

CURRENT ETHICAL ISSUES ARISING IN FEDERAL CRIMINAL CASES

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LATE, LATE FOR A VERY IMPORTANT DATE

You are scheduled for an arraignment in federal court at 9AM. You have previously informed your client of the setting. However, the previous conversation you had with him reveals that he has no intention of coming to court and said "Screw this....I'm going to Alaska."

9AM rolls around and the client is nowhere to be seen. You rush outside the courtroom to place a call to his phone.

You rush back into the courtroom and the judge calls the case. What do you say?

No universal answer on whether counsel must or should disclose the whereabouts of a bail-jumping client.

ABA standard has changed over time .
Compare ABA Formal Opinions 155 (1936)
and 84-349 (1984).

FL...If counsel knows to a reasonable certainty of the absence prior to court setting, duty to inform of client whereabouts if ordered to do so. Fl. Ethics Op. 90-1

NY...Information about client whereabouts gained through professional relationship is governed by confidentiality. NY Ethics Op. 528

Now, assume no bail-jumping threat

....he was properly informed
...and he hasn't shown up.

Now what ?



TOMAYTO, TOMOTTO: LET'S CALL THE WHOLE THING OFF!

You and your client are getting ready to go to sentencing and for whatever reason, your client is not happy with you. He says that you: 1) never gave him a copy of the psr, 2) did not go over the psr with him, and 3) refused to file objections that he asked you to file. You did send a copy of the psr, and go over it with the defendant, and he had no objections to the report, in addition to your lack of legal objections. Despite your best efforts to help him recollect, he goes before the court and says, "My no-good lawyer never sent me a copy of my psr!" The judge looks at you and says, "Counsel?"

The attorney client privilege waived when client alleges a breach of duty. Circuits: 10, 9, 5, 11, 8.

But, counsel should disclose in a judicial setting with appropriate safeguards. *In camera* review, for example.

Safeguard: Communications relevant to issue of competence or breach of duty. Avoid making disclosures beyond the bare minimum.

ALTERNATIVE?



▶ SAME SCENARIO BUT IN A 2255 PETITION

What if AUSA asks to interview you and
prepare an affidavit in response?



CELL PHONE SALACIOUSNESS

A person seeking legal advice comes to you and asks about some videos that have come into his possession and are on his cell phone. The videos are of a rather young-looking person masturbating. You don't know the age of the person until the client reveals that he the person is 17 years old and they have been communicating. The person reveals that the video is ok to possess because the age of consent in that state is 17. However, you are aware that federal law prohibits the possession, production, and distribution of child pornography. You inform the individual of this law and the individual freaks out.



Defense counsel cannot keep the fruits and instrumentalities of a crime.

If you end up with fruits or instrumentalities of crime, immediately take remedial measures to produce them to prosecution while preserving attorney-client and work product privileges. *US v. Scruggs*, 549 F.2d 1097 (6th Cir. 1976)

No attorney-client privilege on testimony when the evidence has been removed or altered. *Cluthette v. Rushen*, 770 F.2d 1469 (9th Cir. 1985).

In re Olson, 223 P.3d 632 (Mont.
2009)

http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsu11_uphoff.authcheckdam.pdf

THE PAPER CHASE

How does the analysis change if instead of a cell phone, your client brings you a hard drive from one of his business computers? He is charged with fraud and doesn't know if any of the documents on this hard drive will be helpful in his case. The FBI has not inspected this hard drive and may not know it exists.



Duty to investigate

Duty to inspect

Attorney-client confidentiality

Obstruction of Justice

Tampering with Evidence



I AM SPARTACUS!

You represent a defendant accused of online solicitation of a minor. You know from your investigation thus far that the "minor" was not actually a minor, but instead an officer with your local police department. You and your investigator create a profile where the officer has his profile (as a minor) and stake out the person's activities.

An attorney may not misrepresent herself to be an impartial party or burden or harass a prospective witness, but jurisdictions vary on the use of deceit.

ABA Model Rule of Professional Conduct 4.1(a), 4.3, and 4.4(a)

Lawyer shall not knowingly make a false statement of material fact or law to a third person.

Philadelphia Bar Association Professional Guidance Committee, Op. No. 2009-02 .

In re Paulter, 47 P.3d 1175 (Colo. 2002)(en banc).

But....

Wisconsin Rules of Professional Conduct,
Rule 4.1(b)

Oregon Rules of Professional Conduct,
Rule 8.4(b)



Wait, wait! Don't tell me!

Your client is charged with bank robbery and 924C and wants to go to trial. You and your investigator have begun to knock on doors of witnesses. The first three witnesses refuse to talk to you and give you no explanation. The fourth witness won't answer the door, and you see him hiding behind the living room curtains. The fifth witness declines to be interviewed, and as the door is closing in your faces, you cry out in frustration, "What the hell is going on? Why won't anyone talk to us? The door opens slightly, and he says, "The FBI agent told me it was a bad idea to talk to the other side." You confirm these are the agent's exact words. What do you do?

NEITHER A PROSECUTOR NOR DEFENSE COUNSEL MAY DISCOURAGE OR OBSTRUCT COMMUNICATIONS BETWEEN A WITNESS AND OPPOSING COUNSEL

It is unprofessional conduct for a prosecutor or defense counsel to advise or cause any person (other than defendant) to be advised to decline to give the opposing party information which such person has the right to give. ABA 3-3.1(d); 4-4.3(d)

Loose lips sink ships.

Your client is a talker. No matter what you tell him, he'll talk. To anyone, anytime, and right now, he's at the jail, with two roommates and access to phones, US mail and Skype.

He wants you to visit him at the jail to discuss trial strategy. What do you do?

Under certain circumstances, defense counsel may be authorized to withhold information from the client.

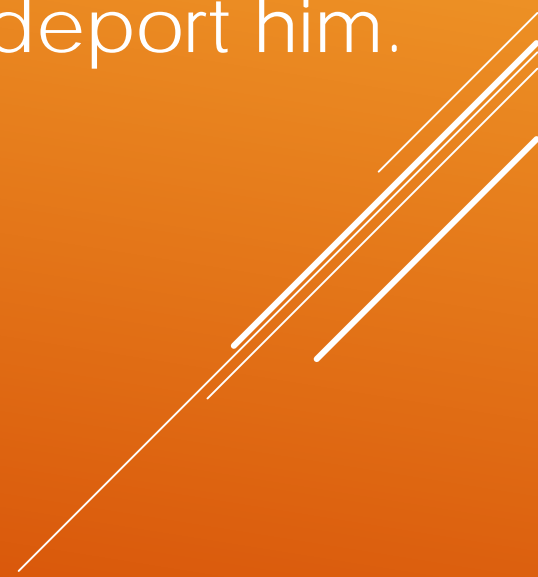
A lawyer is required to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

AMRPC 1.4(a). This includes explaining general strategy and prospects of success, together with tactics that might injure or coerce others. TDRPC 1.03.

In some circumstances, a lawyer may be justified in *delaying transmission* of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication (emphasis in original). AMRPC 1.4, Comment 7; TDRPC 1.03, Comment 4.

BUSTED?

Your client is facing a mandatory minimum of 15 years. The key witness against him is in the country illegally. Your client suggests that you call ICE and anonymously tip them off to the witness's whereabouts so they will deport him. What do you do?



THE END

