The Prosecutor's Dilemma: Can a Criminal Defendant be Interviewed Outside the Presence of His Attorney?

This comment deals with a problem that may confront any attorney, but is most critical for attorneys acting as prosecutors. Can a prosecuting attorney interview a criminal defendant without the presence of the defendant's attorney? The time pressures inherent in the prosecutorial capacity can lead to shortcuts which at times may straddle the line of propriety. What are the standards that courts apply, from both constitutional and ethical viewpoints, to control prosecutorial access to a criminal defendant? This comment attempts to answer these questions and to provide an overview of the guidelines that are imposed upon an attorney.

The nature of the prosecutorial function places a prosecuting attorney in a position where he is the servant of two masters. The prosecutor must heed constitutional guarantees of due process for a defendant, as well as various legislative constraints upon his conduct. But in addition to his role as the legal representative of the government, the prosecutor remains an attorney and is subject to the rules of professional conduct. This comment discusses the propriety of a prosecuting attorney's meeting or communicating with a defendant represented by counsel without that counsel's being present, a subject which involves both constitutional and ethical issues.

Communication with a defendant by any governmental agent, without the presence of his attorney, is at best constitutionally questionable. This is the clear import of the line of United States Supreme Court decisions stretching from Massiah v. United States1 and Miranda v. Arizona2 to Brewer v. Williams.3 However, the Supreme Court has dealt with prosecutorial interrogation only tangentially because this line of cases directly addressed only the actions of investigating police officers, although the results of those actions were being sought for admission into evidence by prosecu-

tors. Lower courts have had to attempt to resolve the question of the admissibility of statements obtained by prosecutors in the absence of defendant’s counsel.

The permissibility and ability of the defendant to waive the right to have counsel present during interrogation is at the heart of this problem. Two lines of reasoning, both stemming from the Supreme Court’s analysis in Massiah and Miranda, have developed, causing a split in the views of the federal circuits on a per se application of the exclusionary rule to confessions and other evidence obtained without the presence of defendant’s counsel.

Some courts are of the view that the right to counsel after indictment is absolute and that any statement obtained by the prosecution, absent defendant’s counsel, is inadmissible. The courts that apply this per se rule of exclusion are concerned with the propriety of permitting interrogators to breach the shield that counsel provides. The fear is that allowing questioning without counsel will subvert the attorney-client relationship and encourage the undermining of the accused’s decision to seek the assistance of counsel.

Other courts have refused to apply the per se exclusionary rule and will permit the admission of such statements, provided the prosecution can meet the burden of proving a clear, explicit, voluntary, or knowing waiver.

Courts agree that there is no real distinction to be drawn between police and prosecutorial conduct. If the statement has been improperly obtained, whether by a prosecuting attorney or by a police investigator, its admission into evidence would detract from a fair trial and it is thus excludible. The principles in the following cases are therefore applicable to both police and prosecutors, though many are concerned with actions taken by police officers.

A minority of federal circuits have posited the per se exclusionary rule as a remedy for an unrepresented interview. These courts believe that all oral communications are improper if they occur in the absence of defendant’s counsel, and any confession so obtained must be suppressed regardless of the voluntariness of the

8. O’Conner, 405 F.2d at 632.
9. Id. at 636.
The Seventh Circuit is one of those courts which has applied the per se rule. In *United States v. Durham*, it held that interviews without advising the defendant’s attorney were impermissible. Further, unless the attorney was so advised, any statements obtained were inadmissible. However, if the Government could show awareness and approval of the interview by the defendant’s counsel, the court’s view “would be entirely different.” The holding in *Durham* is inconsistent with previous Seventh Circuit authority. Until this case, the Circuit had held that no per se rule could be applied to require that an attorney be present at every interview after his appointment.

The majority of federal circuits do not apply the per se rule. The broad analysis applied by most circuits is that while the practice of questioning without the defendant’s counsel being present is undesirable, there is no constitutional requirement of per se exclusion of evidence so obtained. The government is required to show that there was a voluntary and knowing waiver of the right to counsel. More than the mere absence of counsel is required before the courts will exclude the evidence. The court is to look at the actual conduct, motivation, intended effect, and the pointedness of the intrusion in determining if there has been a deliberate undermining of the defendant’s rights. Thus, a discussion with a United States attorney about pleading guilty, initiated at the defendant’s request and without any probing for information, is not constitutionally improper. But the use of a state employed psychiatrist to attempt post-indictment questioning and later to testify to a refusal to submit to the questioning is violative of the defendant’s rights and is excludible.

