Why defense lawyers are now up in arms

by Suzanne Rose

The Justice Department's current practice of issuing subpoenas to defense attorneys to force them to testify against their clients, smacks of the same prosecutorial excesses which were rampant during the Carter administration. The Carter Justice Department, under Attorney General Benjamin Civiletti, was supposed to be a bastion of "human rights." Instead, the federal courts cowered under what must be termed one of the most flagrant attacks on due process in American history—the Abscam, Brilab, and related "stings"—as government officials, labor leaders, and others were convicted of crimes on the basis of trumped-up evidence of paid informers, who were often themselves convicted criminals.

Attorneys around the country, but most particularly in the state of Massachusetts, have been reporting increasing incidents of defense attorneys being subpoenaed to testify against their clients before grand juries. Lawyers' subpoenas, which were virtually unknown a decade ago, have been used increasingly during the last two and a half years of the Reagan Justice Department. As a result of the ability to issue such subpoenas, it will soon become very difficult for defendants accused of certain types of crimes to obtain counsel. These include crimes which the Justice Department is currently making a show of enforcing zealously, such as drug-related crime and organized crime. The practice, of course, also weakens the right of any defendant to due process.

The supporters of the lawyer subpoena tactic argue that it does not really infringe on the client's right to counsel, because he or she only has this right after being *indicted* by a grand jury. This argument is similar to the one made by Attorney General Edwin Meese against the so-called Miranda warning, which entitles the suspect to be informed of his right to secure a lawyer before he undergoes police questioning about a crime; if a person is innocent, so the argument goes, he has nothing to fear from police questioning.

But this is no different from the excesses of the Carter Justice Department. How is the government's use of paid informants to entrap people into committing or appearing to commit crimes, initiated under the Carter administration, any different from the current attacks on a citizen's Sixth Amendment right to representation by counsel? Apart from attacking the Miranda warning, the Reagan Justice Department is also challenging the so-called exclusionary rule, which makes evidence obtained in an illegal search inadmissable at trial, and the constitutional right to defense inherent in attorney-client privilege. This undermines the justice system and enables it to be turned into a political weapon, just as the long-term effect of Abscam was to discredit branches of the government, like Congress, which might stand up to a Justice Department motivated to go after its political enemies.

The battle in Massachusetts

This is the context in which to view the battle going on in Massachusetts, where the state court has attempted to curb the ability of federal prosecutors to issue subpoenas to defense lawyers. The Massachusetts Supreme Judicial Court adopted in October 1985 an ethical standard on the use of lawyer subpoenas, which would require that federal as well as state prosecutors undergo judicial review of any subpoena issued to a defense lawyer to testify before a grand jury about a client. A prosecutor who refused to comply with this procedure could find himself the subject of disciplinary action.

This rule is understandably getting a lot of support from defense lawyers in Massachusetts, who are particularly concerned about the tactics of U.S. Attorney William Weld, who has, according to the affidavit which he filed in a lawsuit seeking to overturn the rule, issued between 50 and 100 subpoenas to lawyers.

Weld, whose suit challenging the applicability of the new Massachusetts state rule to federal prosecutors was filed on Jan. 2, bases his opposition on the supremacy clause of the Constitution, which gives the federal government precedence over state authorities. In Massachusetts, however, the federal courts usually adopt state rules. To debate on this front obscures the major constitutional issue, which is whether or not the rule infringes on the right to counsel.

So far the federal courts, which properly have jurisdiction over this issue, have been unwilling to interpret the case law on this matter in a manner which would uphold the defendant's constitutional right to counsel. An example is the recent decision of the full U.S. Second Circuit Court of Appeals, which ruled on Jan. 9 that a prosecution subpoena to attorney Barry I. Slotnick for testimony before a grand jury, on fees paid to him by alleged mobster Anthony Colombo, did not compromise the attorney's ability to represent his client. The Second Circuit had ruled previously, in a three-judge panel, that a prosecutor must prove a compelling need for information sought and the lack of an alternative source, if the defense lawyer moves to quash the subpoena. Another Boston defense lawyer, Barry Wilson, recently served four and a half months in federal prison for refusing to testify before a federal grand jury in Rhode Island about his client. Critics have charged that prosecutors have been given a green light to single out particularly effective defense lawyers for harassment.