

Fundamental Ethical Considerations in Federal Criminal Defense

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Some Ethical Issues That Arise Daily.

- Is this my decision or the client's?
- What if I end up with the fruits of a crime?
- Does that attorney-client privilege cover this conversation?
- Can the government tell a witness not to talk to me?
- What decisions can I make for my mentally incompetent client?
- Can I take money from a client if I have been appointed to represent him/her by the Court?

Client's Decisions.

- Whether to proceed without counsel.
- What plea to enter.
- Whether to accept a plea offer.
- Whether to cooperate with or provide substantial assistance to the government.
- Whether to waive a jury.
- Whether to testify in his or her own behalf.
- Whether to speak at sentencing.
- Whether to appeal.

Defense Counsel's Decisions.

- All Strategic Decisions After Full Consultation.
 - Which witnesses to call.
 - Whether and how to cross-examine.
 - Which jurors to accept or strike.
 - What motions to make.
 - All other strategic and tactical decisions.

Appellate Counsel's Decisions.

- No constitutional duty to raise every nonfrivolous issue on appeal.
- May winnow out weaker issues.
- No duty to file a petition for rehearing.
- Not required to provide defendant with personal copies of the transcripts.

Possessing Fruits or Instrumentalities of a Crime.

- “It is an abuse of a lawyer’s professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime.”
- In re Ryder, 381 F.2d 713, 714 (4th Cir. 1967).
- Taking possession of the fruits and instrumentalities makes the lawyer a participant in the criminal act.
- In re Ryder, 381 F.2d at 714; see also TDRPC 8.04; 48A Tex. Prac., Tex. Lawyer & Jud. Ethics § 8:4 (2012 ed.).

- Lawyer's acts are not protected by the attorney-client privilege.
- Id.; see also Cal. Standing Comm. on Prof'l Responsibility, Formal Op. No. 1986-89, 1986 WL 69069, at *1-*2 (1986).
- When client requests attorney to take possession of stolen property and attorney takes it, possession of it alters the state of its possession and location.
- Attorney must deliver stolen property to authorities and must inform client he will deliver it to authorities – and may become a witness. Cal. Standing Comm. on Prof'l Responsibility, Formal Op. No. 1986-89, 1986 WL 69069, at *1-*2 (1986).

- Shall not assist or counsel client to engage in conduct the lawyer knows is criminal or fraudulent. AMRPC 1.2(d); TDRPC 1.02(c).
- See, e.g., In re Mross, 657 N.W.2d 342 (Wis. 2003) (90-day suspension for public defender who smuggled cigarettes to incarcerated client).
- Required to give honest opinion about such conduct, but cannot participate. AMRPC 1.2, Comment; see also TDRPC 1.02(c).
- If client's conduct persists, withdrawal may be required. AMRPC Rule 1.2, Comment.; see also TDRPC 1.02, Comment 8; *id.* Rule 1.15.

- Must reveal confidential information to the extent lawyer reasonably believes necessary to prevent the client from committing a criminal act that is likely to result in imminent death or substantial bodily injury. AMRPC 1.6(b)(2) & Comment.
- May also reveal confidential information if substantial injury to financial interests or property is likely. See, e.g., AMRPC 1.6(b)(3) & Comment; TDRPC 1.05(e) & Comments 18 and 19.

- If the attorney leaves evidence in its original location, testimony is barred by the attorney-client privilege. Cluthette v. Rushen, 770 F.2d 1469, 1472-73 (9th Cir. 1985).
- Because removal of evidence by attorney or client suggests an attempt to frustrate prosecution and creates an obligation to turn it over to the state, attorney-client privilege does not bar testimony on the evidence. Id.
- cf. Lawyer Disciplinary Bd. v. Smoot, 716 S.E.2d 491, 500-03 (W. Va. 2010) (1-year suspension for unlawfully altering document of evidentiary value by removing narrative of Dr.'s report before producing it in a federal black lung benefits case).

- If you end up with the fruits or instrumentalities of the crime, immediately produce them to prosecution while maintaining the attorney-client privilege.
- Compare United States v. Scruggs, 549 F.2d 1097, 1103-04 (6th Cir. 1977) (affirming obstruction and possession of stolen money convictions of father and son attorneys who took bank robbery money as a fee, denied doing so, and destroyed the money),
- With Commonwealth v. Stenhach, 514 A.2d 114, 116-27 (Pa. Super. Ct. 1986) (rejecting public defenders' argument that they did not have to produce rifle stock until ordered to do so at client's murder trial but holding that statutes of conviction were overbroad).

