Ethical Considerations: Organized Labor Actions by District Attorneys and Public Defenders

*By Richard Alexander, Esq.**

Annually, throughout the state, assistant public defenders and assistant district attorneys threaten to slow the processing of cases by fully claiming all rights on behalf of individual clients, refusing to negotiate plea bargains and by refusing to accomodate scheduling by waiving time limitations for the trial of felony cases. Public employees by law cannot strike and there is no doubt that a slowdown has as its goal increased bargaining power. By simply playing by *all* the rules it is anticipated that all Superior Court departments will be flooded with criminal cases, that civil trials will come to a halt, and that this pressure will encourage county supervisors to realize the reasonableness of collective bargaining demands.

Can lawyers ethically engage in such action?

The Rules of Professional Conduct of the State Bar of California simply do not address the issue. This is because the ethical rules for lawyers were designed with the typical nineteenth century lawyer in mind — a small town individual practitioner who received income from a number of different clients and worked in a setting of a small, stable and homogeneous population.

Today's lawyer serves a vastly different clientele: urban, heterogeneous, and mobile. Only one-third of the members of the Bar are sole practitioners and approximately one-quarter of the profession are employees of government, large corporations and labor unions, receiving all of their income from one source. Many are employed to provide free legal services to third parties.

The United States Supreme Court has recognized these new ways that lawyers work in today's society by authorizing the employment of lawyers by labor unions to provide services to union members[1] and by allowing attorneys to advertise.[2]

Unfortunately, the ethical rules do not address the special relationships of attorneys employed by government to process criminal cases and simply ignore the distinction between private attorneys and those employed by governmental or corporate bodies. The striking differences are illustrated in an ABA ethics opinion of 1976:

> It is recognized that in the corporate or governmental areas the compensation which is received by the lawyer is normally a specified

> salary which is not specifically related to the number of hours he works or the type of work he does, and in certain cases is a predetermined figure established by a Civil Service Commission or by reference to wages paid to some or all of the other employees of the employer. * * *
>
> Such lawyers have one client only, do not charge fees for the individual work and their compensation generally is not related to particular individual assignments they perform, but is rather related to the overall services they perform. This differentiates them from those lawyers employed in a general practice of law where they perform services for a number of different clients.[5]

One controversial byproduct of the change in the way attorneys work is the issue of labor activity and the right to engage in labor activity by attorneys. Although the Rules contain no requirement that specifically prohibits membership of lawyers in unions or associations representing lawyers, such a tolerant stand was not always the case. Early ethics opinions took a dramatically different view.

The ABA in 1947 held that a lawyer employed full time by a casualty insurance company could not join a union established by claims adjusters.[6] Later in 1966, the ABA prohibited governmental lawyers from joining with non-lawyers in a labor union.[7] The following year the ABA held that salaried, employee-lawyers could join a union or organization of lawyers to negotiate wages and working conditions but denied them the right to withhold services in any way.[8]

Today a lawyer is entitled to belong to a labor union composed of lawyers and to engage in collective bargaining through such unions for the purpose of negotiation of wages, hours, and conditions of employment.[9] A lawyer-employee has the right, through a union, to negotiate the manner in which the public employer carries out its obligation to supply legal services to indigent defendants and the public employer's duty to supply adequate funds in order to permit the public attorneys to properly deliver legal services.

Should lawyers be entitled to engage in work slowdowns?

As in the case of all rights, the right to slowdown is not an absolute and wholly unrestricted right exercisable irrespective of the rights of others and irrespective of the duties and obligations of the holder. Public interest requires that some rights and duties take precedence over others. Restraints may be imposed on the manner in which a right is exercised. It cannot legally be exercised in a manner that seriously encroaches on the fundamental rights of others.

When a lawyer becomes a member of the Bar, part and parcel of that membership is the legal obligation "never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."[10] When a lawyer undertakes representation of a client he or she may not withdraw until reasonable steps have been taken to avoid prejudice to the rights of the client and to allow reasonable time for the employment of other counsel[11] and lawyers obviously cannot neglect legal matters entrusted to them.