The majority of the states appear to conform to the federal

11. 475 F.2d 208 (7th Cir. 1973) (Swygerv, C.J.).
12. Id. at 211.
15. Coughlan v. United States, 391 F.2d 371 (9th Cir. 1968).
17. United States v. Morrison, 602 F.2d 529 (3d Cir. 1979); United States v. Carlson, 423 F.2d 431 (9th Cir. 1970).
18. United States v. Carlson, 423 F.2d at 431.
19. Coughlan, 391 F.2d at 371.
majority view. In these states a defendant may waive his right to have counsel present at an interview if the waiver is clear, explicit, and intelligent.\textsuperscript{20} However, the circumstances surrounding the waiver will be carefully scrutinized.\textsuperscript{21} The burden is on the State to show that the waiver meets the requirements, especially if the waiver occurs after the accused has expressed a desire for and has obtained counsel.\textsuperscript{22} If counsel has been obtained, the courts view any alleged waiver skeptically,\textsuperscript{23} and the State must bear a heavier burden in showing a voluntary waiver.\textsuperscript{24}

In deciding the admissibility, the trial judge is to look critically at the totality of the circumstances surrounding the waiver.\textsuperscript{25} An important circumstance is the origin of the interview. It is "critically important that the [defendant] and not the State sought the . . . interview."\textsuperscript{26} The fear is that otherwise the waiver is less likely the result of free will but of some coercion, intended or not. Thus, even if the accused has previously requested counsel there is nothing to prevent him from changing his mind,\textsuperscript{27} but he cannot be surreptitiously induced to do so.\textsuperscript{28}

The intelligence and articulateness of the accused can also play a role in the court's willingness to believe the waiver voluntary. Where the accused is shown to be literate, educated, and knowledgeable (especially about his rights), the courts are more likely to believe a waiver to be intelligently made.\textsuperscript{29} If the accused is seen as illiterate, it is harder to convince the court of a knowledgeable waiver.\textsuperscript{30}

Not all states have followed this reasoning. By constitutional provision New York has extended rights to defendants beyond those contained in the United States Constitution.\textsuperscript{31} In New York, once the accused has requested and obtained counsel, he may not

\begin{itemize}
  \item \textsuperscript{20} Schilling v. State, 86 Wis. 69, 271 N.W.2d 631 (1978).
  \item \textsuperscript{21} Hallman v. State, 575 S.W.2d 688 (Ark. 1979).
  \item \textsuperscript{22} Jordan v. State, 365 So. 2d 1198 (Miss. 1979).
  \item \textsuperscript{23} People v. Parker, 84 Mich. App. 447, 269 N.W.2d 635 (1978).
  \item \textsuperscript{24} State v. Greene, 117 Ariz. 92, 570 P.2d 1265 (N.M. 1977).
  \item \textsuperscript{25} Walls v. State, 368 N.E.2d 1373 (Ind. Ct. App. 1977).
  \item \textsuperscript{26} Ellerba v. State, 398 A.2d 1250, 1256 (Md. Ct. App. 1979).
  \item \textsuperscript{27} State v. Stellman, 120 Ariz. 1213, 585 P.2d 1213 (1978).
  \item \textsuperscript{28} Walls v. State, 368 N.E.2d 1373 (Ind. Ct. App. 1977).
  \item \textsuperscript{29} Hallman v. State, 575 S.W.2d 688 (Ark. 1979).
  \item \textsuperscript{30} Abston v. State, 361 So. 2d 1384 (Miss. 1978).
\end{itemize}
waive the right to counsel in the absence of his counsel. Any statements elicited without the presence of counsel, by any agent of the State, are inadmissible regardless of a purported waiver. The view is that, "Notwithstanding that warnings alone might suffice to protect the privilege against self-incrimination, the presence of counsel is a more effective safeguard against an involuntary waiver of counsel than a mere written or oral warning in the absence of counsel." This non-waiver doctrine does not apply if the questioning is in regard to an investigation about matters unrelated to the charges against the accused or if the questioning is in a non-custodial environment.

