THE FUTURE OF DEFENSE ADVOCACY

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Good afternoon. I would like to thank the staff of the University of Pennsylvania Law Review for sponsoring this Symposium. The Symposium takes on a very timely and important topic, and I hope that you will be pleased with the end result of today’s deliberations and the articles that will be published in the Law Review. It is with some trepidation that I speak here today; I am concerned that what I say or suggest might place me in the same position that Professor Monroe Freedman found himself some twenty years ago when he advocated that a lawyer should do all that she could to represent her client zealously. Professor Freedman had the misfortune to learn that former Chief Justice Warren Burger, then a judge on the D.C. Circuit Court of Appeals, among others, suggested that he should be disciplined for his remarks.¹ I hope that you will consider my remarks rhetorical, aspirational, and hypothetical. To view them in any other manner would be to attribute them to me personally—and cause me to risk my license to practice law.

I want you to imagine, if you will, that the year is not 1988, but that we are assembled here in the year 2001. Imagine that you are arrested for the crime of “impersonating a lawyer.” Officer Friendly comes to your door, armed with an arrest warrant. He wears the sly grin that is a part of his modus operandi, and whips out a small white card with tiny black letters written on both sides. Immediately recognizing the card as a Miranda rights card, you are relieved. As an experienced lawyer, you are wise to the fact that the Constitution now will be firmly implanted between you and Officer Friendly. You give him that Clint Eastwood look of confidence and say, “Go ahead, Officer Friendly, make my day.” In a sure and steady manner, Officer Friendly makes your day and reads you your Miranda rights:

You are under arrest. Before we ask you any questions you must understand what your rights are. You have the right to

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¹ See M. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM (1975).
remain silent. You are not required to say anything to us at any time or answer any questions. Anything you say can be used against you in a Court. You have the right to talk to a lawyer for advice before we question you and you have the right to have him with you during questioning. If you want to answer questions now without a lawyer being present, you will still have the right to stop answering at any time until you talk to a lawyer.

At this point, you are completely convinced that nothing Officer Friendly says will surprise you. However, as Officer Friendly continues to read you your *Miranda* rights, his tone changes as he reads the following warnings. While they sound unfamiliar to you, they all too accurately reflect a disconcerting trend, one that started in the 1980s. Officer Friendly continues:

If you retain a lawyer, and pay your lawyer in cash, your lawyer is required to report your actions to the government and the government may subpoena your lawyer to be a witness against you. If, however, you pay your lawyer with a check, your lawyer is still required to report this to the government, if the lawyer reasonably infers that the check may have come from criminal activities. If you confide in your lawyer, and the government believes the information you gave her is an important part of the government's investigation, the government may subpoena your lawyer as a witness against you and disqualify all of your lawyer's co-workers from representing you. If you are indigent and the court determines that you are legally eligible for appointed counsel, the court will appoint substitute counsel, who, at a minimum, and perhaps at a maximum, is *licensed* to practice law. You should confide in this lawyer so that you can be zealously represented within the bounds of the law. But you should also realize that if your lawyer believes you intend to commit perjury, your lawyer can report this to the judge and it may not be objectionable if she is required to be a witness against you. You also have a right to prepare a defense on your behalf and to discuss a possible joint defense with your co-defendants and their lawyers. You should be aware, however, that the government might place an informant in the defense camp, ostensibly to prevent fraud and other crimes. Yet this informant's observations, even about non-criminal
conduct, may be reported to your lawyer's adversary, the prosecution. Now that you have been fully advised of your rights, do you wish to speak with a lawyer?

Well, that in a nutshell dramatizes the dilemma that defendants and defense lawyers face today. It reminds me as well of a comic strip some of you may have seen a couple of years ago that was appropriately entitled "Born Loser." The comic strip involved a discussion between a very small child and a friend of her father's. The friend was a lawyer. It read as follows:

The child: Are you a friend of my father's?
The lawyer: Yes I am, little lady.
The child: What do you do for a living?
The lawyer: I'm a lawyer. A criminal lawyer.
The child: Holy cow! Don't go mouthin' that around!

Even children believe that criminal lawyers are unworthy of much respect. Unfortunately, her views are not the exception. Lawyers, as a profession, seem to be held in low regard. And within the profession, criminal lawyers finish last in its unofficial respectability ranking. The only consolation for some criminal defense lawyers is that they are paid by their clients. Unlike public defenders, who work long hours at shamefully low salaries, criminal defense lawyers at least bill their clients; their peers thus consider them real lawyers for that reason.

