

Recurring Ethical Issues Related to Sentencing

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A. Introduction

Lawyers who represent or prosecute criminal defendants are, of course, subject to the rules of legal ethics.² Those rules vary by jurisdiction but have many common features. Forty nine of the fifty states have ethical codes that are largely based on the ABA's Model Rules of Professional Conduct.³ Prosecutors are, in addition to these ethics rules, bound by certain constitutional rules that govern their professional conduct⁴ as well as rules of conduct set forth in the *U.S. Attorneys' Manual* (which, as noted below, sometimes prescribes or proscribes conduct in a manner that exceeds the minimum ethical requirements set forth in the ethics code). Another source of ethical guidance,

¹ Disclaimer: The information contained in this paper does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding upon the Commission, the court, or the parties in any case. Pursuant to Fed. R. App. P. 32.1, some cases cited in this document are unpublished. Practitioners should be advised that citation of such cases under Rule 32.1 requires that such opinions be issued on or after January 1, 2007, and that they either be "available in a publicly accessible electronic database" or provided in hard copy by the party offering them for citation.

² In the distant past, the Justice Department took the position that state bars' ethics rules did not categorically apply to federal prosecutors. However, in 1999, Congress enacted 28 U.S.C. § 530B(a) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.").

³ http://www.abanet.org/cpr/mrpc/model_rules.html (ABA Center for Prof. Resp.). California is the only state not to have adopted some form of the Model Rules. In this paper, the ABA's model rules will be cited for most propositions of legal ethics. Readers should check with their own states' ethics rules if there is any question about the applicability of a particular rule.

⁴ See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963).

although non-binding in nature, is the ABA *Standards for Criminal Justice: Prosecution Function and Defense Function*.⁵

When criminal attorneys think of the ethics rules' application in their cases, they typically imagine pretrial and trial scenarios – such as the prosecution's failure to disclose exculpatory evidence before trial⁶ or a defense attorney's knowing presentation of perjured testimony of her client before a jury.⁷ As discussed below, the rules of ethics continue to apply beyond the jury's guilty verdict or entry of a defendant's guilty plea and fully apply at sentencing and to appeals in criminal cases.

Although many ethical breaches are subject only to professional discipline, others may rise to the level of a constitutional violation. For instance, a defense counsel's lack of competence at sentencing (*e.g.*, a failure to understand and properly apply the sentencing guidelines) may result in a ruling that defense counsel provided constitutionally ineffective assistance of counsel (resulting in a resentencing).⁸ A prosecutor's failure to disclose mitigating evidence may result in a resentencing.⁹ A defense counsel's failure to consult with a defendant about whether he wishes to

⁵ The prosecution and defense function standards are available at:<http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf>.

⁶ *See, e.g., Senator Ted Stevens' Conviction Set Aside*, <http://www.cnn.com/2009/POLITICS/04/07/ted.stevens/>(Apr. 7, 2009)

⁷ *See Nix v. Whiteside*, 475 U.S. 157 (1986) (holding that defense counsel not constitutionally ineffective for refusing to offer perjurious testimony by client).

⁸ *See Glover v. United States*, 531 U.S. 198 (2001) (holding that deficient performance by defense counsel concerning application of sentencing guidelines is prejudicial and entitles the defendant to resentencing if the deficiency caused the defendant to receive a higher sentence).

⁹ *See, e.g., United States v. Severson*, 3 F.3d 1005, 1012-13 (7th Cir. 1993) (vacating non-capital sentence after finding violation of *Brady v. Maryland*, 373 U.S. 83 (1963), concerning the

appeal following imposition of the sentence (resulting in a failure to file a timely notice of appeal) may result in a finding of ineffective assistance and a consequent out-of-time appeal.¹⁰

What follows is a discussion of commonly recurring ethical issues related to sentencing. Although in many cases, the rules are clear cut and their application to common factual scenarios yields a ready answer, in other cases the rules are more complex and may apply differently depending on both the factual scenario presented and the ethical rules followed in a particular jurisdiction. Thus, although this paper is intended to provide clear guidance on the ethical rules related to sentencing, at times it simply identifies an issue for further inquiry.

B. Ethics Issues Related to Sentencing that Occur in the Pretrial Phase, at the Guilty Plea Hearing, or at Trial

1. Issues Relevant to Defense Counsel

One of the most common ethical issues facing defense counsel results from conduct that may occur *before* counsel was appointed or retained – namely, a defendant’s false statements about his name or other material biographical information to a U.S. pretrial services officer during an interview before the detention hearing or to a magistrate judge at the defendant’s initial court appearance. Such false, material statements have serious potential sentencing implications; they could change the defendant’s total offense level by five offense levels in the event that he were to

district court’s application of the guidelines’ enhancement for obstruction of justice); *United States v. Weintraub*, 871 F.2d 1257 (5th Cir. 1989) (“[T]he withheld impeachment evidence tended to undermine Emrick’s trial testimony regarding the amount of cocaine Weintraub distributed. Yet that testimony as to amount was the only evidence known to the defendant and the judge at the time of sentencing. We conclude that the withheld impeachment evidence was material to Weintraub’s punishment.”).