The lawyer's dual obligations to serve justice and to serve his clients take precedence over any right of a lawyer to take labor action against an employer. In short, the client comes first.

Once beyond these duties however, it should be recognized that assistant district attorneys and assistant public defenders are unique lawyers. Their obligation is to provide legal services to the poor and to the general public. They cannot ethically exercise their right to slowdown if doing so deprives their existing clients of their right to proper representation.

However, while it is possible that during a slowdown a lawyer might not accept additional cases or fully prosecute only cases actually under way, it is not necessarily true that such action would violate the ethical rules because the lawyer's conduct would not violate a duty to an existing client. The potential for ethical misconduct lies in not performing the legal work previously undertaken, not in the refusal to accept additional cases.

There is difficulty in deciding who the "client" actually is and where the fiduciary duty lies.

The State Bar Committee on Professional Responsibility and Conduct has assumed that the public employer is a client of the government lawyer-employee.[9] Once this assumption is made it is easy to conclude that it is unethical for attorneys employed by public agencies to engage in a labor slowdown.[10] It should be specially noted that the Committee in its "ethics" opinion primarily relied on Business and Professions Code Sections 6067, 6076, 6077, 6103 and 6128(b). The "legal" analysis of the Committee makes only one reference to an ethics rule, the requirement of Rule 6-101(2) of "reasonable diligence" and "reasonable speed" by attorneys in performing their work. This notable deficiency in an "ethics" opinion confirms that today's ethical problems are simply not addressed by the Rules.

One should not assume that public lawyers only represent their employer, when they are charged with the responsibility of representing individual private citizens and the public at large, even though their income comes from a government employer.[11] Quite often these two relationships conflict: the employer's need that an attorney handle as many cases as assigned, and the need to thoroughly and carefully prepare each case to assure justice for all. If one assumes the "client" is an indigent third party or the general public, then in appropriate cases it may be entirely proper for these attorneys to slow down the processing of cases by fully claiming all rights on behalf of their individual clients in each and every case, even though customarily the majority of cases are not accorded such treatment. Under some circumstances such action may very well be the obligation of public lawyer-employees who are the only persons who can take direct action to insure that the individual private citizen they represent and the public as a whole will receive competent legal services.

The real problem is that the Rules were designed to apply to lawyers employed in the general practice of law and not to lawyers who belong to collective bargaining groups and who engage in governmental service on behalf of the public or individual citizens. Unfortunately, with the exception of the Kutak Committee of the ABA and the rules proposed by the Roscoe Pound Foundation, most bars have not creatively addressed ethical problems in the context of the real world and have left the problems to be solved by the Supreme Court. The organized bar and its leaders should devote themselves to remedying this ongoing dilemma by writing rules which recognize the new role of lawyers in government and society.

FOOTNOTES

* B.A. Ohio Wesleyan University, 1966; J.D. University of Chicago, 1969. President-Elect of the Santa Clara County Bar Association. Diplomate, National Board of Trial Advocacy. Former member of the State Bar Committee on Professional Responsibility and Conduct. Partner, the Boccardo Law Firm, San Jose.

1. *United Mineworkers of America v. Illinois State Bar Association* (1967) 389 U.S. 217.

2. *Bates v. State Bar of Arizona* (1977) 433 U.S. 350.
3. ABA Informal Opinion No. 986 (1976).
4. ABA Formal Opinion No. 275 (1947).
5. ABA Informal Opinion No. 917 (1966).
6. ABA Informal Opinion No. 986 (1976).
7. Business and Professions Code Section 6068(h).
8. Rules of Professional Conduct 2-111.
9. State Bar of California Formal Opinion No. 1979-51.
10. *Id.*
11. See *Ligda v. Superior Court* (1970) 5 C.A. 3d 811.