NOV 30 1976

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

Re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee

This memorandum considers the treatment which should be accorded self-incriminating information conveyed by a Federal employee to an Assistant U.S. Attorney in the course of the latter's representation of the employee in a civil suit.

FACTUAL BACKGROUND

The U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages allegedly caused by the employee's actions associated with the performance of his official duties. During discussions with the Assistant U.S. Attorney handling the case, the employee revealed information about his past activities that could expose him to criminal and civil liability. He told the Assistant U.S. Attorney that he was an FBI informant in the past, but did not note this fact on his application for subsequent Federal employment, and did not report his income from the FBI for tax purposes. The latter omission at least is contrary to clearly expressed FBI policy, and both omissions may be criminal violations. See 18 U.S.C. § 1001; 26 U.S.C. §§ 7201 et seq.

In addition, the employee told the Assistant U.S. Attorney that, as an FBI informant, he had access to the defense camp in a Federal criminal trial and conveyed information to the FBI regarding the defense counsel. Intrusions into the defense camp may in some cases invalidate convictions of the defendants whose rights were violated and give rise to civil liability on the part of the informant.

Beyond this particular episode, the employee apparently also informed the Assistant U.S. Attorney of certain hitherto unreported activities of FBI agents that may have been illegal, although it is not clear whether the employee participated in these activities personally. If he did, he could be exposed to both criminal and civil liability.

At this point, the Department has not attempted to verify the employee's statements or to ascertain the scope of his involvement in illegal activities, if any. Presumably, the employee would prefer to keep information about his past activities confidential, to avoid potential civil or criminal liability, embarrassment and probably even physical danger.

SUMMARY

It is our conclusion that no information the employee conveyed to the Assistant U.S. Attorney in connection with the civil action may be used by the Department to prosecute the employee; nor may it be turned over to anyone else, such as the employing agency, for use against him. Similarly, we do not believe that the employee's revelations about possible criminal violations or other wrongful activities engaged in by others, such as FBI agents or other informants, may properly be used by the Department to bring criminal prosecutions or take disciplinary action against the offenders. We do believe, however, that the Department has an obligation to determine whether the employee engaged in activities as an FBI informant in relation to Federal criminal trials which may vitiate convictions resulting from these trials. Finally, we recommend that the Department obtain other counsel to represent the employee in the civil action.

DISCUSSION

The Department's Standards of Conduct provide that "attorneys employed by the Department are subject to the canons of professional ethics of the American Bar Association." 28 CFR 45.735-1(b). Therefore, the provisions of the present ABA Code of Professional Responsibility may properly be consulted for guidance here.

Use of Confidential Information against the Employee.

Disciplinary Rules 4-101(B)(1) and (2) of the Code of Professional Responsibility provide that, except when permitted under DR 4-101(C), a lawyer shall not knowingly "[r]eveal a confidence or secret of his client" or "[u]se a confidence or secret of his client to the disadvantage of the client." On their face, these provisions appear to prohibit the Assistant U.S. Attorney from reporting any possible violations of criminal laws or administrative regulations by the employee to officials of the Department or of the employing agency who he has reason to believe might use the information against the employee in a criminal prosecution or a disciplinary proceeding.

Ethical Consideration 4-2 does provide that, unless the client otherwise directs, "a lawyer may disclose the affairs of his client to partners or associates of his firm." In our view, however, such disclosure is generally subject to the implicit limitation that it be for the purpose of assisting in the representation of the client in the same case or in other matters, and not for potentially hostile uses. EC 4-5 suggests this limitation by imposing an obligation on a lawyer to be "diligent in his efforts to prevent the misuse of such information by his employees and associates." Thus, even assuming that the U.S. Attorney's Office or the entire Department may properly be regarded as part of the Assistant U.S. Attorney's "firm" under EC 4-2, it does not follow that he may transmit adverse information about the employee to the Criminal Division of the U.S. Attorney's Office or to the Criminal or Civil Rights Divisions of the Department for purposes unrelated to the civil action. Similarly, those Departmental personnel to whom some confidential information has already been revealed -- e.g., those assisting in the defense of the civil action and those whom the Assistant U.S. Attorney has consulted for guidance on the ethical questions -- are also subject to DR 4-101(B)(1) and (2) and EC 4-5 and therefore cannot properly use or transmit such information for other purposes.

