ADVISORY ETHICS OPINION 93-01

SYNOPSIS:

A public defender who is on an involuntary unpaid furlough due to budgetary constraints does not violate the Code of Professional Responsibility if he or she is not available for advice or appointment of new clients during such furlough, but must either be available or make appropriate arrangements for existing clients to have access to advice and necessary representation at critical stages of the criminal legal process during his or her absence.

INTRODUCTION:

The requesting lawyer, a public defender, raises two questions, both of which arise in the context of a budget crisis in which state funding for Vermont's system of public defense of indigents resulted in the imposition of an involuntary furlough of staff public defenders for several days in 1992, a scenario which is likely to be repeated in the future. The two questions are:

1. Whether a public defender who is placed on an involuntary furlough violates the Code of Professional Responsibility if he or she is unavailable for a period of time to existing clients, in the absence of alternative representation?

2. Whether a public defender who is placed on an involuntary furlough violates the Code of Professional Responsibility if he or she is not available for advice or appointment at the initial critical stages of criminal proceedings brought against persons eligible for appointment of a public defender?

As a result of state funding reductions in 1992, the Defender General imposed a one-time, five day "furlough" on public defender offices throughout the state. During the furlough period, defender offices were closed and staff were not paid their salaries. Apparently, the Defender General, who supervises Vermont's defender services program, was available for consultation by clients of the program or potential clients who were referred to the program by law enforcement officers or the courts during the period of the furlough. It is not clear from the requesting letter whether there were volunteer attorneys available for consultation or appointment, or whether contract defenders or ad hoc assigned counsel were "on-call." This opinion, however, does not address the overall ethical obligations of the Defender General or assigned counsel contractors or attorneys who are available for ad hoc assignment, but is limited to the questions posed by the requesting lawyer, a full-time, salaried public defender and others similarly situated.

Relevant Code Provisions, Ethical Considerations and Other Authorities:

Disciplinary Rules:

DR 2-110(c)(l)
DR 6-101(A)(2)
DR 7-101(A)(2), (3)

Ethical Considerations:

EC 2-30
EC 6-4

ABA Standards for Criminal Justice, Providing Defense Services:

4-1.2(d) Attorneys should not accept more employment than they can reasonably discharge.
5-4.3 Workloads should be limited to avoid interference with quality of representation or create breach of professional obligations.
5-5.1 Counsel should be provided at the earliest feasible stage after custody begins.
5-5.2 Counsel should be provided initially and should continue representation throughout trial court proceedings.

Statutes:

13 VSA Sections 5231-5235 - Scope of services; Notice of right to representation and notice to public defender.
13 VSA Sections 5251 et seq - Office of Defender General.
13 VSA Sections 5271 et seq - Office of Public General.

DISCUSSION:

As a practical matter, no attorney is fully available to client for consultation and representation at all times, nor does the Code of Professional Responsibility demand it. Nevertheless, in the context of representing indigents who have a right to counsel

under the Sixth Amendment and state law[1], the lawyer/public defender functions in an atmosphere of increased urgency, since the right to counsel attaches at all critical stages of prosecution; the personal liberty of the client is at stake and prompt availability and intervention may materially affect the lawyer's ability to provide competent representation[2]; and to avoid violations of the guarantee of the effective assistance of counsel.[3] Public defenders, however, also have statutory and budgetary limitations imposed by law which effectively restrict the resources available for client representation[4], even though they are responsible to implement a constitutional guarantee. It has been well-recognized that these limitations bear the potential to create a conflict between budgetary restrictions and the professional obligations of those attorneys. As public defenders, these lawyers are officers of the court and their activities are governed by the Code's admonition to "represent a client zealously within the bounds of the law, " DR 7-102, and are subject to discipline for "intentionally . . . . fail[ing] to seek the lawful objectives of [their] client[s]."[5] As criminal defense practitioners, Public Defenders must also be mindful of the ABA *Standards for Criminal Justice,* which not only require adherence to the standards of conduct required by statute, rule, common law, and codes of professional conduct, but establish as the basic duty "to serve as the accused's counselor and advocate with courage and to render effective, quality representation."[6]

While the ABA Standards do not operate independently with the force of the Vermont Code of Professional Responsibility, they offer a specific context within which to answer the questions posed in this opinion. Thus, we reference to the ABA Standards relating to Providing Defense Services in order to characterize the ethical obligations of Public Defenders whose availability to potential and existing clients is either limited or compromised as a result of inadequate financial resources.