¹⁰ *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

be convicted and face sentencing. *See* USSG §§3C1.1 (two levels added for obstruction of justice) and 3E1.1 (loss of three-level reduction for acceptance of responsibility based on obstruction).¹¹

When she learns her client has previously provided false material information to a court or arm of the court, defense counsel has an ethical obligation to take “remedial measures,” which typically means she must advise the defendant to correct the false statement, even if the lawyer did not represent the client at the time of the false statement.¹² If the defendant refuses to do so, the attorney should seek to withdraw from the case and have no further involvement representing the defendant (and, thereby, avoid further perpetrating the fraud, even if only passively by representing

¹¹ *See, e.g., United States v. Alvarez*, ___ F. App’x ___, 2010 WL 608806 (5th Cir. Feb. 17, 2010) (upholding district court’s application of obstruction of justice enhancement under USSG §3C1.1 based on defendant’s providing false name to pretrial services officer and magistrate judge at the initial appearance, even though the defendant later admitted his true name); *United States v. Campa*, 529 F.3d 980, 1015-16 (11th Cir. 2008) (same); *United States v. Calloway*, 14 F. App’x 389 (6th Cir. 2001) (same).

¹² *See* ABA Model Rule 3.3(b); *see also* Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 386-87 (Winter 2007) (discussing the effect of Rule 3.3(b), as amended in 2002: “Not until the 2002 revisions to the ABA Model Rules of Professional Conduct did the rules state explicitly that if a lawyer calls a witness who offers material evidence that the lawyer knows to be false, the lawyer must ‘take reasonable remedial measures,’ even if the lawyer did not personally offer the evidence.”).

the defendant in a manner that maintains the status quo).¹³ At least in some jurisdictions,¹⁴ in addition to seeking to withdraw, the attorney, notwithstanding the normal requirements concerning attorney-client confidences, must inform the court of a material falsehood if the client refuses to do so; failure to do so is unethical conduct that can result in disciplinary action in those jurisdictions.¹⁵

¹³ See Utah Ethics Op. 00-06, 2000 WL 1523292 (Utah State Bar Eth. Adv. Op. Comm. Sept. 29, 2000) (“We agree that a lawyer who knows that a client has materially misled the court but remains silent and continues to represent the client is ‘assisting a criminal or fraudulent act by the client’ within the meaning of Rule 3.3(a)(2). In our view, however, a lawyer who is surprised by false client testimony in response to questions of the court or opposing counsel has not assisted the client’s fraud either if: (1) she persuades the client to correct the misstatement or; (2) failing that, she is allowed to withdraw from further representation of the client. A prompt request to withdraw will signal to the court the lawyer’s unwillingness to assist her client’s conduct and, if allowed by the court, avoid Rule 3.3’s prohibitions without disclosure of client confidences.”); see also *Att’y Grievance Comm’n of Md v. Rohrback*, 591 A.2d 488, 497-98 (Md. 1991).

¹⁴ The explanatory comments following Model Rule 3.3 include a section entitled “Remedial Measures,” which provides as follows:

In such situations the advocate’s proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to the withdrawal or correction of the false statement of evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted, or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done

¹⁵ See, e.g., *Office of Disciplinary Counsel v. Heffernen*, 569 N.E.2d 1027 (Ohio 1991) (suspending a criminal defense attorney from the practice of law for six months for failing to notify court that the defendant had assumed a false identity at his trial; lawyer did not know of the defendant’s fraud at the time of the trial and only learned thereafter, yet the lawyer did not inform the court of the fraud at that juncture); but see *Rohrback*, 591 A.2d at 96 (“Once the misrepresentation had been made to the [court], it was a consummated act which Rohrback had not assisted. If Rohrback’s legal representation of [the defendant] continued, then as counsel for the accused in a criminal case, Rohrback had no duty to disclose the fraud at that time, any more than he had a duty to disclose that Asbury had [committed the underlying crime with which he was charged].”); see generally *Whistle Blowing v. Confidentiality: Can Circumstances Mandate*

However, for any of these ethical requirements to apply, an attorney must “know,” that is, have a “firm factual basis” in believing that her client lied; merely suspecting a client provided false information without actually knowing it does not trigger the duty to disclose.¹⁶

Informing the court of a defendant’s false statements may result in a higher sentence for the defendant, as discussed above, although a prompt disclosure at an early juncture in the case may cause a sentencing court to exercise its discretion at sentencing in favor of a defendant who promptly remedied the falsehood. District courts have broad discretion regarding application of the guidelines in cases in which they believe that awarding a defendant credit for acceptance of responsibility or refusing to enhance the offense level based on perjury committed by a defendant is warranted.¹⁷

Attorneys to Expose Their Clients, 15 GEO. J. LEGAL ETHICS 719, 722-23 (Summer 2002) (discussing different approaches taken by the states). Those jurisdictions that do not require disclosure if the attorney had no role in sponsoring the client’s false statements reason that the attorney’s duty to maintain client confidences trumps the attorney’s obligation as an officer of the court. *See Rohrback*, 591 A.2d at 96.

¹⁶ *See, e.g., In re Grievance Committee of U.S. Dist. Ct.*, 847 F.2d 57, 63 (2d Cir. 1988) (“Our experience indicates that if any standard less than actual knowledge was adopted in this context, serious consequences might follow. If attorneys were bound as part of their ethical duties to report to the court each time they strongly suspected that a witness lied, courts would be inundated with such reports. Court dockets would quickly become overburdened with conducting these collateral proceedings which would necessarily hold up the ultimate disposition of the underlying action. . . . [D]isclosure [is required] only [if there is] information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal.”).