In the present context, moreover, the Criminal Division of the U.S. Attorney's Office and other sections of the Department more closely resemble separate law firms than they

do part of the Assistant U.S. Attorney's "firm" within the meaning of the passage from EC 4-2 quoted above. In this connection, EC 4-2 also states that in the absence of consent, an attorney should not seek counsel from another lawyer "if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer." If even the limited breach of confidentiality involved when outside counsel is associated or consulted on the same case is not permitted under EC 4-2 without the client's consent, it would seem that the Assistant U.S. Attorney in the present case should not reveal the employee's confidences to other divisions of the Department for unrelated purposes without the employee's consent.

This conclusion is buttressed by another passage in EC 4-5, quoted in part above, which reads:

> Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

The quoted passage requires that the employee's revelations about his past not be communicated to the United States -- the other "client" represented by the Department in the civil action -- which in the present setting at least means that the revelations may not be referred to those divisions of the Department responsible for representing the potentially hostile interests of the United States in criminal prosecutions, or to the employing agency, which would have the responsibility for disciplining the employee.

Of course, as mentioned at the outset of this section, DR 4-101(B)(1) and (2) do not prevent disclosures of confidences that are permitted under DR 4-101(C). Subsection (1) of DR 4-101(C), for example, permits a lawyer to reveal confidences and secrets of his client with the consent of the client after full disclosure, but we assume that the employee will not give his consent here. 1/ DR 4-101(C)(2) also

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1/ To avoid any appearance of coercion in obtaining the employee's consent to further disclosures or to using confidences and secrets against him, we also recommend that the Department not seek to obtain the employee's consent until private counsel has been retained for him.

allows a lawyer to reveal confidences or secrets "when permitted under Disciplinary Rules or required by law or court order." 2/ At first glance, one occasion of a disclosure "required by law" appears to arise under 28 U.S.C. § 535(b):

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency . . .

Ordinarily, it would seem that information received by a Federal employee in the course of his employment is "received in a department or agency" within the meaning of this section, thereby requiring that it be reported to the Attorney General. Cf. The Government Client and Confidentiality: Opinion 73-1, 32 Fed. B.J. 71, 73-74 (1973). And, while 28 U.S.C. § 535(b) is written in terms which suggest that Congress' principal concern was with the reporting of possible violations of Title 18 to the Department of Justice by other agencies, we may assume that Congress contemplated that employees of the Department of Justice would also have an obligation to report such violations to appropriate officials within the Department. Cf. Hearings on S. 2308, Authorizing Investigation by the Attorney General of Certain Offenses, before a Subcommittee of

2/ DR 4-101(C)(3) permits an attorney to reveal the intention of his client to commit a crime and the information necessary to prevent the crime, but there has been no suggestion here that the employee intends to commit any crimes in the future. Disclosure of confidential information is required in any event only if "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed." Formal Opinion 314, American Bar Association, Opinions of the Committee on Professional Ethics 688, 691 (1967 ed.).

the Senate Judiciary Committee, 83d Cong., 2d Sess. 11 (1954). See also § 9, H. Con. Res. No. 175, 85th Cong., reproduced in 28 CFR, Part 45, Appendix ("Any person in Government service should . . . [e]xpose corruption whenever discovered."). Thus, it might be argued that the information required to be reported under 28 U.S.C. § 535(b) is "required by law" to be disclosed under DR 4-101(C)(2) and may therefore be reported to appropriate Departmental officials.

In our view, 28 U.S.C. § 535(b) should not be read to override the confidentiality requirement of DR 4-101(B) in this manner, at least under the present circumstances. Looking first to the language of 28 U.S.C. § 535(b), it would be reasonable to construe the provision in such a way that information relating to violations of Title 18 is not actually "received in a department or agency" when a legitimate, independent shield of confidentiality otherwise prevents the flow of information from the individual employee who receives it to his department or agency. In the present situation, for example, the Assistant U.S. Attorney is representing the defendant employee as part of his official duties, and as shown above, the Department's own regulations incorporating the ethics of the legal profession require him to keep the employee's confidences from the Department. It would be illogical to conclude that information which the Department has in effect forbidden the Assistant U.S. Attorney to disclose to Departmental officials has nevertheless been "received" within the Department under 28 U.S.C. § 535(b).