- An “instrumentality” of a crime is something that was used or was intended to be used to commit the crime, such as a gun, computer software, or burglar’s tools.
- “Contraband” is something that is illegal in itself to possess, such as drugs, child pornography, and counterfeit money.
- A “fruit” of the crime is something that was obtained as a result of the crime, such as the 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).

- No duty to turn over to prosecution ordinary materials with evidentiary significance, such as 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

- In re Olson, 222 P.3d 632 (Mont. 2009).
- Public Defender Olsen represented client charged with sexual abuse of children, searched client's apartment after police did, and found pictures that were not, but could be argued to be, child pornography.
- Removed, tagged, bagged, and sealed items as evidence.
- Got protective order from county court.
- Olsen changed jobs and new public defender sent evidence to the prosecutor.
- Office of Disciplinary Counsel filed complaint against Olsen alleging ethical violations, including obstructing a party's access to evidence, tampering with evidence, and engaging in deceitful conduct.
- The Montana Supreme Court found that there was insufficient evidence to support these allegations because: (1) Olson did everything to preserve the evidence; and (2) the evidence did not show that Olsen was dishonest or deceitful. *Id.* at 638-39.

The Crime-Fraud Exception Pierces the Attorney-Client Privilege

- When the client seeks or obtains attorney's advice in furtherance of illegal activities, the crime-fraud exception makes those conversations admissible.
- To invoke exception, must show (1) client sought advice of counsel to further scheme or crime; and (2) materials bear close relationship to scheme or crime.
- Irrelevant that lawyer was an unwitting tool.
- But, overcoming work-product opinion privilege requires showing lawyer was aware of scheme or crime.
- Force government to make a prima facie showing, and make sure scope of exception is limited to material about scheme or crime.

Counsel Should Not Instruct Client What the Defense Should Be.

- Defense counsel should not tell the client what that defense “should be” before asking the client about the facts.
- Must seek to determine all relevant facts known to the client.
- Should not seek to influence the direction of the client’s responses.
- Should not instruct the client not to be candid.

Discouraging or Obstructing Communications With a Witness.

- It is unprofessional conduct for a prosecutor or defense counsel
 - to advise or cause any person (other than defense counsel's own client) to be advised
 - to decline to give the opposing party information which such person has the right to give.
- Prosecution can justify interference with defense counsel's interview only by showing the clearest and most compelling consideration.

Counsel Cannot Misrepresent to a Witness That He or She Is Impartial or Use Methods to Burden or Embarrass Witness.

- Counsel cannot engage in deceitful subterfuge and doing so may result in disciplinary action.
- See, e.g., Pa. Bar Ass'n Op. No. 2009-02; Cincinnati Bar Ass'n v. Statzer, In re Palter, In re Gatti.
- Some courts, however, have declined to find that deceptive investigative tactics were improper. See, e.g., Office of Lawyer Regulation v. Hurley and Va. State Bar Op. No. 185.

It Is Neither Unethical Nor Frivolous to Put the Prosecution to Its Burden of Proof

- “Defense counsel, in protecting the rights of the defendant, may resist the wishes of the judge on some matters, and though such resistance should never lead to disrespectful behavior, defense counsel may appear unyielding and uncooperative at times. In doing so, defense counsel is not contradicting his or her duty to the administration of justice but is fulfilling a necessary and important function within the adversary system. The adversary system requires defense counsel’s presence and zealous advocacy just as it requires the presence and zealous advocacy of the prosecutor and the neutrality of the judge. Defense counsel should not be viewed as impeding the administration of justice simply because he or she challenges the prosecution, but as an indispensable part of its fulfillment.” ABA Standards, § 4-1.2, Commentary, at 122 (ABA 1993) (superseded).

Disclosure Concerning the Bail Jumping Client

- Jurisdictions disagree about whether and when counsel must disclose bail jumping client's whereabouts.
- Due to ABA's changing position over the years: 1936=must disclose whereabouts of fugitive client; 1980=no duty to disclose that client on bond not ordered to surrender to prison; 1984=withdrew 1936 opinion.
- U.S. v. Del Carpio-Cotrino (S.D. Fla.): must disclose if a firm factual basis (i.e., beyond a reasonable doubt and actual knowledge) client will not appear.

