

# ADVISORY ETHICS OPINION 91-05

## **SYNOPSIS:**

Irrespective of whether the Defender General serves a fixed term or at the pleasure of the Governor, the Defender General must exercise independent professional judgment, free of influence or pressure from other persons, officials, or agencies of state government, in the administration of public defender and assigned counsel programs; and must take steps necessary to assure the independence of individual public defenders or assigned counsel to guarantee the integrity of the relationship between those lawyers and their client.

## **BACKGROUND:**

We have been requested to address the ethical responsibilities of the Office of Defender General. Established by statute as the means for implementing the constitutional right to legal representation of individual criminal defendants, juvenile respondents and institutionalized offenders, the Defender General is appointed by the Governor, subject to the advice and consent of the Vermont Senate, for a four-year term and until a successor is appointed and qualified.<sup>1</sup> In 1975, the legislature amended Chapter 163 of Title 13, Vermont Statutes Annotated, to delete a former provision of §5252, which limited the power to remove the Defender General from office "only in the same manner and for the reasons for which district judges may be removed from office."

While the statute is now far from clear on the matter, it is susceptible to an interpretation that notwithstanding the four-year term, the Defender General serves at the pleasure of the Governor.

Because the Defender General must be a licensed attorney and is thus bound by the Code of Professional Responsibility, we are requested to address the ethical considerations which must guide the Defender General in ensuring the provision of independent legal counsel to eligible clients.

We do not venture an opinion on the Defender General statutory scheme or the proper role of the Governor or any other branch of government, except to note that there is an overall obligation on the part of the State of Vermont to assure reasonable access to legal counsel by indigent persons. This obligation rests on fundamental constitutional and explicit statutory principles; and our discussion of the Defender General's ethical responsibilities must be placed within such context. Further, as set forth below, there appears to be constitutional imperative that the actual provision of defense representation be free of political influence or control.

The Defender General points out certain facts that are relevant to our discussion. In addition to coordinating the representation of indigent defendants in criminal cases, the Office of Defender General represents juveniles who are in the custody of the Commissioner of Social and Rehabilitative Services or are the subjects of investigations by that department; individuals in the custody of the Commissioner of Corrections; and detainees on extradition warrants which have been signed by the Governor. Through the public defender offices and assigned counsel, the Office of Defender General pursues litigation which often involves allegations of misconduct or omission by the agents of the aforementioned Commissioners or by the State Police Officers who serve under the Commissioner of Public Safety. Understandably, the independent professional judgment of the Defender General on behalf of clients who are in an adversary relationship with the state could be threatened, depending upon the degree of influence exercised by various state officials and the legislature through imposition of budgetary or substantive activity restrictions. By law, the Defender General has a limited, but virtual monopoly on the provision of defender services; therefore, any potential or actual restriction upon the independent legal representation of clients must be carefully reviewed by the lawyer who is appointed to the Office of Defender General.

## **QUESTIONS PRESENTED:**

Would service of the Defender General at the pleasure of the Governor affect the duty of the Defender General to assume that deputy defenders, public defenders and assigned counsel exercise independent professional judgment on behalf of eligible clients, who, in a variety of legal contexts, are in adversary relationships with the State of Vermont?

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<sup>1</sup> 13 V.S.A. §5252.

## **DISCUSSION:**

As noted, this committee is not established to give authoritative opinions on the construction or effect of state laws except to the extent that they directly affect the exercise of professional responsibility. Thus, we do not proceed with an assumption that Chapter 163 of Title 13 means that the Defender General actually serves at the pleasure of the Governor. Irrespective of how that issue may be resolved, however, we do address the major ethical considerations for the Defender General, and by necessary implications, the deputies, public defenders and assigned counsel who are retained to represent indigent defendants in Vermont.

The Defender General is not a policy-making official within the executive department, nor does the office function as an arm of the legislature or under the control of the courts. Thus, aside from preparing and submitting an annual budget for the Defender General's Office, the county public defenders and assigned counsel, the Defender General has a narrowly circumscribed role: to ensure that eligible clients receive competent, independent legal representation.