Illogical or not, the Department's regulations and the confidentiality they protect would presumably have to yield if it were clear that Congress intended this result. But our review of the legislative history of the present 28 U.S.C. § 535 uncovered nothing which indicates that Congress gave any consideration whatever to the situation in which a Federal employee receives evidence of a crime in a confidential relationship that arises out of his official duties. Indeed, the statute was primarily concerned with removing obstacles to the official reporting of crimes by other agencies (particularly IRS) to the Department of Justice, not with the duty of individual employees in an agency to report possible violations to their superiors. Given the absence of any

discussion of the subject in the legislative history, it would in our view be inappropriate to infer a congressional purpose to breach the universally recognized and longstanding confidentiality of the attorney-client relationship.

A consideration of the purpose underlying 28 U.S.C. § 535(b) also indicates that the statute should not be read to override DR 4-101(B) in the present case. The obvious purpose of the statute is to enable the Department of Justice to obtain the information necessary to investigate possible criminal violations and determine whether charges should be brought. See 28 U.S.C. § 535(a). Section 535(b) was not intended to alter the traditional scope of the prosecutor's discretion in deciding whether or not to bring charges based on information required to be transmitted. See Powell v. Katzenbach, 359 F.2d 234, 235 (D.C. Cir. 1965); United States v. Cowan, 524 F.2d 504, 508 & n. 7 (5th Cir. 1975). It would be an inappropriate exercise of prosecutorial discretion to bring criminal charges against the employee based on information derived in the manner involved here. To do so would be to ignore the ethical obligation of a prosecutor to seek justice and avoid unfair litigation. See EC 7-13, 7-14; cf. Berger v. United States, 295 U.S. 78, 88 (1935). 3/ Since the Department could not properly prosecute the employee in the present case, the ultimate purpose of 28 U.S.C. § 535(b) would not be served by requiring that evidence of his possible violations be reported to Department officials.

3/ Moreover, DR 4-101(C)(2) on its face only permits a lawyer to reveal a client's confidences and secrets if "required by law;" it does not expressly permit the lawyer (or his partners and associates) to use such information against the client -- in this case, by prosecuting the client. This authority may be implicit in DR 4-101(C)(2) in some cases, but it would in our view raise such serious questions regarding the lawyer's loyalty to his client that using information against a client must be avoided absent a statute which clearly requires otherwise. 28 U.S.C. § 535(b) is not such a statute.

Finally, it should be noted that the Committee on Professional Ethics of the Federal Bar Association has taken the position that when a Federal employee has been duly designated to represent another employee in personnel or similar proceedings (see 18 U.S.C. § 205), he owes a duty of confidentiality to his individual client notwithstanding the general duty to report wrongful conduct. See The Government Client and Confidentiality: Opinion 73-1, 32 Fed. B.J. 71, 72 (1973); C. N. Poirier, The Federal Government Lawyer and Professional Ethics, 60 A.B.A.J. 1541, 1543 (1974). We see no reason why the confidentiality of the attorney-client relationship should be afforded any less protection when an attorney in the Department of Justice is assigned to represent another Federal employee in a damage action arising out of the employee's official duties.

Duty to Report Possible Violations of Criminal Law or Administrative Regulations by Others

Apparently the employee in the present case told the Assistant U.S. Attorney of activities by FBI agents that may give rise to civil or criminal liability on the part of the agents. For the reasons given in the preceding section, information implicating the employee himself in any of these events should not be used against the employee and should not and cannot be disclosed. The issues in this section are whether information regarding activities in which the employee was not personally involved may be turned over to appropriate officials and used to prosecute or discipline wrongdoers; and whether in those situations in which the employee is implicated, information regarding others may nevertheless be reported and used if measures are taken to protect the employee.

If the attorney-client privilege and related evidentiary rules were the only restraints on disclosure, it might be that some information conveyed to the Assistant U.S. Attorney that did not involve the employee personally could be freely revealed to the Criminal or Civil Rights Divisions or other officials of the Department and used by them in prosecuting or disciplining wrongdoers. For example, in order for the attorney-client evidentiary privilege to apply, the

information conveyed to the attorney must in some sense be relevant to the subject of the consultation with the attorney. 8 Wigmore § 2310 (McNaughton rev. 1961). In the present case, revelations regarding the employee's own past conduct were relevant to representation in the civil action because the employee's background and character would be placed in issue by the plaintiffs. It might be argued, however, that revelations about FBI activities of which the employee was aware but in which he did not participate were not relevant to the representation in the civil action and are therefore not protected by the attorney-client privilege. The applicable evidentiary privilege in such a situation is the informer's privilege. Roviaro v. United States, 353 U.S. 53, 59 (1957); 8 Wigmore § 2374. This privilege protects only the identity of the informer, not the communication itself, and belongs to the Government, not the informer. Roviaro v. United States, 353 U.S. at 60; 8 Wigmore § 2374, at 765-66.

