleary apparently favors the former approach because the trial attorney will have the best understanding of the case. On the other hand, in the military justice system Congress has provided for separate appellate defense counsel—an arrangement which allows specialization and assures that claims of ineffective assistance of counsel will not be suppressed. Surely further study needs to be given to the merits of the two alternative systems.

Cleary also favors allowing some opportunity for the client to have a choice of attorneys—as is allowed in the military justice system. Certainly having some choice tends to enhance the confidence of the defendant in his lawyer and in the likelihood of a fair trial. Moreover, there may be some instances in which rapport between the defendant and his attorney may be impaired if they are of different gender or of different race. Thus, whether providing indigent defendants some opportunity for choice of counsel is desirable and feasible merits further examination.

Heretofore, much of the discussion of delivery systems has focused on theoretical considerations of assuring the independence of defense counsel. These considerations may not be of great concern to legislators, who often are urged to reduce expenditures for the defense of "criminals." Likewise, the public may not be enthused about the expenditure of public funds for defense services since many assume—probably correctly—that most criminal defendants are guilty of some crime. However, perhaps the desire to curtail costs can be rechanneled to produce changes that will yield other benefits as well. This has sometimes occurred in the past. For example, after *Gideon* and *Argersinger v. Hamlin*<sup>42</sup> had been decided, some states lowered excessive maximum punishments authorized for certain offenses in order to reduce the need to provide indigent defendants with counsel. More recently, some assigned counsel systems have been replaced by more effective public defenders because it was anticipated that such a change would produce economies.

In its recommendation C-1, the Prado Committee specifically recommended: "Federal defender organizations should be established in all districts or combinations of districts, where such an organization will be cost-effective, where more than a specified minimum number of appointments is made each year, or where the interests of effective representation otherwise require establishment of such offices."<sup>43</sup>

---

42. 407 U.S. 25 (1972) (holding that, absent waiver, no person may be imprisoned for *any* offense without representation at trial).

43. COMMITTEE REPORT, *supra* note 32, at 2292.



The Committee on Defender Services also has favored greater use of defender organizations; and perhaps for that reason, a number of additional defender offices have recently been established. Currently, with respect to number of appointments, the Eastern District of Virginia and the Western District of North Carolina are the two largest districts in which there are no public defender offices but, whether for cost savings or otherwise, these districts probably will acquire offices. Similarly, Congress and some state legislatures may be persuaded that funding post-conviction defender organizations is a wise investment because it lessens the likelihood of extensive and costly post-conviction proceedings predicated on the claimed ineffectiveness of defense counsel at trial.

Perhaps some recommendations of the Prado Committee which were rejected by the Judicial Conference may ultimately be accepted by Congress because of a belief that a better allocation of resources would result than under the present system. My service on the Prado Committee—and previously on another committee reporting to the Judicial Conference—convinced me that a committee of judges which meets twice a year and whose members have ever-increasing responsibilities is at a disadvantage in setting the national policy for allocating funds for the defense of criminal cases and for achieving cost savings without harming the quality of representation. Likewise, I suspect that the use of local boards to operate community defender organizations may produce desirable economies absent from some public defender offices, which the judiciary oversees.

Ironically, fears about continued funding were a major factor in the decision by most federal public defenders to oppose Prado Committee recommendations designed to enhance their independence. One of their beliefs was that their close relationship with the federal judiciary would help shield their appropriations from curtailment by Congress. Indeed, many federal public defenders feared that if defense services in criminal trials were under the direction of a Center—or of some other entity not composed of, or directly governed by, judges—their funding would be subject to relentless attacks like those that have been made over the years on the Legal Services Corporation and on federal funding of legal services. Hopefully, the defenders can be persuaded that their funding will not be curtailed if their oversight by the judiciary is reduced.

Costs of defense in criminal trials have significance not only to the legislators who must fund the defense of indigents but also to those criminal defendants who are able to afford counsel. For them, the cost of defense may lead to financial disaster or to an unwanted plea bargain in order to avoid the cost of a contested trial. Fairness to such persons requires substantial reform, such as the proper exercise of prosecutorial discretion and the streamlining of court procedures to avoid unnecessary costs and delay.<sup>44</sup> For example, a court's

---

44. A prosecutor in my home city of Durham was criticized by some lawyers because he developed procedures that were intended to make it less necessary for defendants to hire attorneys to represent

exercise of its power to appoint court experts pursuant to Federal Rule of Evidence 706 or its state counterpart may reduce the need for a defendant to retain an expert. Likewise, the expansion of discovery on behalf of defendants may, in some instances, lessen defense costs. Of course, the availability of experienced retained counsel may also be curtailed by the forfeiture or threat of forfeiture of defendants' assets and by the filing of criminal charges against criminal defense attorneys.<sup>45</sup>