The courts have not missed the ethical implications of prosecutorial interrogation of an unrepresented defendant. Improper conduct on the part of a prosecuting attorney raises not only constitutional questions but ethical problems as well. The ethical problems stem from ABA Code of Professional Responsibility Disciplinary Rule [hereinafter referred to as DR] 7-104(A)(1). This section prohibits an attorney during the course of his representation to: "Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." As a member of a governmental entity, a prosecuting attorney is not shielded from his duties and responsibilities as a member of the bar. The ethical requirements of the Code of Professional Responsibility relating to communications between attorney and client apply equally to criminal as well as civil litigation.

Though enforcement of the Code is part of the supervisory authority of the courts, a violation of DR 7-104 is viewed as not being of constitutional dimensions. Hence, the possibility exists of statements obtained through unethical conduct being admitted in

33. Id. at __, 348 N.E.2d at 898, 384 N.Y.S.2d at __
34. Id. at __, 348 N.E.2d at __, 384 N.Y.S.2d at __
35. ABA CODE OF PROFESSIONAL ETHICS [hereinafter cited as ABA CODE], Disciplinary Rule [hereinafter cited as DR] 7-104(A)(1).
37. United States v. Thomas, 474 F.2d 110 (10th Cir. 1973).
evidence at the defendant’s trial. However, a violation of this provision can lead to disciplinary hearings against the attorney. The American Bar Association has looked dimly on attorneys who communicate with an opposing party in disregard of the proscription of DR 7-104. In *ABA Opinion No. 108* (1934), the Committee on Professional Ethics was asked to construe the forerunner of DR 7-104—Canon 9. The Committee held Canon 9 to be clear and explicit. Canon 9 prohibited all communication between an attorney and the opposing party without notice to or the presence of his counsel. The function of the canon was to preserve the functions of the legal profession and to shield the adverse party from improper approaches. The reasons for the canon were thought to be clear in that they arose from the nature of the attorney-client relationship and the necessity of protecting the interests of both the adverse party and the opposing attorney. To meet these needs, Canon 9 (now DR 7-104) was to be construed literally. It is thus ethically improper for an attorney to interview an opposing party without notice to or the presence of that party’s counsel, even though the party will be a witness at the trial or the interview occurs merely in the course of an investigation into the facts of the case.

The prosecutor is not, however, limited to communication solely through attorneys. An attorney may interview, without opposing counsel’s presence, employees of the accused and witnesses of the opposing party. This contact is permitted only if the party being interviewed is not an adverse party. For example, where several persons are accused of related thefts, a prosecutor may not interview one in regard to proceedings against another without the presence of the others’ counsel. Nor can the prosecutor interview the mother of a minor defendant, since she is so closely identified with the minor that she may be within the scope of the proscription.

40. *ABA Committee on Professional Ethics, Opinions* [hereinafter cited as *ABA Opinions*], No. 187 (1938).
41. *Id*.
42. *ABA Opinions*, No. 117 (1947).
43. *ABA Opinions*, No. 14 (1947). *See also NYSB Opinions*, No. 404 (1975) (applying this reasoning to DR 7-104).
44. H. DRINKER, *Legal Ethics* 202 (1954) [hereinafter cited as *Drinker*].
45. *Id*.
A distinction can be made between a represented party and an unrepresented one. If a person is represented by counsel, the ethics of the profession serve to bar any communication without the presence of counsel. But if the party is unrepresented and all the attorney is doing is obtaining information, it has been held that there is no impropriety, even though the information may be harmful to the informant.\[^{46}\] In reaching this result, the New York State Bar Association reasoned that, in light of Canon 7’s requirement of zealous representation, DR 7-104 and Ethical Consideration [hereinafter referred to as EC] 7-18 should be applied cautiously and only to the extent necessary to meet the “relatively limited ends” these provisions were designed to meet.\[^{47}\] This conclusion was reached in civil litigation, and what application it may have to the constitutionally more limited area of criminal process is unclear. It seems likely this type of information gathering can properly proceed only until the time the accusatory finger points at an individual, at which time the previously discussed constitutional guarantees would attach. Questioning beyond that point has already been seen to create great hazards for the prosecution.