Recent actions by the executive, legislative, and judicial branches of government have reinforced this negative image of the criminal defense lawyer. For example, prosecutors have attempted to penetrate the sanctity of the attorney-client relationship by issuing subpoenas to lawyers in unprecedented numbers. Such activity calls into question the integrity of criminal defense lawyers. The executive branch has also demonstrated its willingness to question the integrity of criminal defense lawyers as evidenced by the President's Commission on Organized Crime. The Commission's findings concerning a small group of attorneys mislead the public by suggesting that corruption is rampant and widespread among all criminal lawyers. It is well known that such is not the case.

Congress has contributed to the hysteria by expanding the power of prosecutors to intrude into the attorney-client relationship. For ex-

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ample, the Comprehensive Crime Control Act of 1984\(^4\) and other statutes\(^5\) dramatically increase prosecutorial power to threaten the attorney-client relationship.

Unfortunately, the judicial branch has become an unwitting ally in this attack on criminal defense lawyers. Judges too frequently place an apparent seal of approval on a number of prosecutorial practices, including the issuance of subpoenas to obtain materials from attorneys' offices\(^6\) and post-hoc approval of the use of informants to participate in strategy sessions between clients and their lawyers.\(^7\)

Despite these widespread problems, the defense bar has not fashioned a unified or consistent response to these governmental actions. Both retained and appointed criminal defense counsel see their plight as unique. Neither has joined forces with other members of the legal profession, such as tax lawyers, civil litigators and antitrust lawyers, who will in the future face similar challenges.

Prosecutors' practically unlimited discretion and virtually unrestricted use of subpoenas pose a serious threat to all members of the defense bar. For example, the increasing use of subpoenas against lawyers and the subpoenas' particularly disruptive impact when issued during a trial illustrate this problem. This tactic forces clients to question whose interests their attorney is representing: those of the client or those of the lawyer. One study reports "widespread" use of subpoenas against attorneys.\(^8\) Prosecutors expected the attorney to supply them with documents and information in some instances, while on other occasions they required lawyers to be prepared to serve as witnesses before grand juries or at trial. The American Bar Association in 1986 noted the growing rates at which federal prosecutors were issuing subpoenas to defense lawyers. In response, the ABA House of Delegates overwhelmingly approved a resolution requiring prosecutors to obtain


\(^5\) See, e.g., Money Laundering Act, 18 U.S.C. § 1957 (Supp. IV 1986) (requiring attorneys to report transactions of over $10,000 if they believe their clients' funds were acquired through illicit activity).

\(^6\) See, e.g., In re Grand Jury Subpoena Served Upon John Doe, 781 F.2d 238, 242 (2d Cir. 1985) (demanding production of all records of the defense attorney's financial transactions).

\(^7\) See, e.g., United States v. Mastroianni, 749 F.2d 900, 906 (1st Cir. 1984). The court, however, did "recommend" that the prosecutor make a prior "showing of need" before a "neutral magistrate" to assuage any claims of impropriety. Id. at 906 n.2; see also Weatherford v. Bursey, 429 U.S. 545, 554-557 (1976) (holding that when information, obtained in a strategy session by an undercover agent, remains undisclosed to the prosecutor no sixth amendment violation has occurred).

\(^8\) See Genego, supra note 2, at 3; infra notes 18-25 and accompanying text.
prior judicial approval before issuing subpoenas to attorneys. The ABA is not alone in condemning the practice of prosecutors issuing subpoenas to lawyers. In Massachusetts, for example, the Supreme Judicial Court has recently adopted Rule 3:08. The rule requires a prosecutor to obtain judicial approval prior to serving a subpoena on a lawyer if that subpoena forces the lawyer to present evidence concerning a client to the grand jury.

In addition to being subject to an unprecedented number of subpoenas, defense lawyers are forced to litigate issues concerning the timing of subpoenas. In Massachusetts, federal prosecutors issued subpoenas to all defense counsel representing several defendants who were under state investigation for drug offenses. The subpoenas required the attorneys to appear before a federal grand jury with records concerning legal fees and other monies they had received from their clients. Although the federal prosecutors issued the subpoenas during the pendency of the state charges, they claimed that the timing was not designed to intimidate or harass defense counsel. Requiring defense counsel to appear before a federal grand jury to provide evidence against the same client she is vigorously defending in state court is, however, the most outrageous form of harassment. Fortunately, the district court judge quashed the subpoenas. The District Court expressed no reluctance in concluding that "[t]he actions of the U.S. Attorney are without doubt harassment," would deter attorneys from representing clients in criminal cases, and would result in the personal and professional embarrassment of defense lawyers.