Impeaching a Witness You Know Is Telling the Truth

- Defense counsel is not precluded from cross-examining a witness he or she knows is telling the truth. ABA Standards § 4-7.6(b).
- But, a prosecutor should not do so. Id. § 3-5.7(b).
- “Our interest in not convicting the innocent permits counsel . . . to put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth.” U.S. v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., dissenting and concurring in part).

An Attorney May Not Call a Witness To Testify If He or She Knows the Witness Will Claim a Valid Privilege.

- Neither prosecutor nor defense counsel should do so for the purpose of impressing upon the jury the fact of the claim of the privilege, and doing so may constitute unprofessional conduct. ABA Standards, § 3-5.7(c), at 103; *id.* § 4-7.6(c) at 223.
- To warrant reversal of conviction, prosecutor must have made a conscious and flagrant effort to construct case on inferences arising from assertion of the privilege. U.S. v. Brown, 12 F.3d 52, 54 (5th Cir. 1994) (vacating convictions and sentences).
- If your client is to be a witness, remember U.S. v. Mitchell, 526 U.S. 314, 321-30 (1999).

Counsel Must Not Assist a Client Who Intends to Testify Falsely.

- No constitutional right to testify falsely.
- No claim if counsel persuades or compels client to desist from perjury.
- One court has held that there is no constitutional violation when the attorney refused to put the perjurious client on the witness stand.
- Another court has held that counsel did not act improperly by discussing fear of perjury with trial court.

Some Recognized Steps to Take.

- Strongly discourage client from taking the stand.
- If no success, seek to withdraw but do not inform the court of the reason for doing so.
- If no success, repeat last step again at trial before client takes the witness stand.
- If no success, tell the court ex parte that client is testifying against advice of counsel.
- When client takes the stand, question only generally (i.e., What happened next?) and let client engage in narrative testimony.
- Do not mention perjured testimony in closing argument.

Disclose or Correct Perjury?

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

How Do You Know Testimony is False?

- If you only believe it is false but do not know it, TDRPC 3.03 weighs in favor of putting client on the stand and letting the fact finder decide.
- Various standards for “knowing” client will commit perjury: good cause, compelling support, actual knowledge, and knowledge beyond a reasonable doubt.
- Wisconsin S. Ct. -- ineffective assistance to turn to narrative testimony without knowing client will commit perjury.

Defense Counsel Should Not Represent Two Clients in the Same Case or Related Cases.

- ABA and Texas Rules -- potential for a conflict of interest is so grave that counsel should not represent more than one of several codefendants.
- Problems arise from wide-ranging conspiracies and past clients.
- Consider duty of loyalty and duty of confidentiality.
- U.S. v. Sanchez Guerrero (5th Cir.): represented 2 brothers and a witness against 1 of them who wanted a sentence reduction.

Disclosure of Confidential Information in Response to Client's Attack.

- A number of cases have stated:
 - Attorney-client privilege is waived when client attacks for breach of duty by counsel.
 - Scope of waiver applies to all communications relevant to the issue of breach or competence.
 - Counsel should avoid unnecessary disclosure of privilege information.

ABA Formal Op. 10-456 (July 14, 2010).

- Cautions counsel to provide confidential information only in a judicial setting.
- “Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer.”
- But see D.C. Legal Ethics Comm. Op. 364 (Jan. 2013) (disagreeing with ABA Formal Op. 10-456 based on D.C. ethics rule and permitting disclosure in a non-judicial setting).

CJA Appointed Counsel Must Not Request or Accept Payment from Others.

- CJA prohibits augmentation via side agreements and the like.
- CJA protects defendant and third parties from demands to augment counsel's payment.
- If funds to retain counsel become available, move to vacate appointment order and inform court you will be retained.

Client Normally is Entitled to Case File Held by Counsel.

- Majority of jurisdictions – Client is entitled to the entire case file, including work product.
- See Iowa Supreme Court Attorney Discipline Bd. v. Gottshalk.
- Minority of Jurisdictions – Work product does not belong to and need not be turned over to client.
- See Ill. State Bar Assoc., Advisory Op. 94-13 (1995).

