

PROFESSIONAL RESPONSIBILITY AND SENTENCING

Special Considerations for AUSAs

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What rules apply to AUSAs?

- 28 U.S.C. § 530B(a)
- Jurisdiction's rules of professional conduct
 - Check your district court's local rules
- DOJ policy
- State bar opinions?

Discovery obligations

- ABA Model Rule 3.8
 - “A prosecutor in a criminal case shall ... 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.”
- Coextensive with Rule 16, *Jencks*, *Brady*, *Giglio*?
- Is there a materiality requirement?
- JM § 9-5.001.D.3
 - Disclose, not later than initial PSI, information that casts doubt on proof of aggravating factors at sentencing

Discovery (cont.)

- Seeking a protective order
 - ABA Model Rule 3.8, Comment 3: Will disclosure result in substantial harm to an individual or the public interest?
 - ABA Model Rule 3.3(d): “In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”

Duty of candor

- ABA Model Rule 3.3(a): “A lawyer shall not knowingly...
- (1): “...make a false statement of fact or law to a tribunal or fail to correct a false statement of **material** fact or law previously made to the tribunal by the lawyer.”
- (3): “...offer evidence the lawyer knows to be false.”
 - USAM § 9-16.300: We stipulate only to facts that accurately represent the defendant’s conduct
 - But contrast with what, in good faith, is provable
 - If the judge asks you a question about it, there’s a good chance it’s material!

Questions from the court

- Rule 3.3 trumps the duty of confidentiality in most jurisdictions
 - ...but you may need client consent prior to disclosure
- ABA Model Rule 1.6, Comment 15: Absent the client's informed consent, the lawyer should assert all nonfrivolous claims that an order to disclose information is not authorized by law or is protected by privilege

Duty of candor (cont.)

- Termination of obligation
 - ABA Model Rule 3.3, Comment 13: “Conclusion of the proceeding”
 - Final judgment affirmed, or time for review has passed
 - Check your jurisdiction’s rules!

Seeking advice

- Consult with your office's Professional Responsibility Officer
- Or DOJ's Professional Responsibility Advisory Office (PRAO)
 - (202) 514-0458