In 1985, Professor William Genego conducted a survey of all the members of the National Association of Criminal Defense Lawyers (NACDL), the largest member organization of criminal defense law-

10 Mass. Sup. J. Ct. R. 3:08 (upheld in United States v. Klubock, 639 F. Supp. 117, 126 (D. Mass. 1986), aff'd by an equally divided court 832 F.2d 664, 665 (1st Cir. 1987)), vacated, 832 F.2d 664 (1st Cir. 1987) (en banc) (the half of the en banc court that voted to affirm the district court opinion also adopted the vacated majority panel opinion, id. at 665) (Torruella, C.J.)).
11 See id.
12 See In re Grand Jury Matters, 751 F.2d 13, 15 (1st Cir. 1984).
13 See id.
14 See In re Grand Jury Matters, 593 F. Supp. 103, 107 (D.N.H. 1984). The First Circuit Court of Appeals agreed that the federal prosecutor's actions were improper under the circumstances. See In re Grand Jury Matters, 751 F.2d at 19.
16 See id.
17 See id.
18 See Genego, supra note 2, at 3.
yers in the country.19 The survey collected data concerning the incidence and the effect of prosecutorial practices on criminal defense attorneys' representation of clients.20 Over 4,000 surveys were mailed to defense lawyers and 42% of the questionnaires were completed and returned.21 The response indicated that there had been a dramatic increase nationwide in the issuance of subpoenas to lawyers.22 Moreover, 46% of the lawyers indicated that they had made some changes in their practice as a result of the escalation of prosecutorial efforts to intrude into the attorney-client relationship.23 Genego's study further revealed that 66% of all surveyed indicated that they had been subjected to some form of harassment by prosecutors, ranging from subpoenas to testify to IRS summonses to questions about their fee arrangements to motions seeking to disqualify counsel.24 The most telling aspect of the survey was the revelation that 14% of the respondents indicated they had decided not to represent at least one client in a criminal matter out of fear of a government investigation or possible forfeiture of attorneys' fees; some attorneys "decided to end their federal criminal practice completely."25

Decisions to abandon the representation of clients in criminal cases have three immediate effects. First, the number of private attorneys handling criminal cases is reduced. Second, the court must appoint counsel to ensure that defendants are purportedly represented. This procedure surely adds to the massive caseload currently handled by both public defenders and court-appointed private counsel. Third, the government now has a readily available weapon, the subpoena, which can be used to discourage new attorneys from undertaking the representation of clients in criminal cases.

While these problems appear limited to individual cases, there is at least one incident that had an impact on hundreds of cases and an entire office of lawyers. Recently, a disgruntled investigator employed by the Pima County Public Defender office in Tucson, Arizona, allegedly contacted the Tucson Office of the State Attorney General's office to report what she believed were irregularities in the manner public defenders represented their clients.26 In response to these allegations,
the Attorney General's office sought to investigate the matter by interviewing the investigative staff at the Public Defender's Office. Although the individuals interviewed were then working on cases being prosecuted by the Attorney General's Office, the Attorney General's Office apparently did not consider conducting these interviews a conflict of interest. Fortunately, the Attorney General's Office was ordered to cease and desist its efforts to disrupt the defendants' attorney-client relationships.

Ronald Goldstock has proposed guidelines for limiting prosecutors in their use of search warrants and telephone taps. He has also suggested the pen register as a preferable alternative to search warrants because the identity of clients is usually not privileged information. These suggestions are quite good, and if implemented will restrain investigations that are likely to undermine the attorney-client privilege. These limitations, however, fail to provide sufficient protection for the attorney-client relationship. The prosecutor's dual role as advocate and as administrator of justice makes self-regulation inadequate. Moreover, no effective reporting mechanisms currently note the use of search warrants, wire taps, pen registers, and informants, whether they are successful or what results come from efforts to obtain information through these means.


27 See Verified Complaint at 4, Estrada v. Corbin, No. CV-86-0605 (on file with the University of Pennsylvania Law Review).

28 Defendant's Supplemental Memorandum of Points and Authorities at 3, Estrada v. Corbin, No. CV-86-0605-SA (December 2, 1986).

29 See Goldstock & Chananie, "Criminal" Lawyers: The Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing, 136 U. Pa. L. Rev. 1855, 1865-76 (1988). Mr. Goldstock argues that investigators should first exhaust the usual techniques and then turn to the least intrusive use of the search warrant or wire tap. For example, he believes prosecutors should first tap non-attorney phones, then the suspected attorney's phone, and only as a last resort, the entire law office. In addition, he argues that court review of probable cause for a search of law offices or electronic surveillance of an attorney should be stricter than in other instances because of the greater privacy interest at stake when an attorney-client relationship exists.