It is true that lawyers generally have an ethical obligation to make legal services available[7], and to complete work undertaken on behalf of the client.[8] However, it is the State which has the fundamental legal obligation to implement the Sixth Amendment's right to appointed counsel for those charged with offenses that may lead to incarceration, but who cannot afford the assistance of counsel.[9]

Thus, despite the fact that representation of indigent criminal defendants is a full-time occupation, a public defender, any more than private counsel, has neither an independent or special ethical obligation to extend his or her professional availability beyond what is consistent with the exercise of independent judgment.[10] Indeed, like any other lawyer, a public defender or assigned counsel is precluded from engaging in conduct that is prejudicial to the administration of justice[11], and should withdraw from representation if it "is obvious . . . that continued employment will result in violation of a disciplinary rule."[12] The ABA Model Rules of Professional Responsibility state that a lawyer should not provide representation in the first instance if the representation will result in a professional conduct violation.[13] However, neither the Model Code, DR 2-109(A), nor the Vermont Code explicitly provide for the initial declination of representation in order to avoid a violation resulting from accepting more responsibility than can be handled competently or within a reasonable time, notwithstanding the common understanding that one should not take on an unreasonably high caseload. Of course, the Model Rules, unlike the Model Code or the Vermont Code, explicitly state that a lawyer "when ordered to do so by a tribunal . . . shall continue representation notwithstanding good cause for terminating the representation.[14]

The Committee is mindful of the perception that a public defender, unlike an attorney in private practice, who does not otherwise hold him or herself out as available for appointment or consultation by indigent criminal defendants on an on-call basis, has a singular role in the legal system and a materially different relationship with clients. In other words, given the nature of the system of public defense, there is an expectation that the public defender will *always* be available and accessible to

[1] 13 VSA sec. 5234(a)(1), (2) (requires notification to defendant of right to counsel and notification to public defender at commencement of detention).
[2] DR 6-101(A)(2) (requiring "preparation adequate in the circumstances"); DR 6-101(A)(3) (prohibiting "neglect of a legal matter")
[3] See *Strickland v. Washington,* 466 U.S. 668, 685-86, 92 (1984).
[4] 13 VSA sec. 5271 (Public defender offices must operate "within the limits of funds and staffing authorized by the general assembly")
[5] See also ABA, *Model Rules of Professional Conduct,* Rule 1.3: ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"), *Id,* note 35, Rule 1.3, cmt. 1.
[6] Standard 4-1.2(b) (ABA 1991).
[7] Canon 2; EC 2-16, EC 2-24, 25, and 29.
[8] EC 2-31 (full availability of legal counsel "requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved.").
[9] See *Powell v. Alabama,* 287 U.S. 45, 60-71 (1932); *Escobedo v. Illinois,* (378 U.S. 478, 485, 492 (1964) (Extending right to police investigations); *Douglas v. California,* 372 U.S. 353, 357-58 (1963) (Appeals); *Hamilton v. Alabama,* 368 U.S. 52, 54-55 (1961) (Arraignmel1tS); *Gideon v. Wainwright,* 372 U .S. 335 (1963); *Argersinger v. Hamlin,* 407 U.S. 25, 27-40 (1972) (Misdemeanors); *In* Re *Gault,* 387 U.S. 1, 34-42 (1967) (Juvenile Cases); *Gagnonv. Scarpelli,* 411 U.S. 778, 783-91 (1973) (Probation revocation). See also, 13 V.S.A. secs. 5231 (Statutory right to representation, services and facilities); 5232-33 (Scope of proceedings and extent of service entitlements afforded by statute).
[10] See DR 5-101(A), EC 5-1, 5-21, 5-22, competence, EC 2-30, DR 6-101(A)(2) (Attorney "shall not accept employment . . . when . . . unable to render competent service . . . or handle cases without preparation adequate in the circumstances."), or the requirements of zealous advocacy under DR 7-101 (A)(1).
[11] DR 1-102(A)(5)
[12] DR 2-l10(B)(2)
[13] Model Rule 1.16(a)(1)
[14] " Model Rule 1, 16(c) of DR 2-110 (Continued representation if ordered by a tribunal not clearly stated but is implicit).

present or potential appointed clients.[1] One response is that simply because a public defender is a lawyer who is involved in implementing the State's constitutional obligation to provide counsel, does not mean that the Canons of Ethics or the Code of Professional Responsibility require that he or she must be available to clients at all times, any more than a private attorney must maintain twenty-four hour availability. Under this response, the Code would not necessarily be implicated for the public defender whose access is restricted by his or her employer by imposition of an involuntary furlough caused by a budget shortfall.