The framers of the Code of Professional Responsibility recognized, however, that the protection afforded by the attorney-client and related evidentiary privileges is not adequate to preserve the confidences of a client. As pointed out in the previous section, DR 4-101(B)(1) and (2) prohibit an attorney from revealing the confidences and secrets of his client or from using those confidences and secrets against him. The term "confidence" is defined in DR 4-101(A) as "information protected by the attorney-client privilege under applicable law," but the term "secret" is defined more broadly to encompass all "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." There is no requirement in the definition of "secret" that in order to be secure against unilateral disclosure by the attorney the information must be relevant to the subject of the consultation between client and attorney; it is enough that the information was "gained in the professional relationship." The wording of the definition also suggests that the client may request that information be kept inviolate even if its disclosure would not be embarrassing or detrimental to him. Presumably, then, the employee in the present case could prevent the disclosure of any evidence of wrongdoing even if he had no connection with the offenses and the information was gratuitously

conveyed during a consultation. EC 4-4 confirms this expansive reading of the Code:

> The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. (Emphasis added).

We have not been informed whether the employee in the present case expressly requested that any or all of the information he conveyed to the Assistant U.S. Attorney be held inviolate. As a practical matter, however, the absence of a request for confidentiality is likely to be irrelevant, because the attorney representing the employee may not in any event reveal information "the disclosure of which would be embarrassing or would be likely to be detrimental to the client." See DR 4-101(A). It seems likely that the employee would be personally implicated to some degree in many episodes he has recounted. In addition, the revelation that he was an FBI informant would probably in itself be embarrassing or detrimental to the employee, so that knowledge of alleged FBI activities that he gained as an informant would be regarded as "secret" information even if he had not personally participated in the activities.

Surely public disclosure of any information that is potentially embarrassing or detrimental for the reasons just stated would be prohibited by DR 4-101(B)(1). Moreover, under the rationale of the preceding section of this memorandum, such information could not even be revealed to another attorney in the Department for purposes unrelated to the Department's representation of the employee.

It might be contended, however, that at least a limited breach of confidentiality is warranted in order to permit the Department to determine whether there has been wrongdoing by others and to take necessary action if there has. As shown

in the previous section, the objective of preserving the absolute confidentiality of communications can and should be met where the evidence of possible unlawful activity pertains only to the employee, especially since the employee could not fairly be prosecuted in any event. But it could be argued that the objective of absolute confidentiality must yield to a certain degree when there is evidence of wrongdoing by others because of the strong countervailing policy of reporting and prosecuting crimes involving Federal officials and because the other persons who may have violated criminal statutes or administrative rules have no substantial claim under the Code of Professional Responsibility to avoid prosecution based upon evidence obtained in a confidential relationship with someone else. The Department could attempt to protect the employee's interest in the confidentiality of his communications by declining to take any action against him personally, by invoking the informer's privilege to protect his identity, and by foregoing reliance on his testimony in any criminal trial or disciplinary action involving FBI agents or others. 4/ If this were done, it could be maintained that the public interest in investigating and disciplining or prosecuting wrongdoers outweighs the minimal impairment of confidentiality entailed in revealing the identity of the employee and the substance of his communications only to other divisions of the Department. This balancing approach makes some sense, but we do not believe that a weighing of all relevant factors actually favors even a limited disclosure within the Department. The prescription in DR 4-101(B)(1) that a lawyer not "[r]eveal a confidence or secret of his client" is written in mandatory terms; it should not in our view be overridden by a more general concern for vindication of the public interest in prosecuting or disciplining violators of criminal laws or administrative regulations. If the employee were represented by private counsel, it seems clear

4/ The evidentiary privilege to protect the identity of an informant must give way where disclosure of his identity or the contents of his communication is relevant and helpful in the defense of a criminal action, Roviaro v. United States, 353 U.S. at 60-61, but the Department could simply decline to prosecute or drop an ongoing prosecution if the employee's identity or testimony was essential to the case.

that counsel could not properly disclose potentially embarrassing or detrimental information outside of his law firm, to the Criminal or Civil Rights Divisions of the Department or to anyone else, merely because other individuals were implicated in wrongdoing. Because the Department is acting in lieu of private counsel for the employee, and because revelations to other divisions of the Department more closely resemble prohibited dissemination outside of a private law firm than a permitted sharing of information within, the same rule should apply here to the extent possible.

