FEDERAL RULES OF ETHICS

U.S. SENTENCING COMMISSION

NATIONAL ANNUAL SEMINAR

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NATIONAL SEMINAR ON THE FEDERAL SENTENCING GUIDELINES
GRAND HYATT DENVER, COLORADO
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KEY CATEGORIES

- Competence (Rule 1.1)
- Confidentiality (Rule 1.2)
- Conflict of Interest (Rules 1.6 – 1.12)
- Candor

AVOIDING CONFLICTS OF INTEREST

- Conflict occurs when attorney has ***competing or incongruent loyalties***
- A need to satisfy multiple roles, duties, or obligations.
- Attorney has important knowledge about facts and evidence underlying the charges (potential witness)
- Representing co-defendants against interest of one another

CLIENT'S DECISIONS

- Plead or not to plead
- Jury or bench trial.
- Testify or not testify
- Appeal or not appeal
- Proceed *pro se* or by counsel
- Objective and general methods of representation

ETHICAL ISSUES ARISE AT SENTENCING

- Is this my decision or the client's?
- Should I allow the client to speak to the Probation Officer?
- How much should I tell the Probation Officer or the Court?
- What if the PSR is wrong for once in my favor?
- What if my client does not want me to object to an incorrect PSR?
- What if the client lies to the Probation Officer or the Court?

DEFENSE COUNSEL'S DECISIONS

All Strategic Decisions *After* Full Client Consultation.

1. Which witnesses to call.
2. Whether and how to cross-examine.
3. Which jurors to accept or strike.
4 What trial motions to make.
4. All other strategic and tactical decisions.

DEFENSE COUNSEL'S DECISIONS ON APPEAL

1. No constitutional duty to raise every non-frivolous issue.
2. May winnow out weaker issues.
3. No duty to file a petition for rehearing.
4. Not required to provide defendant with personal copies of the transcripts.

DEFENSE COUNSEL CANNOT KEEP THE FRUITS AND INSTRUMENTALITIES OF A CRIME.

It is an abuse of a lawyer's professional responsibility.

It makes the lawyer a participant in the crime.

The attorney-client privilege does not cover it.

Problem: What if I end up with that stuff anyway?!!!

FRUIT OR INSTRUMENTALITY VS. EVIDENCE

- "Instrumentality" = was used or was intended to be used in the crime – e.g., gun, computer software, or burglar's tools.

- "Contraband" = illegal in itself to possess – e.g., drugs, child pornography, or counterfeit money.

- "Fruit" = was obtained as a result of the crime – e.g., victim's Rolex.

- See Stephen Gillers, Guns, Fruits, Drugs, and Documents: A Criminal Lawyer's Responsibility for Real Evidence, 63 Stan. L. Rev. 813, 822 (2011); Evan A. Jenness, Possessing Evidence of a Client's Crime, The Champion 16, 17 (Dec. 2010).

CAREFUL NOT TO OVERDISCLOSE

- No duty to turn over ordinary materials with evidentiary significance, e.g., bank records, e-mails, and phone records. See Jenness, supra at 18.
- More problematic are "not entirely ordinary items with evidentiary significance," such as a "client's bloody glove and Nixon's Watergate tapes." Id.
- According to Jenness, they are treated "much the same as contraband, fruits and instrumentalities," but courts "split the baby by requiring lawyers to surrender the evidence, but precluding prosecutors offering evidence that defense was the source" if the defense stipulates to authenticity. Id.; see generally Restatement (Third) of the Law Governing Lawyers § 119; ABA Standards for Criminal Justice – Defense Function, Standard 4.4.6

THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE.

If advice is sought in furtherance of illegal activities, crime- fraud exception permits introduction into evidence.

- Prima facie showing required. Government must show:
- Client was engaged in a criminal scheme when advice was sought to further the scheme; and
- Conversations bear a close relationship to the existing or future scheme.
- Irrelevant whether lawyer unaware or unwitting tool.
- Note: Work product privilege belongs to client and attorney. To overcome attorney's opinion work product privilege, must show attorney intended to engage in crime.

Counsel need not advise a prospective witness on self-incrimination or the need for an attorney.

- But, wherever a prosecutor believes a witness may be subject to criminal prosecution, it is proper for the prosecutor to advise the witness of his or her rights.

COUNSEL CANNOT REPRESENT SELF TO BE IMPARTIAL OR USE METHODS MERELY TO BURDEN OR EMBARRASS, A PROSPECTIVE WITNESS.