¹⁷ District courts exercise “broad discretion” in deciding whether to grant or deny credit for acceptance of responsibility. *See, e.g., United States v. Gallegos*, 129 F.3d 1140 (10th Cir. 1997); *United States v. Smolka*, 261 F. App’x 578, 582 (4th Cir. 2008). Therefore, “the determination [whether to grant or deny credit for acceptance of responsibility] is entitled to great deference on [appellate] review.” USSG §3E1.1, comment. (n.5); *see United States v. Sanchez-Ruedas*, 452 F.3d 409, 414 (5th Cir. 2006); *United States v. Hicks*, 368 F.3d 801, 809 (4th Cir. 2004). Appellate courts likewise have afforded district courts “broad discretion” in applying the obstruction of justice enhancement. *See, e.g., United States v. Minnis*, 489 F.3d 325, 333 (8th Cir. 2007); *see also United States v. Readon*, 138 F. App’x 211, 216-17 (11th Cir. 2005) (holding

The same ethical considerations concerning false statements or testimony by a defendant apply at later stages of the case – including pretrial motion hearings, guilty plea hearings, and at trial.¹⁸ The Supreme Court has specifically addressed the application of USSG §3C1.1 to a defendant who testified at trial and was convicted; the Court held that application of the obstruction enhancement was proper and did not violate the defendant’s constitutional right to testify in a case in which the district court made a finding that the defendant in fact had willfully committed perjury.¹⁹

2. Issues Relevant to Both Defense Counsel and Prosecutor

Prosecutors and defense counsel alike must reveal any plea agreements relevant to sentencing (or any other matter), if asked by the district court during a colloquy with the court pursuant to Federal Rule of Criminal Procedure 11(c)(2). The reason for such a disclosure is not only to assure that a defendant’s guilty plea pursuant to a bargain with the government is voluntary but also “to prevent corruption”²⁰ potentially resulting from “secret” plea bargains. A falsehood or misrepresentation in response to the court’s question about a plea agreement is a blatant ethical

that, after *United States v. Booker*, 543 U.S. 220 (2005), a district court is free to vary from the guidelines and to refuse to apply the obstruction enhancement where a defendant committed perjury in court).

¹⁸ See, e.g., *United States v. Acevedo-Garcia*, 337 F. App’x 97 (2d Cir. 2009) (upholding district court’s refusal to grant the defendant credit for acceptance of responsibility based on the fact that the defendant gave a false name at the guilty plea hearing, even though he later admitted his true name); *United States v. Ruiz-Padilla*, 305 F. App’x 178 (5th Cir. 2008) (upholding district court’s denial of acceptance of responsibility where defendant had sent a written statement to the court that contained a false name, even though defendant later admitted his true name).

¹⁹ *Dunnigan v. United States*, 507 U.S. 87 (1993).

²⁰ *United States v. Revis*, 22 F. Supp.2d 1242, 1263 n.27 (N.D. Okla. 1998).

violation.²¹ Prosecutors have an added duty to disclose the existence of all of the terms of a plea agreement even if not asked by the court.²²

A related issue concerns “fact bargaining” as a component of a plea bargain. “Fact-bargaining” typically involves a plea agreement whereby the prosecution and defense enter into certain stipulations, usually in the factual basis²³ of a plea agreement; such stipulations can affect the defendant’s sentence under either a mandatory minimum statutory provision (*e.g.*, drug quantity) or the sentencing guidelines (*e.g.*, the loss amount in a fraud case).

Whether fact-bargaining is ethical or unethical is a question to which there is not a straightforward answer. For instance, the D.C. Circuit has stated that a plea agreement that “deludes” a sentencing court into believing that a defendant possessed a lesser amount of drugs than he actually did would be unethical.²⁴ The court did not specifically define what constitutes such

²¹ See ABA Model Rule 3.3(a) (“A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . .”).

²² *United States v. Abbott*, 241 F.3d 29, 35 (1st Cir. 2001) (“We recognize that Abbott remained silent during the hearing regarding the connection between his plea and his mother’s plea. In the circumstances, however, Abbott could well have believed that only by keeping quiet as to the linkage would he prevent his mother from going to jail. He may have thought that if the bargain were disclosed his own plea would be rejected and his mother would be tried and sentenced to prison. An undisclosed bargain such as the instant one carries with it a serious possibility of coerciveness. *This is why the prosecution must shoulder the burden of disclosing, in the first instance, all material information [concerning] plea agreements . . .*”) (emphasis added).

²³ See Fed. R. Crim. P. 11(b)(3).

²⁴ See *United States v. Dukes*, 936 F.3d 1281, 1282 (D.C. Cir. 1991) (“The plea bargain did not include a promise by the government about the sentence . . . And there was no agreement to delude the court into believing Dukes actually possessed less than 11.02 grams of cocaine base; ethics, Department of Justice policy, and the Guidelines bar prosecutors from entering into such deals.”) (citing Memorandum of the Attorney General to Federal Prosecutors Concerning Plea Bargaining under the Sentencing Reform Act, reprinted in G. McFadden, J. Clarke & J.

“deluding” because in that case the prosecutor disclosed to the court the uncontrovertible evidence that the defendant in fact possessed 11.02 grams of crack cocaine, despite the defendant’s claim that he should be sentenced based on a much lesser quantity.²⁵ However, the court’s citation to well-established Department of Justice policy²⁶ and the policy statement set forth in USSG §6B1.4²⁷ as

Staniels, *Federal Sentencing Manual*, App. 11B, at 11-87 (1991), and USSG § 6B1.4).