Also arguing against such use of the information are the inevitable uncertainties regarding the ability of the Department as a practical matter to keep the employee's identity secret. We have not been told the details of the employee's revelations, but it may well be that his identity could be readily ascertained by those intimately involved with the alleged wrongdoing (either the FBI agents or the victims of the activities) if the Department's interest in the matter became public. The employee might be understandably insecure about such disclosure and the possibility of a civil action against him as a result. Since the confidentiality of the attorney-client relationship is intended to dispel insecurities of this kind, see EC 4-1, we recommend that the employee's secrets implicating others be preserved absent his consent.

Disclosure of Information Relating to Possible Intrusion by the Employee into the Defense Camp during a Criminal Trial

As we understand the situation, the employee informed the U.S. Attorney's Office that, while serving as a paid informant for the FBI, he had access to the defense camp in at least one Federal criminal trial and conveyed information to the FBI regarding defense counsel. It is unclear whether this information directly related to the attorney's work in the criminal case and whether the attorneys prosecuting the case used it, or even had any knowledge that an informant was present in the defense camp.

There is a substantial body of authority for the proposition that knowing intrusion by the Government into the defense camp in a criminal trial, either by permitting an informant to be present or by intercepting conversations between the defendant and his counsel, violates the Sixth Amendment right to the effective assistance of counsel and requires reversal of any ensuing conviction even if the defendant makes no specific showing of prejudice. For example, in O'Brien v. United States, 386 U.S. 345 (1967), the Supreme Court vacated a conviction because FBI agents, in the course of a wiretap unrelated to the defendant's case, had overheard two conversations of the defendant regarding his trial, one of which was with his defense counsel. The conviction was vacated even though the Solicitor General represented to the Court that the contents of the conversations were not communicated outside of the FBI to attorneys of the Department of Justice, including those who prosecuted the case. See 386 U.S. at 346 (Harlan, J., dissenting). See also Bursey v. Weatherford, 528 F.2d 483, 487 (4th Cir. 1975), cert. granted ____ U.S. ____ (1976); Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953); Coplon v. United States, 191 F.2d 749, 759 (D.C. Cir. 1951). Cf. Hoffa v. United States, 385 U.S. 293, 306-07 (1966); Black v. United States, 385 U.S. 26 (1966); In re Berg, 409 U.S. 1238 (1972)(Douglas, J., in chambers); United States v. Rispo, 460 F.2d 965, 976-77 (3d Cir. 1972).

Other cases suggest that reversal is required only upon a showing of prejudice, at least where there has not been a "gross intrusion" by the Government. See, e.g., United States v. Valencia, _____ F.2d _____, _____ (6th Cir., Sept. 2, 1976), Slip at 8; United States v. Scott, 521 F.2d 1188, 1192 (9th Cir. 1975). The Department has to a certain extent embraced the latter position in its amicus curiae brief filed in the Supreme Court in Weatherford v. Bursey, supra (No. 75-1510), arguing that there is no Sixth Amendment violation at all unless the Government activity was designed to procure confidential defense information or the prosecution actually obtained such information. Brief at 22-32. 5/ But whatever

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(Footnote 5 on p. 14)

the correct rule, the employee's assertion in the present case that he was present as an FBI informant in the defense camp and conveyed some information to the FBI regarding the defense counsel raises a serious question as to the validity of any convictions that may have occurred in the particular trial or trials involved. Even if an "intentional" invasion, prosecution access to confidential information, or actual prejudice must be shown in order for the defendant to obtain relief, the presence or absence of these factors cannot be determined without further investigation, and perhaps notification of the defendants or a judicial hearing.