Chapter 163 contemplates this exclusive, limited and independent function:

"...[N]o other official or agency of the state may supervise the Defender General or assign him duties in addition to those prescribed by this Chapter." 13 V.S.A. §5253 (a)

Moreover, the governing statutes suggest that the legislature intended to require a breadth and quality of representation which meets professional ethical requirements. In authorizing the Defender General to contract for services, it is required that "the services performed shall meet the professional standards that this Chapter provides." 13 V.S.A. §5253 (b)(1). However, Chapter 163 does not prescribe any particular "professional standards" in its text. We therefore conclude that the Legislature otherwise intended that the Defender General and contract attorneys be bound by the *Vermont Code of Professional Responsibility*.

We are mindful that the Defender General has administrative as well as advocacy responsibilities. With respect to the administrative duties, the Defender General must prepare and submit a budget for review by the executive department and eventual approval by the Vermont legislature. We do not here comment on that responsibility, except to note that the Defender General should (and we assume does) present a budget which reflects the best judgment on what resources are necessary to ensure adequate access to competent legal representation, and address any administrative rules on statutory developments which would potentially compromise the independence of the office or the effectiveness of its legal services.

In addition to the obligation to seek adequate resources, the Defender General must implement the constitutional and statutory obligations imposed upon that office by assuring that the structure of the delivery system guarantees professional independence for the lawyers who actually provide legal representation. The structure of defender systems has received extensive study and comment since the landmark Supreme Court decision in *Gideon v. Wainwright*,<sup>2</sup> which guaranteed the right to counsel in state criminal proceedings. In 1971, the State of Vermont elected to establish a mixed, but coordinated system of representation utilizing full-time public defenders and private assigned counsel administered by the Office of the Defender General. A number of other states have also utilized this approach.<sup>3</sup>

As noted in the American Bar Association *Standards for Criminal Justice*, Standard 5-1.3: Providing Defense Services, the indispensable quality of any defender services program is the guarantee of independence of the lawyers who represent indigent clients:

"The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not normally be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender and assigned counsel programs."<sup>4</sup>

The ABA Standards echo the standards established by the National Legal Aid and Defender Association and the National Advisory Commission on Defense Services, all of which recognize that "it is essential that both full-time defenders and assigned counsel be fully independent, free to act in behalf of their clients as dictated by their best professional judgment. . . . Where counsel is not fully independent to act in the client's behalf, the deficiency is often perceived by the defendant, which encourages cynicism toward the justice of the legal system."<sup>5</sup>

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1969).

<sup>3</sup> See e.g. Md. Code Ann. Art 27 A. § 6(b)(1979); N.J. Stat. Ann. § A:158 A-7(d)(1978); N.M. Stat. Ann. §§ 41:22A-7, 8 (Supp. 1975).

<sup>4</sup> *Id.*

<sup>5</sup> ABA Standards, Commentary Standard 5-1.3 at pg. 5-15.

In a related Standard 5-3.1 concerning the qualities of the Chief Defender and staff, the AHA Standards note that "independence of the Chief Defender and staff is fundamental to both the fact and appearance of zealous representation of the accused."<sup>6</sup> Further, although not directly required by ethical canons except with regard to hiring competent staff, see Canon 6 ("A lawyer should represent a client competently"), "security of employment for the Chief Defender and staff is useful in attracting career personnel and in encouraging professional independence."<sup>7</sup>

The foregoing discussion makes clear that the structure of the public defender and assigned counsel system in Vermont establishes a framework which is intended to ensure the independence of the system and the lawyers who operate within it. Canon 5 of the Code of Professional Responsibility states a broad rule: "A lawyer should exercise independent professional judgment on behalf of a client."

EC 5-1 provides:

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of [the] client and free of compromising influences and loyalties. Neither personal interests, the interests of other clients, nor the *desires of third persons* should be permitted to dilute . . . loyalty to [the] client."