²⁵ *See id.*

²⁶ The *U.S. Attorneys’ Manual* clearly states that fact bargaining that fails to disclose readily-provable, relevant facts related to sentencing enhancements is improper: “Plea agreements should honestly reflect the totality and seriousness of the defendant’s conduct, and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate Sentencing Guideline provisions. . . . The Department’s policy is to stipulate only to facts that accurately represent the defendant’s conduct.” *U.S. Attorneys’ Manual*, Sec. 9-16.300; *see also id.*, Sec. 9-27.400 (“Plea bargaining, both charge bargaining and sentence bargaining, must honestly reflect the totality and seriousness of the defendant’s conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.”); *id.*, Sec. 9-27.430 (“[T]he Department’s policy is only to stipulate to facts that accurately represent the defendant’s conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical. If a prosecutor has insufficient facts to contest a defendant’s effort to seek a downward departure or to claim an adjustment, the prosecutor can say so. If the presentence report states facts that are inconsistent with a stipulation in which a prosecutor has joined, the prosecutor should object to the report or add a statement explaining the prosecutor’s understanding of the facts or the reason for the stipulation.”). Section 9-27.720 of the *U.S. Attorneys’ Manual* provides that: “In order to ensure that the relevant facts are brought to the attention of the sentencing court fully and accurately, the attorney for the government should . . . [c]ooperate with the Probation Service in its preparation of the presentence investigation report” and also “[m]ake a factual presentation to the court when . . . “[i]t is necessary to supplement or correct the [PSR] . . . or [i]t is requested by the court.” *Id.* With respect to the probation officer, this section of the manual also provides that the prosecutor should “provide . . . requested information” to the probation officer, including information in “prosecutorial or investigative files to which probation officers do not have access.” *Id.* If the “court . . . request[s] specific information from government counsel at the sentencing hearing . . . , the attorney should, of course, furnish the requested information if it is readily available and no prejudice to law enforcement interests is likely to result from the disclosure.” *Id.*

²⁷ USSG § 6B1.4, comment. (“This provision requires that if a plea agreement includes a stipulation of fact, the stipulation must fully and accurately disclose all factors relevant to the

corollaries to the applicable ethical rule suggests the court believed that any stipulations in a plea agreement that fail to “fully and accurately disclose” all facts and circumstances relevant to guidelines enhancements would be improper.²⁸ Conversely, the First Circuit²⁹ has held that, although a stipulation in a plea agreement may not be done in a manner that affirmatively *misrepresents* the evidence to the court (at the guilty plea hearing or at sentencing) or to the probation officer (during the presentence investigation) so as to reduce a defendant’s sentencing exposure, the prosecution and defense may plea bargain in a manner in which the prosecutor agrees to proffer only certain facts and omit others, thereby intentionally failing to meet the prosecution’s burden at sentencing.³⁰ The First

determination of sentence. . . . [T]he overriding principle is full disclosure of the circumstances of the actual offense and the agreement of the parties.”).

²⁸ *See id.* Although it does not address the issue in the specific context of fact-bargaining, the *ABA Standards, Prosecution Function* appears consistent with the *U.S. Attorneys’ Manual*:

The prosecutor should assist the court in basing its sentence on *complete and accurate information* for use in the presentence report. The prosecutor should disclose to the court *any information* in the prosecutor’s files relevant to the sentence. If incompleteness or inaccuracy in the presentence report comes to the prosecutor’s attention, the prosecutor should take steps to present the *complete and correct information* to the court and to defense counsel.

Standard 3-6.2(a) (“Information Relevant to Sentencing”) (emphasis added).

²⁹ *See United States v. Yeje-Cabrera*, 430 F.3d 1, 24 n.17, 27-29 (1st Cir. 2005) (“There is . . . an ethical requirement that counsel not mislead the courts and from the Sentencing Guidelines themselves. . . . No misrepresentation was made [in this case]; rather, there was an omission, helpful to the defendant, which was an implicit part of the bargain. . . . The district court was correct to condemn any deception of the court. But here, no claim of deception of the court is possible. . . . The prosecution does not argue that it has a right to lie to a court and it did not do so here.”).

³⁰ The prosecution has the burden to prove enhancements at sentencing (such as the loss amount in a fraud case or drug quantity in a drug case) by a preponderance of the evidence. *See, e.g., United States v. Russell*, 595 F.3d 633, 646 (6th Cir. 2010); *United States v. Ewing*, 129 F.3d 439, 434 (7th Cir. 1997). In at least some circuits, however, the presentence report itself constitutes evidence upon which a district court may make factual findings relevant to sentencing

Circuit reversed a district court that had taken a position consistent with the D.C. Circuit in condemning fact-bargaining that omits evidence rather than affirmatively makes factual misrepresentations.³¹

The line between an affirmative misrepresentation and an omission of proof may be a extremely fine. For instance, in a drug case where the prosecution has overwhelming evidence that a defendant actually possessed 11 grams of crack cocaine when he was arrested, would the following stipulation in a plea agreement – “If this case were to go to trial, the prosecution would prove that the defendant knowingly possessed 4 grams of crack cocaine” – constitute an affirmative misrepresentation or an omission concerning the drug quantity?