On the other hand, ethical obligations extend to the *individual attorney* and are not obviated by the fact that the attorney works as a public defender. Under this analysis, the requirements of the Code are implicated by the questions posed to us. It is this approach that seems most appropriate, despite our observation of the fact that the underfunding of defender services is approaching a crisis and may pose the temptation to modify the ethical expectations placed upon individual defenders.[2] A similar observation applies to court-appointed private counsel: One recent study concluded that' "(v)irtually no assigned counsel program in the country is adequately funded. In fact, the funding situation nationally is frequently and accurately characterized as a crisis."[3] The chronic funding shortfall is reflected not only in the lack of availability of competent counsel, but also in the amounts paid to assigned counsel and public defenders alike.[4] Model Rule 1.6 applies to all client representation and should be construed with good cause factors in deciding whether lawyer may refuse appointment where representation would cause violation of Rules because of caseload; Oklahoma Constitution, Art. 2, sec. 7 (due process), Art. 5, sec. 51 (immunities clause) violated by application of Oklahoma compulsory appointment and lawyer compensation provisions which is arbitrary and unreasonable and works deprivation of lawyer's property rights in practicing law. State must provide post-appointment hearing to allow attorneys to show cause why they should not be required to accept appointment and must provide speedy, adequate and certain compensation for representation.

CONCLUSION:

Thus, despite the concerns about the pressures of an inadequately funded and overburdened system of public defense, we conclude that a lawyer who serves as a public defender or as court-appointed counsel has an ethical responsibility to be reasonably available to existing clients in order to protect their interests. In the criminal law context, this may mean that a lawyer needs to be accessible by telephone or personally, even during non-working hours or during an involuntary, unpaid furlough. Accessibility will assure that the lawyer can make a case-by-case, individualized assessment of the need for further action on the client's behalf. An involuntary furlough does not absolve the public defender or appointed counsel of the obligation to either be personally available to existing clients to provide advice or representation at critical stages of the criminal process; or to make arrangements with back-up counselor the Defender General to assure that counsel is reasonably available.

With regard to the second question, we believe that an involuntary furlough would place an unfair, arbitrary and intolerable burden upon a public defender or potential appointed counsel to accept new appointments. Again, the decision is one for the individual lawyer." The determination of whether workloads are excessive must necessarily be entrusted to defender, organizations and to assigned counsel. Only the lawyers themselves know how much must be done to represent their clients and how much time preparation is likely to take."[5] The touchstone is whether the lawyer is placed in the position of being asked to accept "[e]mployment . . . when [the lawyer] is unable to render competent service " EC 2-30; or to handle cases "with-out preparation adequate in the circumstances."[6]

[1] See, e.g., *Dziubak v. Mott,* _____ Minn. _____, 62 U.S.L.W. 2102 (Minn. Sup. Ct., C-791- 2517, 8/6/93) ("[There] are significant differences between private counsel and public defenders. First, public defenders may not reject a client but are obligated to represent whomever is assigned to them, regardless of their current caseload or the degree of difficulty the case presents. Second, public defenders are limited in their representation by the resources available to their office, which is grossly underfunded. Private defenders are limited only by what their client is able to pay.") (Holding that public defenders are immune from liability from negligence because, *inter alia,* lack of resources not within their control; liability would deter recruitment and retention of dedicated professionals committed to providing effective defense.)

[2] See R. Klein, "The Eleventh Commandment: Thou Shalt Not be Compelled to Render the Ineffective Assistance of Counsel," 68 *Indiana L.J.* 363 (1993). See also, Report, ABA Special Committee on Criminal Justice in a Free Society, "Criminal Justice in Crisis." ("defense representation . . . is too often inadequate because of underfunded and overburdened public defender offices." Id. at 9; most significant problem is lack of financial resources, Id. at 39; "Even the most well-intentioned lawyers cannot assess the best interests of their clients if they are continually facing case- loads which they know they cannot handle." Id. at 41.).

[3] R. Klein, supra at 364, quoting N. Geist," Assigned Counsel: Is the Representation Effective?", *Criminal Justice,* Summer 1989, at 16, 18.

[4] See also, e.g. *State of Oklahoma v. Lynch,* 796 P.2d. 1150 (Okla. 1990).

[5] ABA Standards, Providing Defense Services, Standard 5-4.3 (Workload), Commentary at p. 5-48.

[6] DR 6-101 (A)(2).