Similarly, EC 5-21 provides:

"The obligation of a lawyer to exercise professional judgment solely on behalf of [the] client requires that [the lawyer] disregard the desires of others that might impair . . . free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to [the] client; and if [the lawyer] or . . . client believes that the effectiveness of . . . representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of [the] client."

Of particular relevance to this opinion is EC 5-22, which states:

"Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which [the lawyer] is compensated directly by [the] client and professional work is exclusively with [the] client. On the other hand, if a lawyer is compensated from a source other than [the client], [the lawyer] may feel a sense of responsibility to someone other than [the] client."

It is the pressure, financial, social or political which presents the greatest risk to the independence of the Defender General, public defenders and assigned counsel. Thus, DR 5-107 (B) establishes the bedrock ethical consideration involved here:

"A lawyer shall not permit a person who recommends, employs, or pays [the lawyer] to render legal services for another to direct or regulate . . . professional judgment in rendering such legal services."

In light of this admonition and in consideration of the fact that, in Vermont, the Defender General administers the exclusive means by which indigent defendants obtain legal representation, the Defender General must be mindful of the requirement of Canon 2 which directs that a lawyer "should assist the legal profession in fulfilling its duty to make legal counsel available." In this respect, certain Ethical Considerations are relevant. It is not unexpected that the Defender General, public defenders and assigned counsel will be appointed to serve clients whose actions, legal defenses or cases are controversial or unpopular. Adverse publicity, criticism and political pressure may otherwise tend to affect the independence or vigor of a defense lawyer's efforts on behalf of a client. However, "regardless of . . . personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse."

EC 2-27. In addition, EC 2-29 states:

"When a lawyer is appointed by a court . . . to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, [the lawyer] should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, . . ."

Finally, no less than attorneys employed by a legal services organization, an attorney who acts as Defender General, public defender or assigned counsel should behave "at all times . . . in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interest of individual clients;" and "should adhere to the highest professional standards of effort and competence."<sup>8</sup>

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<sup>6</sup> *Id.* at 5-35.

<sup>7</sup> Standard 5-3.1, commentary, at p. 5-36.

<sup>8</sup> EC 2-33.

Like any other lawyers, the Defender General, a public defender or assigned counsel are bound to "represent . . . client[s] zealously within the bounds of the law."<sup>9</sup> This obligation includes seeking "any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense."<sup>10</sup>

As the committee is aware, zealous representation of individuals in criminal cases may require advocacy which requests the court to consider innovative theories or to otherwise extend the bounds of the law. This can be seen in recent years in the efforts of counsel in criminal cases to achieve greater protection of individual rights through the application of the Vermont Constitution to particular fact situations. As noted by the Vermont Supreme Court in these fact specific context, the bounds of the law are far from clear. Thus, the Defender General, public defenders and assigned counsel" while serving as advocate[s] . . . should resolve in favor of [their clients] doubts as to the bounds of the law."<sup>11</sup> The foregoing considerations are manifested in DR 7-101(A)(1) which admonishes that a lawyer" shall not intentionally: (1) Fail to seek the lawful objective of his client through reasonably available means permitted by law and the disciplinary rules . . .".

Three important United States Supreme Court Opinions bear directly on the issues presented to this committee. The court had occasion to examine the duties of counsel appointed to represent indigent defendants in three separate contexts. In *Ferri v. Ackerman*,<sup>12</sup> a case involving federal criminal proceedings, the Court noted:

"[T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in ensuring effective representation of criminal defendants, [the] duty is not to the public at large, except in that general way. [The] principal responsibility is to serve the undivided interests of [the] client. Indeed, an indispensable element of the effective performance [the lawyer's] of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation."<sup>13</sup>

The court applied this principle next in *Branti v. Finkel*, 445 U.S. 507 (1979) where it held that the employment of assistant public defenders could not "properly be conditioned upon . . .allegiance to the political party in control of the . . . government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the state."<sup>14</sup> The fact that the Vermont Defender General may be appointed by an elected official and may have some policy-making role limited to the provision of counsel to indigent defendants, does not undermine the Defender General's duty to act independently. The Court speaks to this as well: "[W]hatever policy making occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests."