Although a plea agreement whereby the prosecution engages in an omission of proof that reduces a defendant’s sentencing exposure is an area where there is no clear answer concerning the

issues, which would permit a court to rely on a PSR even if the prosecution abides by the factual stipulations in a plea agreement and does not offer any evidence at sentencing. *See, e.g., United States v. Rome*, 207 F.3d 251, 254 (5th Cir. 2000) (“If a defendant presents no rebuttal evidence, the facts contained in the PSR may be adopted without further inquiry so long as the facts rest on an adequate evidentiary basis.”); *but see United States v. Poor Bear*, 359 F.3d 1039, 1041 (8th Cir. 2004) (“The PSR is not evidence. . . . If the defendant objects to any of the factual allegations contained therein on an issue on which the government has the burden of proof, such as the base offense level and any enhancing factors, the government must present evidence at the sentencing hearing to prove the existence of the disputed facts. . . . The district court cannot rely on facts at sentencing that have not been proved by a preponderance of the evidence.”).

³¹ *See United States v. Green*, 346 F. Supp.2d 259 (D. Mass. 2004), *rev’d sub nom. Yeje-Cabrera*, *supra*; *see also Berthoff v. United States*, 140 F. Supp.2d 50, 62, 66-67 (D. Mass. 2001) (“The government’s choice to limit the drugs attributable to each defendant who pled guilty usurped the judicial role in determining drug quantity. . . . If fact bargaining is acceptable, then the entire moral and intellectual basis for the Sentencing Guidelines is rendered essentially meaningless. . . . [I]t involves fraud on the court as the government’s recital of material facts during the plea colloquy and at sentencing necessarily must omit or at a minimum gloss over material facts at sentencing.”).

ethical implications,³² that situation should be distinguished from one in which the prosecutor has a good-faith doubt that she can prove a particular enhancement based on evidentiary problems. In such a situation, the prosecutor and defense counsel do not act unethically by affirmatively stipulating to a particular fact in a light most favorable to a defendant (*e.g.*, stipulating that a particular enhancement does not apply).³³

C. Ethics Issues During the Presentence Investigation Phase

1. Issues Relevant to Defense Counsel

Just as a defendant may significantly increase his sentencing exposure by willfully making false statements to the court or arm of a court in the early stages of a criminal prosecution, the same is true with respect to false statements made during the presentence interview of the defendant conducted by the probation officer.³⁴ Defense counsel, who typically is present during the

³² Because issues of legal ethics are matters within the province of state bar associations and state supreme courts, *see* 28 U.S.C. § 530B(a) (“An attorney for the Government shall be subject to [a state’s ethics rules] to the same extent and in the same manner as other attorneys in that State.”), a prosecutor with concerns over the ethical implications of fact bargaining should seek guidance from his or her state’s legal ethics authority.

³³ *See United States v. Coney*, 390 F. Supp.2d 844, 850-51 (D. Neb. 2005); *see also Thornburgh Bluesheet: Plea Policy for Federal Prosecutors* (1989), reported in 6 Fed. Sent. 347 (1994) (“The Department’s policy is only to stipulate to facts that accurately represent the defendant’s conduct. . . . Stipulations to untrue facts are unethical. [However,] [i]f a prosecutor has insufficient facts to contest a defendant’s effort to seek a downward departure or to claim an adjustment, the prosecutor can say so.”).

³⁴ *See, e.g., United States v. Wilson*, 197 F.3d 782, 785-87 (6th Cir. 1999) (affirming district court’s denial of acceptance of responsibility and application of obstruction of justice enhancement based on defendant’s providing a false name and false information about his criminal record to a probation officer during presentence interview).

presentence interview,³⁵ should assure that the defendant does not provide materially false information to the probation officer. If the defendant does so, counsel should seek to convince her client to correct the falsehood or misrepresentation; if the defendant refuses to do so, counsel must move to withdraw or, if that is not permitted, disclose the falsehood to the court.³⁶

In confronting potential situations where a defendant may be inclined to provide false information to a probation officer during the presentence investigation, defense counsel should be aware that a defendant possesses a constitutional right under the Fifth Amendment self-incrimination clause to remain silent – without penalty – in connection with sentencing under *Mitchell v. United States*.³⁷ In *Mitchell*, the defendant pleaded guilty to distributing cocaine but during her plea colloquy refused to admit the quantity involved. Following a sentencing hearing where her codefendants testified about how much cocaine the defendant usually distributed each week, the district court found that she had distributed enough to mandate a minimum sentence of ten years. In making this finding, the court expressly considered the defendant’s refusal to testify. Finding error, the Supreme Court concluded that “[b]y holding petitioner’s silence against her in determining

³⁵ Although no federal appellate court has held that a presentence interview is a “critical stage” of the prosecution within the meaning of the Sixth Amendment right to counsel, *see, e.g., United States v. Gordon*, 4 F.3d 1567, 1572 (10th Cir. 1993) (“[W]e join those circuits that have concluded that the presentence interview is not a critical stage of the proceeding within the meaning of the Sixth Amendment.”) (citations omitted), defense counsel should attend presentence interviews with their clients in certain cases. *Cf. ABA Standards, Defense Function Standard 4-8.1(c)* (“Sentencing”) (“Where appropriate, defense counsel should attend the probation officer’s interview with the accused.”). Some defense counsel have contended that a defense attorney should attend the client’s presentence interview in every case. *See, e.g., Jennifer Niles Coffin, Tap Dancing Through the Minefield: Navigating the Presentence Process*, 31 CHAMPION 10, 10 (Nov. 2007) (“Always . . . attend the presentence interview.”).