Withholding Information from the Client – Texas and ABA Rules

- A lawyer is required to keep the client reasonably informed and to promptly comply with reasonable requests for information.
- A lawyer must explain a matter and give sufficient information to allow the client to make informed decisions.
- A lawyer must allow client to copy or deliver a document *unless substantial grounds exist to refuse*.
- Grounds for not disclosing information:
 - Lawyer is restricted from sharing due to other legal obligations. Pa. Op. No. 2007-100.
 - Lawyer is restricted from sharing due to discovery rules. Utah Op. No. 06-04.
 - Lawyer is restricted from sharing by court, duty to another person that would be violated, or risk of causing serious harm to the client. Tex. Op. No. 570.
 - Lawyer is limited by district court order prohibiting giving discovery documents to client because: (1) client has no right to Jencks before trial; and (2) dissemination can lead to witness intimidation.

Dealing with the Mentally Incompetent Client.

- “Perhaps no area of the criminal defense lawyer’s role is more fraught with confusion and lack of certainty.”
- “The defense lawyer is truly ‘at sea.’”
- “State ethics rules fail to adequately deal with the criminal defense lawyer’s duties to the mentally ill or impaired client.”
- John Wesley Hall, Jr., Professional Responsibility in Criminal Defense Practice 455-57 (West 2005) (discussing this issue at length and related rules and standards).

Only 3 Texas Ethics Rules mention a “client under a disability”:

- Rule 1.02: Discusses seeking a guardian to protect client. See also Rule 1.02(g) & Comment 13.
- Rule 1.03: Discusses withholding psychiatric diagnosis from client, seeking to maintain reasonable communication, and realizing client may have ability to understand some matters. See also Rule 103, Comments 4& 5.
- Rule 1.05: Discusses revealing confidential information, such as when it is reasonably necessary to secure a guardian. See also TDRPC 1.05(c)(4) & Comment 17.

Comments to ABA Model Rule 1.14.

- May take protective action, such as seeking professional services and should be guided by:
 - wishes and values of the client to extent known;
 - client's best interests; and
 - ***goal of intruding into client's decision making autonomy to the least extent feasible.***
- Criminal defense lawyer with good-faith doubt about client's competency must raise it with the court.

ABA Formal Ethics Op. 96-404.

- Authority to take protective action should be exercised with caution and in a limited manner.
- Protective action should be least restrictive action under the circumstances.
- Withdrawal from representation is disfavored.

ABA Standards for Mental Health.

- Standard 7-4.2(c) -- Defense counsel:
- Should move for competency evaluation whenever counsel has a good faith doubt as to it.
- May move for evaluation over client's objection.
- Should make known to court and prosecutor facts giving rise to good faith doubt as to competence.

- Standard 7-4.10(d):
- A person determined to be incompetent and detained for treatment should have no right to refuse ordinary and reasonable treatment designed to effect competence.
- A defendant should have the right to refuse any treatment that may impair ability to prepare a defense, that is experimental, or that has an unreasonable risk of serious effects.

- Standard 7-4.12:
- Determination that defendant is incompetent should not preclude further judicial action, defense motions, or discovery proceedings which may fairly be conducted without the participation of defendant.

Restatement (3rd) of the Law Governing Lawyers § 24.

- Lawyer representing client with diminished capacity should:
 - ***Pursue lawyer's reasonable view of client's objectives;***
 - ***As client would define them if able to make considered decisions ;***
 - Even if client expresses no wishes or gives contrary instructions.

Competence to Withdraw Appeal, Habeas, etc.

- Rees v. Peyton, 384 U.S. 312 (1966), cert. was granted, and petitioner told counsel to withdraw petition.
- Petitioner and state disagreed on Petitioner's competence.
- Court remanded to district court for a hearing.

- Test: "whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."

- See also Comer v. Stewart, 215 F.3d 910, 914-18 (9th Cir. 2000); Rumbaugh v. Procnier, 753 F.2d 395, 398 (5th Cir. 1985); Awkal v. Mitchell, 174 Fed. Appx. 248, 249-50 (6th Cir. 2006) (unpublished) .

Appointment of Standby Counsel

A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles .

McKaskle v. Wiggins, 465 U.S. 168, 183-84
(1984)

- [A]ttorneys are officers of the court, and are bound to render service when required by such an appointment.
- Power inherent in the function of the judiciary exists so that a court may manage its affairs to achieve the orderly and expeditious disposition of cases. Such power can be invoked by a court to manage its docket as well as regulate the conduct of its bar. United States v. Bertoli, 994 F.2d 1002, 1016 (3d Cir. 1993).