Presumably the Department would ordinarily not hesitate to give such notification when presented with new evidence of the kind now in hand. At trial, due process requires the prosecution to turn over to the defense upon request any evidence that is material to guilt or punishment, Brady v. Maryland, 373 U.S. 83, 87 (1963); Moore v. Illinois, 408 U.S. 786, 794-95 (1972), and the Code of Professional Responsibility imposes a duty to turn over such evidence even without a request:

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government

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(Footnote 5 from p. 13)

5/ The Department's brief (at 34 n. 23) also represents to the Court that the FBI instructs its agents and informants not to attend defense planning sessions if they can be avoided consistently with maintaining the secrecy of their status. They are also instructed that if they are nevertheless drawn into confidential sessions they should not report to their superiors or to a prosecutor what they have heard. If this policy was in effect when the employee's actions took place, he was apparently in violation of it.

> lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. DR 7-103(B).

DR 7-103(B) would clearly require the prosecution to inform the defendant of evidence that a Government agent was present in the defense camp if such presence became known to the prosecution during trial or while the case was on direct review. 6/ The Department has followed this course in the past. For example, in Black v. United States, 385 U.S. 26 (1966), after the petition for certiorari had been denied and before an application for rehearing on the denial was filed, the Solicitor General informed the Court (and thereby the petitioner as well) that certain conversations between the petitioner and his attorney had been monitored. See also O'Brien v. United States, 386 U.S. 345 (1967).

Once a conviction has become final, the prosecuting attorneys are no longer involved in "criminal litigation" involving the defendants, and DR 7-103(B) is, strictly speaking, no longer applicable. However, EC 7-13 provides that "the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." Unlike DR 7-103(B), this Ethical Consideration is not limited to the period during "criminal litigation." While Ethical Considerations are only aspirational rather than mandatory in character, the nature of the possible constitutional violation, the Department's apparent responsibility for it if it occurred, and the defendant's inability to detect the violation and raise an objection at trial all suggest that the Department should ordinarily adhere to EC 7-13 and notify the defendant when it learns after a conviction has become final that an FBI agent had access to the defense camp.

6/ Alternatively, the prosecution might move for dismissal of the indictment if it did not wish to disclose the identity of the agent or the circumstances surrounding his intrusion (in order, for example, to demonstrate a lack of prejudice). Cf. Alderman v. United States, 394 U.S. 165, 184 (1969); Roviaro v. United States, supra, 353 U.S. at 61.

The Supreme Court's opinion last term in Imbler v. Pachtman, 424 U.S. 409 (1976), strongly supports this conclusion. The case was an action under 42 U.S.C. § 1983 alleging that the prosecutor in a State criminal trial had knowingly used perjured testimony to obtain a conviction. After the conviction was affirmed by the California Supreme Court on appeal, the prosecutor informed the Governor of certain newly discovered evidence that tended to discredit a key prosecution witness. The letter became a part of the permanent record in the case and was therefore apparently available to the convicted defendant. In holding that the prosecutor was absolutely immune to a damage action based on the knowing use of perjured testimony, the Court stated:

> The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial this duty is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility § EC 7-13 (1969); ABA Standards [Relating to the Prosecution Function] § 3.11. Indeed, the record in this case suggests that respondent's recognition of this duty led to the post-conviction hearing which in turn resulted ultimately in the District Court's granting of the writ of habeas corpus. 424 U.S. at 427 n. 25.

If, as the Supreme Court implies, the prosecution has a continuing ethical obligation to turn over newly discovered evidence tending to discredit testimony not known at trial to have been false, and therefore not indicative of any prosecutorial misconduct, then surely the Department has an obligation to disclose newly discovered evidence, such as that possibly involved here, which does suggest misconduct by the Department.

The problem, of course, is that any such action in the present case would require at least a limited breach of confidentiality in conducting a search of FBI records to determine the truth of the employee's statements about his status as an informant and access to the defense camp. If FBI records tend to substantiate his statements, subsequent proceedings to remedy any resulting miscarriage of justice would run the far more serious risk that embarrassing and detrimental information about the employee's own involvement in the intrusion would be made known to the public and to the defendants whose rights were infringed, thereby giving rise to the possibility of public embarrassment and civil liability. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Bursey v. Weatherford, supra. Nevertheless, on the special facts presented here, we believe the Department must take some action.