³⁶ ABA Model Rule 3.3(b); *see also supra* notes 12-15.

³⁷ 526 U.S. 314 (1999).

the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination.”³⁸ Thus, under *Mitchell*, a sentencing court may not *increase* a defendant’s sentence based on the defendant’s invocation of the constitutional right to silence.

Although *Mitchell* did not address whether a court may deny a defendant credit for acceptance of responsibility under USSG §3E1.1 for remaining silent about matters other than the offense of conviction,³⁹ the sentencing guidelines prohibit courts from denying credit for acceptance if a defendant invokes his right to silence about relevant conduct “beyond the offense of conviction” that could increase his offense level.⁴⁰ Whether credit for acceptance of responsibility may be denied for a defendant’s silence about other matters (such a criminal history) is a question that is, as yet,

³⁸ *Id.* at 330.

³⁹ *Mitchell*, 526 U.S. at 330 (“Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines . . . is a separate question. It is not before us, and we express no view on it.”); *see also State v. Burgess*, 943 A.2d 727, 736 (N.H. 2008) (“[A] majority, if not all, of the Federal Circuit Courts of Appeal that have addressed the issue left open in *Mitchell* have held that it is not a Fifth Amendment violation to deny a reduction of a sentence under the acceptance of responsibility provision of the Sentencing Guidelines, section 3E1.1, because a defendant refuses to admit guilt or express remorse. . . . These courts reason that, in refusing to grant a reduction of a sentence under section 3E1.1, a sentencing court is simply denying a benefit to the defendant, rather than imposing a penalty upon his exercise of the privilege.”) (citing cases).

⁴⁰ *See also* USSG §3E1.1, comment. (n.1(a)) (“[A] defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection.”). Denial of credit for acceptance of responsibility – and a possible enhancement for obstruction of justice – can occur if a defendant “falsely denies[] or frivolously contests” allegations of relevant conduct in the PSR. *See id.*

unresolved.⁴¹

Just as defense counsel should seek to prevent the defendant from providing false information during the presentence interview, counsel likewise should not present testimony or letters of support from a defendant's family or friends if counsel "knows [such testimony or letters] to be false."⁴² If counsel submitted such testimony or letter and later learned that she had unwittingly provided false information to the court, counsel must take remedial actions, including informing the court of the falsehood.⁴³

Finally, during the presentence stage, defense counsel occasionally is faced with a presentence report prepared by a probation officer that contains erroneous information that *benefits* the defendant (*e.g.*, its guidelines calculations omit an enhancement or omit relevant criminal

⁴¹ Not only have the courts not addressed the issue, but members of the defense bar have taken contrary positions on this question. Compare Christopher P. Yates & Louise E. Herrick, *Going on the Record: The Perils of Discussing Criminal History During the Presentence Interview*, 13 FED. SENT. R. 330, (May/June 2001) ("It remains to be seen whether the privilege can successfully form the basis for a refusal to discuss criminal history during the presentence interview. At very least, assertion of the privilege coupled with silence about criminal history during the presentence interview may result in loss of a reduction for acceptance of responsibility. At worst, a judge may decline to apply *Mitchell* and find the assertion of the privilege to be unwarranted with respect to criminal history, thereby subjecting the silent defendant to the prospect of an enhancement for obstruction of justice."), with David McColgin, *Grid and Bear It*, 29 CHAMPION 50, 53-54 (Nov. 2005) ("At the pre-sentence interview, counsel should make sure the defendant remains silent regarding any criminal history. As the Supreme Court made clear in *United States v. Mitchell*, defendants have a Fifth Amendment right to remain silent regarding any facts which might bear upon the severity of the sentence, and no adverse inference can be drawn from that silence.").

⁴² ABA Model Rule 3.3(a)(3).

⁴³ *See id.* Because this situation involves the attorney's offering of *third-party* evidence – as opposed to statements from her own client – there is no tension between disclosure and maintaining attorney-client confidences. Thus, in this situation, in every jurisdiction the attorney must take remedial appropriate actions even if it would involve disclosure of the third party's falsehoods.

history). Every district requires the parties to respond to the presentence report.⁴⁴ If neither the defendant nor defense counsel caused the error in the PSR, counsel is not ethically obligated to call the error to the probation officer or court's attention. However, in responding to such a PSR, counsel must not say anything that *states agreement* with a PSR containing erroneous information. Rather, counsel may ethically respond by stating that the defendant "has no objection" to the PSR as written.⁴⁵

2. Issues Relevant to Prosecutors

During the presentence phase, the prosecutor has a general duty to disclose any mitigating evidence that "tends to . . . mitigate the offense charged or which would reduce the punishment of the accused."⁴⁶ This ethical obligation is more demanding than the *constitutional* obligation to

⁴⁴ See, e.g., S.D. Tex. Loc. Crim. Rule 32.6.