The knowledge of the prosecutor regarding the representation of the accused may play a role in determining both the ethical question and the admissibility of any statements. Such a consideration has arisen in cases where the accused has hidden the fact of representation from both investigators and prosecutors. In Ellerba v. State,\[^{48}\] the prosecutor was not only unaware that counsel had been tentatively retained by relatives of the accused, but the accused himself repeatedly denied wanting counsel. Even when accused’s counsel stormed into the prosecutor’s office, in an “outrage” over the interrogation, the accused denied that was his counsel. In this circumstance the court felt that no violation of the accused’s right to counsel had occurred. Although the court did not reach the ethical issue, the same conclusion would doubtless apply. DR 7-104 prohibits communication with an opposing party whom “he [the lawyer] knows to be represented by a lawyer in that matter . . . .”\[^{49}\] EC 7-18 has similar language requiring knowledge of

\[^{47}\] Id.
\[^{48}\] Supra note 25.
\[^{49}\] DR 7-104(A)(1).
representation before the Code comes into play.  

How far an attorney need go to discover whether a party is represented was addressed by the Oregon court in In re Schwabe.  There the attorney in question received a letter from the counsel retained by the opposing party stating that this lawyer had been retained by the party. The accused's attorney refused to believe the appointment and went directly to the opposing party and questioned him about the retention of counsel. The court found that this communication, after knowledge of the retention of counsel, violated Oregon's equivalent of DR 7-104. The court stated that even if the communication is to question whether a party has retained counsel, there is a violation of professional ethics. That the court was, in effect, condemning any direct communication is evident since, upon questioning by the accused attorney, the opposing party had actually denied retaining counsel (although he later employed the same counsel in an action on the same matter). The attorney was publicly reprimanded for merely asking.

There are two exceptions to the “no communication” rule. These are (1) if the attorney for the other party consents to the contact, and (2) if information vital to settlement of the case is not communicated by the other attorney to his client. If the latter is the case, the remedy may be to contact the client directly, but only after warning the opposing counsel of the prospective contact. Similarly, it would be ethically improper to send form letters to both the accused and his attorney with an offer to accept a guilty plea to a lesser charge. Such a letter could cause the accused to plead guilty (even before indictment), and the accused needs the assistance of counsel when such an offer is made.

The consent exception also carries some limitations. If the accused's counsel does consent to direct contact without his presence, the limits of the contact need to be clearly defined and scrupulously followed. Failure to do so will, at a minimum, cast doubt

50. ABA Code, Ethical Consideration 7-18.
51. 408 P.2d 922 (Or. 1965).
52. “[P]etitioner is a very experienced practitioner, who, we feel certain, ‘knew better.’” 408 P.2d at 924.
53. ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS [hereinafter cited as INFORMAL OPINIONS], No. 517 (1962).
54. DRINKER, 220.
55. INFORMAL OPINIONS, No. 1373 (1976).
56. Id.
on the admissibility of the evidence obtained in violation of the agreement and will almost certainly comprise a breach of ethics. A breach of ethics will not necessarily result in the exclusion of any statements obtained. That a violation of DR 7-104 is one factor to be considered in judging the admissibility of evidence is seen in the analysis applied by the Michigan Supreme Court in *People v. Green.* There an assistant district attorney sat in on and asked some questions at interviews requested by the defendant (after retention of counsel but in his absence as specifically requested by the defendant). The court was of the opinion that the prosecuting attorney clearly had violated the proscription of DR 7-104. The court, however, admitted statements given by the defendant, reasoning that an ethical violation would not necessarily impair the fairness of the trial. Exclusion was felt not to be the proper remedy for an ethical violation that did not violate the accused's rights. Rather, disciplinary proceedings were seen as a more effective deterrent to such conduct.

**Conclusion**

It would thus appear that any choice as to whether a prosecuting attorney should interview a represented defendant in the absence of his attorney is largely chimerical. While such an interview may meet constitutional guidelines, it is very likely that any interview will violate the proscriptions of the Code of Professional Responsibility. Obviously the aims of the two types of restrictions are different. The constitutional guidelines seek to protect the rights of the defendant. The professional seeks to protect the standing of the profession as well. Clearly the ethical standards are the more stringent and consequently an attorney must meet their higher requirements to avoid sanctions.

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57. United States v. Callabrass, 458 F. Supp. 964 (S.D.N.Y. 1978); Brewer v. Williams, 430 U.S. 387 (1977) (in which a prosecuting attorney was permitted to obtain a handwriting example without defense counsel and proceeded to show to and obtain from accused an admission as to authorship of a disputed writing; the admission was consequently suppressed).