THE ETHICS OF SENTENCING

CRIMINAL JUSTICE ACT TRAINING

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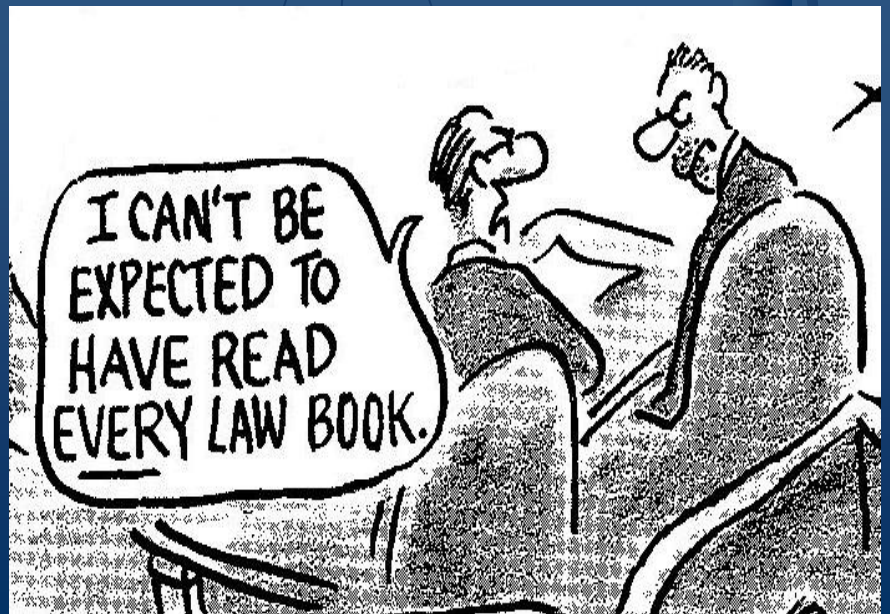
KEY CATEGORIES

- Competence (Rule 1.1)
- Confidentiality (Rule 1.2)
- Communication (Rule 1.4)
- Conflict of Interest (Rules 1.6 – 1.12)
- Candor (Rule 3.3)

Competence

- Rule 1.1 requires lawyer to have legal knowledge, skill, and preparation reasonably necessary for the representation.



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

REPRESENTING TWO DEFENDANTS IN THE SAME OR RELATED CASES THAT HAVE FACTS IN COMMON.

- Defense counsel should not represent more than one client in a criminal case because 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.

COUNSEL'S RESPONSIBILITIES

- Plea offers must be communicated to client (*Missouri v. Frye*, 132 S.Ct. at 1408)
- Counsel client so their decisions are knowingly and intelligently made
- Investigate the facts and know applicable law (competency)

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

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 or objections to make.
5. 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 transcripts. (Practice tip: provide copies of transcripts.)

CLIENT OR LAWYER'S CALL?

- Client charged with felon in possession
- Client says to lawyer: fight **everything**
- Lawyer stipulates to interstate commerce element over client's objection
- *U.S. v. Wilson et al.*, No. 18-1079 (3d Cir. May 22, 2020): 924(c) bank robbery case

UNITED STATES V. WILSON ET. AL.

- "Of course, counsel always retains the ethical responsibility to consult with the defendant about how to achieve the defendant's goals. See, e.g., Model Rules of Prof'l Conduct r. 1.4(a)(2). But failure to consult with the defendant on the stipulation or to heed his instruction to contest a jurisdictional element, while perhaps ethically worrisome, is not structural error."

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).

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?!?!

CAREFUL NOT TO OVER-DISCLOSE

- 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.

Rule 3.3: Candor Toward the Tribunal

(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 that the lawyer knows to be false…

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.

NEITHER UNETHICAL NOR FRIVOLOUS TO HOLD PROSECUTION TO ITS BURDEN OF PROOF.

- Counsel may require that every element of the case be proved.
- Counsel may move to exclude evidence, subpoena documents, and cross-examine all witnesses
- Defense counsel's zealous advocacy is an indispensable part of the adversary system.

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

- 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).

DEFENSE COUNSEL MUST NOT KNOWINGLY ASSIST THE CLIENT IN TESTIFYING FALSELY WHEN CLIENT INTENDS TO

- 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.

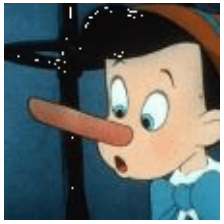
SOME RECOGNIZED STEPS TO TAKE WHEN YOU KNOW THE CLIENT WILL COMMIT PERJURY.

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 lawyer **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 reasonable remedial measures.
- Cases approve disclosure ***to court*** (not gov't).

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.

SOURCES FOR RULES AND GUIDES FOR ETHICS ISSUES

- State Rules of Disciplinary Conduct (adopted as Local Federal Rules)
  - *Schultz v. Commission for Lawyer Discipline*, No. 55649 (Tex. 2015)[broader favorable evidence production requirement than Brady]
- ABA Model Rules of Professional Conduct
- ABA CJS Standards for the Prosecution and Defense Function
- State Bar Ethics Opinions
- National Association of Criminal Defense Lawyers Ethics Opinions
- ABA Center for Professional Responsibility
- CJA Representative
- FPD Office
- Defense Colleagues

ETHICAL ISSUES ARISE AT SENTENCING

- Is this my decision or the client's?
- Should I allow the client to speak to the Probation Officer?
- Can the client speak at sentencing even if lawyer prefers otherwise?
- How much should I tell the Probation Officer or the Court?
- What if the PSR is wrong . . . in my favor, for once?!
- 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?

HYPO #1

- Client pleaded to PWID 15 kg heroin: 10 year mando
- PSR mistakenly has client in CHC I; Counsel knows CHC II is correct category
- PSR mistake means client is "safety valve" eligible
- PSR: 10-year mando N/A; GL = 87-108 months
- Correct calculation: 121-151 months (120-month mando)

HYPO #1 QUESTIONS

- Does Jones have an ethical obligation to inform the PO and Court of the error in the PSR concerning Client's prior criminal history (which would disqualify him for the safety valve and also place him in CHC III)?

  Yes, there's an ethical obligation to disclose

  No, there's an ethical obligation ***not*** to disclose

HYPO #2

- Client facing stacked 924c's in bank robbery complaint (57 yrs)
- AUSA threatens to indict the case that way next week
- Evidence appears bad, though Client steadfastly maintains innocence
- AUSA offers a deal: pre-indictment, pre-discovery (approx. 13-14 years), sets tight deadline. If Client refuses, stacked 924cs will be indicted.

HYPO #2 QUESTIONS

- Could Jones ethically advise Client to accept the plea offer without Jones conducting any additional investigation and without actually reviewing the discovery

  Yes, may ethically advise client to accept deal

  No, may not ethically advise client to accept deal

HYPO #3

- 20-year old Client, no record, heroin user
- Arrested while packaging drugs in his cousin's house
- Shotgun found in the corner of room during search
- No evidence client owned, possessed, or used shotgun
- Lawyer gets rid of 924(c) but worried about gun bump
- AUSA agrees not to mention gun to USPO or Court

HYPO #3 QUESTIONS

- May AUSA ethically enter into the plea agreement proposed by Jones – leaving out mention of the unloaded shotgun from the factual basis?

  Yes, AUSA may ethically leave out gun

  No, AUSA may not ethically leave out gun


Questions?

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CONCLUSION