- Two Kinds of Standby Counsel:
- § 220.55.20 -- Standby Counsel Services Accepted by a Pro Se Defendant – appointed when defendant qualifies for appointed counsel.
- § 220.55.30 -- Standby Counsel Appointed Under the Court's Inherent Authority – serves exclusively on behalf of court to protect integrity and continuity of proceedings, does not represent defendant, is paid as an expert or consultant, may be appointed regardless of whether defendant is financially able to obtain representation, and shall be terminated if pro se defendant elects to retain counsel.
- Guide to Judiciary Policies and Procedures, Vol. 7, Part A, Chap. 2, Appointment of Counsel.

ABA Standards for Criminal Justice – Defense Function,
Standard 4-3.9.

- (a) Defense counsel whose ***duty is to actively*** assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.
- (b) Defense counsel whose ***duty it is to assist*** a pro se accused ***only when the accused requests*** assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

- State v. Silva, 27 P.3d 663, 677-78 (Wash. App. 2001):
- Role of standby counsel is not that of a mere errand runner.
- Court may consider such issues as security or avoidance of abuse by opportunistic or vacillating defendants.
- Court may order standby counsel to: (1) act as liaison between accused and court or prosecutor; (2) provide forms; (3) assist in securing an investigator; and (4) any other duties necessary for accused's to prepare an adequate pro se defense.
- See also United States v. Byrd, 208 F.3d 592, 594 (7th Cir. 2000) (leaving to judge's discretion contours of standby counsel's obligations).

- State v. Powers, 563 S.E.2d 781, 787-88 (W. Va. 2001):
- Points out ambiguity in definition and role of standby counsel.
- Notes three different terms frequently used – “standby,” “advisory,” and “hybrid,” which are not clear and may or may not overlap.
- When a court appoints standby counsel to assist a pro se defendant, the court should advise both counsel and defendant of the specific duties standby counsel should be prepared to perform.

Selected Rules on Appointment of Counsel.

- Appointment required for felony or Class A misdemeanor.
- Court must determine whether net financial income and resources are insufficient to obtain qualified counsel.
- Determination does not include cost of necessities of life, cost of bond, and ability of family to pay for counsel.
- Doubts are to be resolved in defendant's favor.
- Court has duty to make adequate inquiry, but defendant has duty to show eligibility by a preponderance.
- If potential self-incrimination problems arise, request ex parte hearing, in camera review of documents, and sealing record.
- If you know client is lying or had lied about eligibility, persuade client to reveal the lie, but if he will not you must do so.

Conflicts of Interest Arising from Payment by a Third Party.

- Quintero v. United States, 33 F.3d 1133 (9th Cir. 1994):
 - A conflict of interest exists and there has been ineffective assistance of counsel if a third party involved in the drug offense pays the attorney's fees for an indigent defendant and the defendant rejects a favorable plea agreement at his attorney's urging.
 - Published the opinion "to alert trial judges, particularly in drug cases, to determine whether or not third parties are paying the fees of retained counsel when the defendant is indigent and, if so, whether the defendant understands the potential conflict of interest that may exist in such an arrangement and voluntarily waives that conflict." Id. at 1134.
- Cf. United States v. Stepney, 246 F. Supp. 2d 1069 (N.D. Cal. 2002) (discussing power of district court to inquire into and review joint defense agreements for potential conflicts of interest due to confidentiality provisions).

- ABA Standards for Criminal Justice – Defense Function, Standard 4-3.5(e)(i)-(iii). Payment from third party:
- Should determine whether confronted with a conflict of loyalty since entire loyalty is due the accused.
- Should not accept such compensation unless:
 - Accused consents after disclosure;
 - No interference with professional judgment or client-lawyer relationship; and
 - Confidential information is protected from disclosure.

- TDRPC 1.06(a) & (b)(2):
- (a) A lawyer shall not represent opposing parties in the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
 - . . .
 - (2) reasonably appears to be or become adversely affected by the lawyer's . . . responsibilities to another client or a third person.

- TDRPC 1.06, Comment 12; see also AMRPC 1.7(a)(2) & Comment 13.
- May be paid from source other than client, if client is informed of that fact and consents, and arrangement does not compromise lawyer's duty of loyalty to the client.
- If payment presents a significant risk that lawyer's representation will be materially limited by lawyer's own interest in accommodating the person paying the fee, then lawyer must comply with the requirements of paragraph (b) before accepting representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Conclusion