- Engaging in deceitful subterfuge may lead to disciplinary action.
- Examples: Philadelphia Bar Ass'n Op. No. 2009-02, Cincinnati Bar Ass'n v. Statzer, In re Paulter, In re Gatti, and In re Crossen.
- Some courts, however, have declined to find that deceptive investigative tactics were improper.
- Examples: Office of Lawyer Regulation v. Hurley and Virginia State Bar Op. No. 1845.

IT IS NEITHER UNETHICAL NOR FRIVOLOUS TO PUT THE PROSECUTION TO ITS BURDEN OF PROOF.

- Criminal defense counsel may require that every element of the case be established.
- Although defense counsel may resist the wishes of the judge on some matters and may appear unyielding and uncooperative at times,
- Defense counsel's zealous advocacy is an indispensable part of the adversary system.

CRIMINAL DEFENSE COUNSEL MAY ATTEMPT TO IMPEACH OR DISCREDIT A TRUTHFUL WITNESS.

- Defense counsel's belief that the witness is telling the truth does not preclude cross-examination.
- But, a prosecutor should not discredit or impeach a witness if the prosecutor knows that witness is testifying truthfully.
- "Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth." United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part).

COUNSEL SHOULD NOT CALL A WITNESS TO TESTIFY IF THE WITNESS WILL CLAIM A VALID PRIVILEGE NOT TO TESTIFY.

In some instances doing so will constitute unprofessional conduct.

Court should carefully scrutinize calling such a witness due to the potential for unfair prejudice.

To warrant reversal, effort must be conscious and flagrant.

DEFENSE COUNSEL MUST NOT ASSIST THE CLIENT IN TESTIFYING FALSELY WHEN HE KNOWS THE CLIENT

- No constitutional right to testify falsely.
- No claim if counsel persuades or compels client to desist from perjury.
- Do not inform the court in front of fact finder that client is testifying against advice of counsel.
- One court has held no constitutional violation arises from refusing to put the perjurious client on the stand.
- Another court has held that counsel did not act improperly by discussing fear of perjury with the trial court.

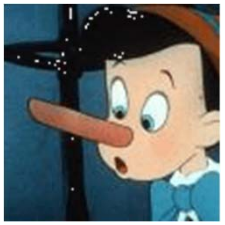
SOME RECOGNIZED STEPS TO TAKE WHEN YOU KNOW THE CLIENT WILL COMMIT PERJURY.

1. Strongly discourage the client from taking the stand.
2. If no success, seek to withdraw but do not inform the court of the reason for doing so.
3. If no success, repeat step 2 at trial before the client takes the witness stand.
4. If no success, tell the court the client is testifying against the advice of counsel.
5. Elicit a narrative only from the client (no specific questions and answers) and do not mention or rely on the false testimony in closing argument.

DISCLOSE OR CORRECT THE PERJURY?

- Rules recognize that lawyer may refuse to offer evidence he or she knows is false. (Knowing it is false and believing it is false are two different things.)
- Rules recognize as a last resort that lawyer may reveal perjury and should take remedial measures.
- Cases approve disclosure to court.

HOW DO YOU KNOW THE TESTIMONY IS FALSE?



- Some states, like Texas, have a rule stating that, if you only believe the testimony is false but do not know it, you should put the client on the witness stand and let the jury decide. TDRPC, Rule 3.03.
- Court's vary on the standard for "knowing" the client will commit perjury: "good cause," "compelling support," "actual knowledge," "knowledge beyond a reasonable doubt."
- One court has held that it is ineffective assistance of counsel to turn to the narrative mode of testimony if you do not know your client will commit perjury.

COUNSEL SHOULD NOT REPRESENT TWO DEFENDANTS IN THE SAME CASE OR IN CASES THAT HAVE FACTS IN COMMON.

- Defense counsel should not represent more than one client in a criminal case since the potential for conflict is so grave.
- Duties of confidentiality and loyalty continue after case ends, and conflicts should be avoided between past and new clients.
- Court need not allow joint representation even with clients' consent.

AUTHORITIES ARE DIVIDED ON WHETHER ATTORNEY-CLIENT PRIVILEGE BARS DISCLOSURE NECESSARY TO RESPOND TO A CLIENT'S ATTACK.

- Case law has long held attorney-client privilege is waived when client attacks counsel on grounds such as ineffective assistance.
- ABA Formal Op. 10-456 (July 14, 2010) cautions counsel to provide confidential information only in a judicial setting when responding to a client's claim.
- D.C. Legal Ethics Comm. Op. 364 (Jan. 2013) and Tenn. Formal Ethics Op. 2013-F-156 (June 14, 2013) disagree and permit defense counsel whose conduct has been placed in issue by a former client's claim to make, without judicial approval or supervision, such disclosures of information as reasonably necessary to respond to the client's specific allegations.

CONCLUSION