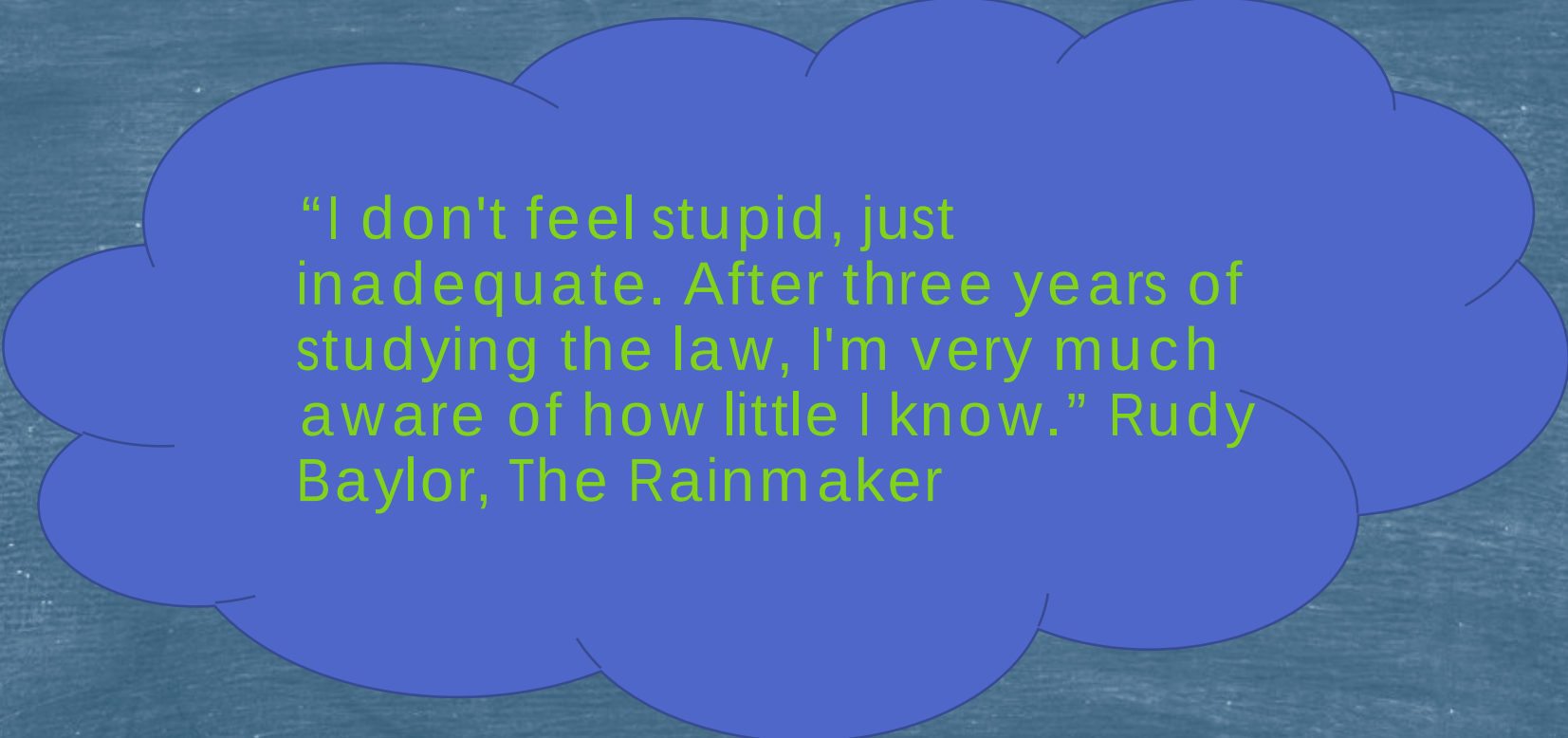




"I don't feel stupid, just inadequate. After three years of studying the law, I'm very much aware of how little I know." Rudy Baylor, The Rainmaker