30 See id. at 1868.

31 Cf. United States v. Ofshe, 817 F.2d 1508 (11th Cir.), cert. denied, 108 S. Ct. 451 (1987). In this case, the defendant was arrested and indicted for the possession and intent to distribute cocaine. Mr. Ofshe hired attorney Marvin Glass as co-counsel in his defense. See id. at 1510. While representing Mr. Ofshe, Glass learned that he was the target of a criminal investigation. To reduce his own criminal responsibility, Glass offered to provide information to the prosecutor, Scott Turow, with respect to some criminal conduct by Mr. Ofshe and agreed at one point to wear a "body bug." See id. at 1511. Although the court affirmed Mr. Ofshe's conviction, the court noted that "Glass' and Turow's conduct was reprehensible," and suggested disciplinary action against them. Id. at 1516, n.6. If adequate reporting mechanisms existed in the system, per-
I propose a comprehensive plan for regulating investigations. The plan addresses the problems that arise from the relationships among defense lawyers, prosecutors, and judges. These problems illustrate the difficult issues facing defense attorneys representing criminal clients and raise the question of what rules should govern advocacy by criminal defense lawyers on behalf of their clients. The appropriate and constitutional role for defense lawyers is to represent their clients zealously within the bounds of the law. Before defense lawyers can meet that objective, however, a reevaluation of the role of defense counsel in criminal cases is needed. Three steps are necessary to accomplish this goal. First, the criminal justice system must operate on the assumption that defense lawyers represent their clients zealously, without violating the law. Second, external enforcement rules should regulate prosecutorial discretion when prosecutors seek to subpoena defense lawyers, forfeit attorney's fees, or employ wire taps, informants or other means of invading the defense camp. Only external enforcement rules can ensure prosecutorial discretion is properly exercised and the attorney client relationship is not disrupted. Third, because the court presumes the good faith of defense lawyers, the prosecutor should face a heightened burden of proof if she requests informants against defense lawyers, subpoenas, post-hoc approval of wire taps, or authorization to search law offices. A model without these three elements undermines the important role of defense lawyers as zealous advocates. The absence of these elements will deny some clients their counsel of choice and seriously threaten the adversary system as we know it today.

I share Professor Uviller's concern that the Obstructing Justice Act is dangerously vague. Although it seems to be used more frequently against defense lawyers, United States v. Ofshe indicates that potential charges of obstruction of justice are also important considerations for prosecutors. In this case, the Eleventh Circuit assessed the
prosecutor’s actions in light of the Obstructing Justice Act and found a possible violation. If the Ofshe decision has a chilling effect on prosecutors, the obstruction of justice statute may be re-examined in order to restrict its application. This reexamination will take place because even in cases where a prosecutor seems to act on the basis of her good judgment, experience, and what she believes to be the direct approval of her superiors, she will be subject to possible obstruction of justice charges when she asks an attorney for information about a client whom that attorney represents. I agree with Professor Uviller’s suggestion that we review the judicial construction of the statute, not only because of its importance for prosecutors, but to preserve the entire legal profession.

Finally, the following example illustrates why such a strict model is necessary to protect the adversarial system and the attorney-client relationship. All of you are familiar with the case of Ray Donovan, the former Secretary of the Department of Labor. He was investigated, indicted, formally charged, and tried in a complex case involving a number of criminal violations. Mr. Donovan was ultimately acquitted because of effective representation, but he asked a telling question at a press conference after his trial. Although delighted with his acquittal, Mr. Donovan voiced one concern: he asked, “which office do I go to get my reputation back?” This important question must be asked and answered if we continue to pursue efforts to stop the illegal activity of a few bad lawyers at the expense of the rest. While it is necessary to prosecute those lawyers who commit crimes, we must be concerned about the zealous lawyers who face these challenges to their attorney-client relationships every day. We should all strive to improve the legal profession as a whole. There is much work to do and this symposium is an important start in the right direction.

Thank you.

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36 See id. at 5 (“based upon the record before us, we believe that Turow may have committed an obstruction of justice in violation of 18 U.S.C. § 1503 (1982)”; see also Uviller, supra note 34, at 1900-01 (discussing Ofshe and the need for a more precise definition of “obstruction of justice”); supra note 31 (discussing Ofshe and the need for adequate reporting mechanisms).

37 See Uviller, supra note 34, at 1883-86.

38 See Raab, Donovan Cleared of Fraud Charges by Jury in Bronx: 7 Others Acquitted, N.Y. Times, May 26, 1987, at 1, col. 6 (Donovan faced state charges of fraud and grand larceny).

39 Id. at B2, col. 1.

40 See id.