Finally, in *Polk County v. Dodson*,<sup>15</sup> the Supreme Court held that despite the fact that a public defender has an employment relationship with the state, it does not make him or her a state functionary, at least when it comes to the provision of legal representation to clients. In holding that a public defender does not act "under color of state law" for purposes of potential liability under the federal Civil Rights Act, the court underscored the independent adversarial role of the defender. Quoting from the ABA Standards for Criminal Justice 4-3.9 (2nd ed. 1980), it held that "except for the source of payment, [the relationship between defender and client] became identical to that existing between any other lawyer and client. Once a lawyer has taken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program".<sup>16</sup>

The *Dodson* Court emphatically states:

"In our system a defense lawyer characteristically opposes the designated representatives of the state. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public not by acting on behalf of the state or in concert with it, but rather by advancing the "undivided interests of (the) client."<sup>17</sup>

The Court also rejected the notion that public defenders are different from other defense lawyers because of their relationship to the state.

<sup>9</sup> Canon 7.

<sup>10</sup> EC 7-1.

<sup>11</sup> EC 7-3.

<sup>12</sup> *Ferri v. Ackerman*, 440 U.S. 193 (1979).

<sup>13</sup> 440 U.S. at 204.

<sup>14</sup> *Id.* at 519.

<sup>15</sup> *Polk County v. Dodson*, 454 U.S. 312 (1981).

<sup>16</sup> 454 U.S. at 318

<sup>17</sup> *Id.* at 318-319.

"First, a public defender is not amenable to administrative direction in the same sense as other employees of the state. Administrative and legislative decisions undoubtedly influence the way a public defender does . . . work. State decisions may deter- mine the quality of [the] law library or the size of [the] caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer . . . a public defender works under Canons of Professional Responsibility that mandate . . . exercise of independent judgment on behalf of the client. (Citing DR 5-107 (b))

Second, and equally important, it is the constitutional obligation of the state to respect the professional independence of the public defenders whom it engages. This court's decision in *Gideon v. Wainwright* . . . established the right of state criminal defendants to the 'guiding hand of counsel at every step in the proceedings against [them].' . . . Implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control."<sup>18</sup>

In his concurring opinion, Chief Justice Berger forcefully noted that the advocate

"as an officer of the court which issued the commission to practice, owes an obligation to the court to repudiate any external effort to direct how the obligations to the clients are to be carried out. The obligations owed by the attorney to the client are defined by the professional codes, not by the governmental entity from which the defense advocate's compensation is derived."<sup>19</sup>

In summary, even if Chapter 163 of 13 V.S.A. may be construed to limit the Defender General's service to be at the pleasure of the Governor, the Defender General nonetheless has a very clear ethical obligation to protect the integrity of the public defender and assigned counsel program. This means that the Defender General must administer the responsibilities of the office independently of any other branch of government; resist any political or other outside influence, seek adequate resources to carry out the constitutional obligation to see that the accused person receive the services of effective and independent advocates; and protect the duty of public defenders and assigned counsel to function consistent with their roles under the adversary system. This may require the Defender General to resist, in good faith, any attempts which are intended to or would clearly tend to have the effect of compromising the independence of individual counsel.

We do not offer an opinion as to whether the potential for or an actual attempt to remove a duly appointed Defender General from office during his or her term would impermissibly interfere with the ethical responsibilities which the Defender General is bound to follow. We are restricted to commenting upon the ethical considerations which affect the Defender General's actions while actually serving in office.

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<sup>18</sup> 454 U.S. at 321-322 (citations omitted).

<sup>19</sup> *Id.* at 327.