Although this symposium has selected for discussion issues believed to be of a special importance and timeliness in the struggle to assure the Sixth Amendment right to counsel, many other issues also merit extensive consideration. One such issue was omitted here because of its extensive coverage in a recent issue of *Judicature*. There Deputy Attorney General Jamie S. Gorelick<sup>46</sup> and Professor Samuel Dash<sup>47</sup> present sharply conflicting views on a recently promulgated set of regulations, which evolved from the "Thornburg Memorandum" and concern the ethical standards to be followed by federal prosecutors in their contacts with defendants who are represented by counsel.<sup>48</sup> Gorelick takes the position that these regulations are needed and that the Attorney General has the power to prescribe regulations that will be binding on federal prosecutors and preempt conflicting state codes of ethics and local rules of court. Dash contends that such regulations are an impermissible usurpation of a state's power to regulate its bar and protect the attorney-client relationship, as well as a violation of the Supremacy Clause.

Various other ethical issues concerned with the right of counsel also have attracted recent attention. For example, what is the responsibility of defense counsel with respect to incriminating evidence delivered to him or her by the client? What should a defense counsel do if the client intends to take the stand and give testimony which the attorney knows—or strongly believes—will be false? How far can a defense counsel go in defending his or her client against leaks of information by a prosecutor or by law enforcement agents? Ultimately the answers to these ethical issues can be very important in determining the scope of defense representation.<sup>49</sup>

---

them in some traffic cases. Commendation might have been more in order.

45. Recently, three South Florida attorneys were the subject of federal indictments alleging money laundering and related crimes. There were some suggestions that they had been selected for prosecution because of their extensive and vigorous representation of criminal defendants, especially in drug cases. Jim McGee, *Playing Computer Cat and Mouse, Agents Tracked Cali Suspect's Moves*, WASH. POST, June 7, 1995, at A6. Of course, such claims are foreseeable, whether or not there is a factual basis for them.

46. Jamie S. Gorelick, *Justice Department Contacts with Represented Persons: A Sensible Solution*, 78 JUDICATURE 136 (Nov.-Dec. 1994).

47. Samuel Dash, *Justice Department Contacts with Represented Persons: An Alarming Assertion of Power*, 78 JUDICATURE 136 (Nov.-Dec. 1994).

48. Communications with Represented Persons, 28 C.F.R. § 77 (1994). The Criminal Justice Section of the American Bar Association has been specially concerned with this issue.

49. The proliferation of issues concerning the right to counsel can be illustrated by a recent experience I had while writing this Foreword. I received a call from a staff member in a legislative office who inquired whether a judge could properly enter a sealed order approving expenditures for

Issues concerning right to counsel transcend national boundaries. The ever-increasing mobility of our population makes more likely the prospect that Americans will be tried in foreign courts, where counsel may not be provided. Thus, it becomes important to determine under what circumstances foreign convictions may later be considered for sentence enhancement purposes in American trials—an issue which also has recently been discussed elsewhere.<sup>50</sup> Of even greater significance would be an examination of the circumstances under which counsel are provided defendants in foreign criminal trials and the scope of responsibilities of such counsel, when provided.<sup>51</sup> Unfortunately we could not arrange for an examination of that topic within the time frame of this symposium.

Even though some issues could not be dealt with, I expect that this symposium will prompt their extensive consideration elsewhere. Even more important, I hope that the articles in this symposium will induce a greater appreciation of the complexity of complying fully with the Sixth Amendment mandate that in a criminal prosecution the accused must be provided the effective assistance of counsel.

---

defense services in a capital case. In reflecting on this issue, I realized that conflicts between making information available for the press and public and maintaining secrecy as to the activity which has occurred in defense of the accused. The Prado Committee grappled with a similar issue when it recommended that suitable orders be entered to prevent the prosecution from discovering from fee applications and otherwise, the scope of activity on behalf of the defendant. COMMITTEE REPORT Recommendation D-4, *supra* note 32.

50. See Alex Glashausser, Note, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes*, 44 DUKE L.J. 134 (1994).

51. Article VII of the NATO Status of Forces Agreement was probably the first treaty to impose on the parties a specific obligation to provide counsel for foreign service members prosecuted in their courts. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846. Subsequently, some other international agreements have also granted a right of counsel for criminal defendants, *see e.g.*, International Covenant on Civil and Political Rights, art. 14, § 3(b)(d), 9A. Res 2200A (XXI), Dec. 16, 1966, 21 U. N. JAOR Supp. (No. 16) at 52. However, significant differences exist among the parties to international agreements with respect to the interpretation of any right of counsel that they grant.