⁴⁵ Cf. Texas Ethics Opinion 54, 1995 WL 908214 (Tex. Prof. Eth. Comm. 1995) (examining ABA Model Rule 3.3 and Texas's adoption of that rule and concluding that, if neither criminal defense counsel nor his client have made any misrepresentations to the sentencing court, counsel may remain silent when the prosecutor erroneously tells the court that the defendant has no prior criminal record when in fact he does). This position, which follows the ABA Model Rules' approach, is not followed in at least one state that did not adopt Model Rule 3.3. See *In re Seling*, 850 A.2d 477 (N.J. 2004) (interpreting New Jersey's ethics rules, which did not adopt ABA Model Rule 3.3 regarding an attorney's duty of candor to the court, to require an attorney to disclose damaging knowledge about his client in order to correct a mistaken belief held by the court, even if the attorney or her client did nothing to cause the court's mistake).

⁴⁶ ABA Model Rule 3.8(d) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."); see also *ABA Standards, Prosecution Function*, Standard 3-3.11(1)(a) ("Disclosure of Evidence by the Prosecutor") ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense

disclose mitigating (and other types of favorable) evidence under *Brady*.⁴⁷ This broad ethical duty has even more relevance when sentencing decisions are made based not only on the application of the sentencing guidelines but also on the factors set forth in 18 U.S.C § 3553(a).⁴⁸ If prosecutors are aware of mitigating evidence not directly relevant under the sentencing guidelines but arguably relevant under § 3553(a), they should disclose such evidence to the defense before sentencing.

D. Ethics Issues at Sentencing Hearing

1. Issues Relevant to Defense Counsel

charged or which would tend to reduce the punishment of the accused.”); Standard 3-6.2 (“Information Relevant to Sentencing”) (“The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”).

⁴⁷ See ABA Standing Comm. on Ethics & Prof’l Respon., Formal Opinion 09-454 (Jan. 1, 2010). In particular, such information or evidence must be disclosed even if it is not “material” within the meaning of *Brady* and its progeny. *Id.* *Brady* “materiality” means that there is a “reasonable probability” that, “but for” the non-disclosure, the result of the proceeding would be different. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Under the ethical rule, a prosecutor must disclose such evidence if it only “tends to” mitigate the offense or reduce the potential sentence. See also *Cone v. Bell*, 129 1769, 1783 n.15 (2009) (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of [‘]material[’] evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.”).

⁴⁸ See *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (“The statute, as modified by *Booker*, . . . provides that, in determining the appropriate sentence, the court should consider a number of factors, including ‘the nature and circumstances of the offense,’ ‘the history and characteristics of the defendant,’ ‘the sentencing range established’ by the Guidelines, ‘any pertinent policy statement’ issued by the Sentencing Commission pursuant to its statutory authority, and ‘the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.’ In sum, while the statute still requires a court to give respectful consideration to the Guidelines, . . . *Booker* ‘permits the court to tailor the sentence in light of other statutory concerns as well’”).

Just as in prior stages of the case, defense counsel may not allow her client to commit perjury at the sentencing hearing. If counsel anticipates that the client will do so, the attorney should attempt to persuade the defendant not to do so and, if the client persists in his intention to do so, the attorney should seek to withdraw from representing the client. If withdrawal is not permitted, then – depending on the jurisdiction’s ethics rules – the attorney may be compelled to disclose the client’s perjury if it was material.⁴⁹

Another ethical issue that can arise at the sentencing hearing occurs when defense counsel is aware of an error in the PSR, which benefits the defendant but was not caused by counsel or the defendant. As noted above, with respect to counsel’s response to the PSR, counsel or the defendant may not say anything to suggest the *correctness* of the PSR in such a case but is not required to volunteer that the PSR is mistaken.⁵⁰ Counsel’s situation becomes more difficult if the court specifically asks counsel whether the PSR is “correct” or if there is “anything incorrect” in it, as some judges routinely do at sentencing. In that situation, counsel may refuse to answer the court’s question by informing the court that counsel may not, consistent with his ethical obligations, answer one way or the other.⁵¹

2. Issues Relevant to Prosecutors

⁴⁹ See ABA Model Rule 3.3(b); see also *supra* notes 12-15.

⁵⁰ See, e.g., Texas Ethics Opinion 54, 1995 WL 908214 (Tex. Prof. Eth. Comm. 1995) (examining ABA Model Rule 3.3 and Texas’s adoption of that rule and concluding that, if neither criminal defense counsel nor his client have made any misrepresentations to the sentencing court, counsel may remain silent when the prosecutor erroneously tells the court that the defendant has no prior criminal record when in fact he does).

⁵¹ *Id.* at (stating that, in such a case, the lawyer may tell the court that he “refuses to corroborate the inaccurate statement, or the lawyer may ask the court to excuse him from answering the question,” which will have the effect of “alert[ing] to a problem”).

The primary ethical issue at the sentencing hearing for prosecutors concerns breaches of plea agreements. A prosecutor should not breach a plea agreement – directly or indirectly – if the defendant has substantially complied with his end of the bargain.⁵² An indirect breach occurs when the prosecutor does not explicitly contradict the terms in the agreement governing the government’s obligations but unjustifiably takes a position inconsistent with those obligations.⁵³

E. Ethics Issues Concerning Appeals

1. Issues Relevant to Defense Counsel

Defense counsel has an ethical – and constitutional – obligation to file a notice of appeal when requested by her client.⁵⁴ Even if the defendant has waived his right to appeal in a plea agreement, a majority of the courts of appeals still require defense counsel to file a notice of appeal (although appellate counsel very well may end up filing an *Anders* brief and motion to withdraw – an issue discussed below).⁵⁵

⁵² *ABA Standards, Prosecution Function*, Standard 3-4.2 (“Fulfillment of Plea Discussions”) (“A prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.”).