Weighing against absolute confidentiality in the present case is much more than a generalized concern for bringing offenders to justice. The Government has a competing ethical obligation under EC 7-13 and the Supreme Court's opinion in Imbler v. Pachtman, supra, to notify the defendant or the court of newly discovered evidence of a possible constitutional violation. This ethical obligation would be an especially grave one if the employee's statements are true, because identifiable individuals may have suffered and may continue to suffer as a result of a Sixth Amendment violation for which the Department itself may be responsible. Balancing the competing ethical obligations, it is our conclusion that, in order to enable remedial measures to be taken, a limited breach of confidentiality would be warranted to the extent of notifying the defendant or the appropriate court of any constitutional violation that was perpetrated by the employee with the Department's acquiescence, in any trial at which the defendant was convicted. 7/ In making

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7/ Acquittal obviously would not erase any violation of Sixth Amendment rights that may have occurred. But the continuing ethical obligation to disclose newly discovered evidence appears to apply principally where the defendant has been convicted, Imbler v. Pachtman, 424 U.S. at 427 n. 25, quoted above, and in any event the defendants are not suffering any lasting prejudice as a result of the intrusion if they were acquitted. The only effects of notifying such defendants might therefore be public embarrassment for the employee and a civil action against him based on the constitutional violation.

such notification, the Department could take steps, such as presentation of evidence to the court for in camera or perhaps even ex parte review, to prevent unwarranted publicity that could injure or embarrass the employee.

If such a breach of confidentiality involving the disclosure of information outside the Department is proper, then a fortiori the Department may breach the confidentiality of the attorney-client relationship to the far more limited extent of searching FBI records for substantiation of the employee's statements about his past status and activities relating to Federal criminal trials. We recommend that this preliminary step be taken as soon as possible, but with the maximum feasible precautions to prevent wider dissemination of information pertaining to the employee or to the purpose of the inquiry.

It would be premature to discuss at this point the specific steps that should be taken if FBI records lend credence to the employee's assertions. This would depend on such factors as: (1) the degree of his intrusion; (2) whether the intrusion was deliberate or unavoidable; (3) the nature of information communicated to the FBI; (4) whether information communicated to the FBI was in turn made available to the prosecution or used by the FBI to develop additional evidence; (5) whether the prosecution otherwise profited by the employee's intrusion; (6) whether the defendants were convicted, and if so, whether they are in custody or have completed their sentences. The search of the Department's records should be sufficiently thorough to develop this and any other relevant information.

Should the United States Attorney continue to represent the employee in the case?

As we understand the situation, the interests of the United States and those of the employee do not differ with respect to the underlying issues involved in the lawsuit. However, there is apparently some concern that the individual defendant may have a much stronger incentive to settle than the United States, in order to prevent his prior wrongful activities from being disclosed and publicized in the course of further discovery and trial.

DR 5-105(B) provides that a lawyer may not continue multiple employment

> if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

DR 5-105(C) in turn permits a lawyer to represent multiple clients

> if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

It is not clear that the ability of the U.S. Attorney's Office to exercise independent judgment on behalf of the employee is "likely" to be adversely affected by its representation of the United States in the same case. But EC 5-15 takes a more cautious approach, suggesting that continued multiple representation is generally inadvisable if the interests of the clients are merely "potentially differing," and EC 5-16 states that the clients should be informed, and presumably given the opportunity to make other arrangements, whenever there are circumstances "that might cause any of the multiple clients to question the undivided loyalty of the lawyer." See also EC 5-21, 5-22. In our view, such circumstances are present here, both by virtue of the potentially differing interests in the civil action and because of the more substantial divergence of interests with respect to use of information about illegal activity disclosed by the employee. 8/

8/ It would also be awkward for the Department to be in the position of advising the employee as to when and whether he should assert his Fifth Amendment privilege against self-incrimination, which might become necessary as the civil action proceeds.

For these reasons, and in view of the sensitive nature of the ethical question, we recommend that the Department refuse to consent to further multiple representation in the present case; and that it obtain other counsel for the employee even if the employee would prefer that the Department continue to represent him. Private counsel should be retained as soon as possible in order to avoid any further difficulties. Counsel could then be consulted and given an opportunity to protect the employee's interests with respect to the steps the Department might propose for remedying constitutional violations uncovered in the course of the search of FBI records.

Antonin Scalia
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