

Sentencing Ethics

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Many Ethical Issues Arise in Sentencing

Is this my decision or the client's decision?

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 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?

Client's Decisions

1. What plea to enter.
2. Whether to waive a jury trial.
3. Whether to testify in his or her own behalf.
4. Whether to appeal.
5. Whether to represent himself or herself.

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 trial motions to make.

All other strategic and tactical decisions.

Defense Counsel's Decisions on Appeal

1. No constitutional duty to raise every nonfrivolous issue requested by the defendant.
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??!



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:

1. Client was engaged in a criminal scheme when advice was sought to further the scheme; and
2. 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, and In re Gatti.
- 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.

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- 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.

Defense counsel must not assist the client in testifying falsely when he knows the client intends to do so.

- 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.

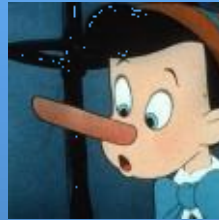
Some recognized steps to take when you know the client will commit perjury.

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.

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?



- If you only believe the testimony is false but do not know it, TDRPC, Rule 3.03 weighs in favor of putting the client on the stand and letting the finder of fact decide.
- Courts 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.

Defense counsel should not represent two defendants charged in the same case or who have common facts in their cases.



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.

Attorney-client privilege does not bar disclosure necessary to respond to a client's attack.

- The attorney-client privilege is waived by the client when the client alleges a breach of duty by counsel.
- Scope of the waiver applies to all communications relevant to the issue of breach or competence.
- Counsel should avoid unnecessary disclosure of privileged information.

May your law practice be filled with ethical
peace and harmony.