⁵³ *See, e.g., United States v. Rivera*, 357 F.3d 290 (3d Cir. 2004) (finding breach of plea agreement where the plea agreement stipulated that the final offense level would be 35 but where, at sentencing hearing, the prosecutor at one point said that he “stood by” the presentence report, which had applied an additional four-level enhancement, thus bringing the final offense level to 39); *United States v. Mondragon*, 228 F.3d 978 (9th Cir. 2000) (finding breach of a plea agreement where prosecutor in the plea agreement had promised to “make no recommendation regarding [the] sentence” but, at the sentencing hearing, called the court’s attention to the “seriousness” of the defendant’s criminal history as set forth in the presentence report).

⁵⁴ *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

⁵⁵ *See United States v. Mabry*, 536 F.3d 231, 240-42 (3d Cir. 2008) (discussing case law from several circuits and noting the circuit split on this issue). However, where a defendant who

A more difficult scenario arises when the defendant does not request that counsel file a notice of appeal but also does not waive or otherwise affirmatively abandon the right to file an appeal. In *Roe*, the Supreme Court stated that, in such a situation, “the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal” after sentencing but well within the time to file a notice of appeal (*i.e.*, ten days from the date of the entry of written judgment in the federal system).⁵⁶ However, as a constitutional matter, the court held that counsel’s failure to consult with the defendant about whether he wishes to file an appeal constitutes deficient performance only if “a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing”⁵⁷ and, furthermore, that there is a “reasonable probability that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed.”⁵⁸

Once a case is on appeal, defense counsel may be faced with what appears to be a “frivolous” appeal – *i.e.*, one in which every potential claim for relief “lacks an arguable basis either in law or

has clearly waived his right to appeal as a part of a plea agreement requests counsel to appeal, defense counsel may wish to advise the defendant that pursuing an appeal could constitute a breach of the defendant’s obligations under the agreement and thereby release the government from its end of the bargain. *See, e.g., United States v. Poindexter*, 492 F.3d 263, 271 (4th Cir. 2007).

⁵⁶ *Id.* at 479 (citing *ABA Standards, Defense Function*, Standard 4-8.2(a)).

⁵⁷ *Id.* at 480.

⁵⁸ *Id.* at 484.

in fact.”⁵⁹ An attorney acts in an unethical manner by making a frivolous argument.⁶⁰ As noted, a defendant’s appeal can be rendered frivolous if the defendant voluntarily entered into an appellate waiver as part of a plea agreement in the district court that forecloses what would otherwise be non-frivolous claims.⁶¹ In cases where a waiver does not render the entire appeal frivolous, counsel should be aware that, simply because a particular claim is squarely foreclosed by applicable circuit precedent does not mean that the issue is legally frivolous; so long as any “reasonable jurist” could conclude that the claim possesses merit, it is not frivolous.⁶² Therefore, if a claim finds support in the law of another circuit and the Supreme Court has not yet addressed the issue, the issue necessarily is non-frivolous.⁶³ In such a case, counsel merely raises the issue as a prerequisite for filing a certiorari petition in which the circuit split is called to the Supreme Court’s attention.⁶⁴

In a case in which there is no non-frivolous claim for relief, defense counsel must follow the procedures set forth by the Supreme Court in *Anders v. United States*⁶⁵ – namely, reviewing the entire record to identify any possible claims for relief; setting forth the procedural and factual history of the case, along with an explanation of why none of the claims are non-frivolous,

⁵⁹ Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 HOU. L. REV. 747, 761 (Summer 2008) (discussing the Supreme Court’s definition of “frivolous” in several contexts).

⁶⁰ ABA Model Rule 3.1.

⁶¹ See, e.g., *United States v. Lorenz*, 2010 WL 1267137 (8th Cir. Apr. 5, 2010).

⁶² See *Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991) (per curiam).

⁶³ See *McKnight v. Gen. Motors Corp.*, 511 U.S. 659, 659-60 (1994) (per curiam).

⁶⁴ *Id.*

⁶⁵ 386 U.S. 738 (1967).

in an “*Anders* brief”; and filing a motion to withdraw from the case.⁶⁶

F. Conclusion

The foregoing paper has addressed ethical issues related to federal sentencing practice that arise on a frequent basis. The scope of this paper is by no means exhaustive with respect to all ethical issues that could arise concerning sentencing. Other rules of ethics occasionally come into play in the sentencing context (*e.g.*, conflicts of interest).⁶⁷ Both defense counsel and prosecutors should always be vigilant in following ethical requirements at all stages of criminal case, including the presentence and sentencing phases.

⁶⁶ In *Anders*, the Court set forth the following prophylactic procedure as a guide for criminal defense counsel and the appellate court when a defendant insists on pursuing an appeal that counsel deems frivolous:

[I]f counsel finds [the defendant’s] case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished to the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Anders, 386 U.S. at 744.

⁶⁷ See, *e.g.*, *United States v. Nicholson*, 475 F.3d 241, 250 (4th Cir. 2007) (“If [defense counsel] had pursued a downward departure motion based upon Nicholson’s necessity to carry the handgun for self defense, he would have been obliged to assert that Nicholson’s fear of Butts was real. See USSG §5K2.12. . . . In so doing, [defense counsel] would, in seeking a downward departure for Nicholson, necessarily have accused his other client, Butts, of uncharged criminal conduct.”).