Ethical Considerations

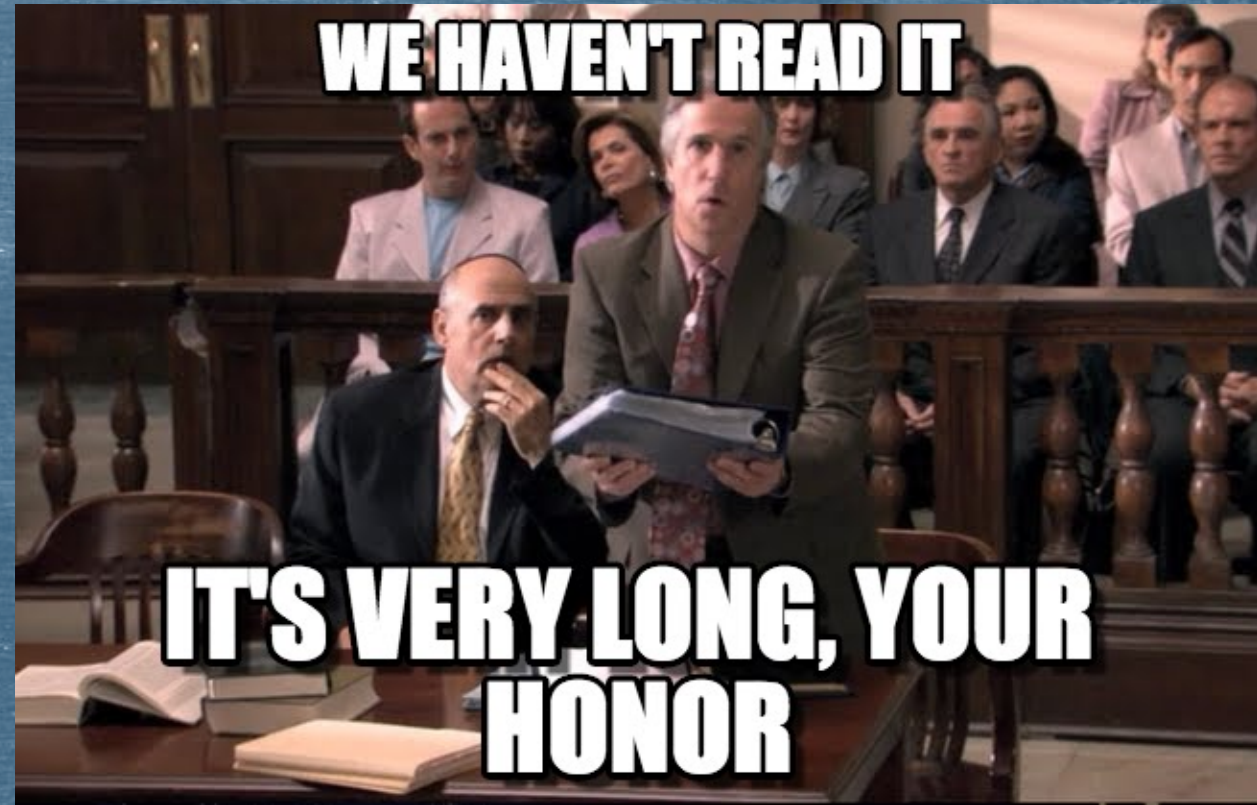
With a Focus on Discovery and Disclosure

Top Ten Most Ethical Fictional Lawyers (and not Atticus Finch or Rudy Baylor)

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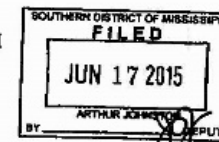
Discovery: AUSA obligations to disclose

- **Federal Rule of Criminal Procedure 16**
 - **Government's Disclosure – 30 days**
 - By defendant's request:
 - Defendant's written or record statements
 - Defendant's prior record
 - Materials relating to defending case or if to be used at trial or belonged to defendant
 - Reports/examinations and tests
 - Expert witness – notice and summary
 - Not subject to disclosure
 - Government work product
 - Jencks material
 - Grand Jury transcripts
 - **Order requires *Brady* Material**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

v.



ORDER REGARDING DISCOVERY

This matter being considered on the motion of the United States Attorney for an Order regarding pretrial discovery and inspection, the Court finds and orders as follows:

1. Discovery and inspection is granted to the following extent:

(a) The United States Attorney shall make available to defendant within thirty (30) days of this Order any evidence described in Fed.R.Crim.P., Rule 16(a)(1), which the United States Attorney intends to offer in evidence during its case in chief or as otherwise provided in Rule 16, and all information accumulated during investigation of this matter which constitutes Brady exculpatory material as soon as possible or as soon as discovered (with the exception that the United States Attorney is not required to produce the entire statement(s) of witnesses containing possible Brady material as defined by Section 3500, Title 18, United States Code, until such time as the United States Attorney produces Rule 26.2 and Section 3500(e) statements to defendant);

defendant(s) has listed an expected United States Attorney witness as an expected defense witness, then the United States Attorney has no obligation to provide a statement of the witness until just

(b) The United States Attorney shall provide to defendant at least five (5) calendar days prior to trial on the merits: (1) a list of prospective witnesses expected to be used in the United States Attorney's case in chief; (2) all statements of such witnesses as defined in Rule 26.2, Fed.R.Crim.P., and Section 3500(e), Title 18, United States Code, (except that if the defendant(s) has listed an expected United States Attorney witness as an expected defense witness, then the United States Attorney has no obligation to provide a statement of the witness until just prior to direct examination of that witness by the United States Attorney in its case in chief); (3) the general nature of any evidence of other crimes, wrongs, or acts intended to be introduced at trial pursuant to Rule 404(b), Fed.R.Evid.; and (4) Giglio impeachment material of which the United States Attorney is aware; it being understood that the omission of a witness(es) from the list shall not result in excluding that witness from testifying, if the omission was not due to deliberate concealment by the United States Attorney, in which event the United States Attorney is required to notify defendant at the earliest opportunity of the name of the omitted witness; it being further understood that the Rule 404(b) notice may be provided during trial if the Court excuses pretrial notice on good cause shown;

If you proceed to trial, the prosecutor must also disclose the following at least 5 calendar days prior to trial:

- List of prospective witnesses
- All Jencks statements
 - Exception – if defendant has same witness, then Gov must only provide statement of that witness prior to direct examination
- 404(b) material – evidence of other crimes, wrongs, or acts
- *Giglio* impeachment material
 - Being understood that the omission of a witness from the witness list shall not result in excluding that witness from testifying, if the omission was not due to deliberate concealment by the AUSA, in which the AUSA is required to notify defendant at earliest opportunity

Quick Refresher: *Brady/Giglio/Jencks*

► *Brady v. Maryland*, 373 U.S. 83 (1963)

- The Supreme Court held that the withholding by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.
- Impeachment evidence, like exculpatory evidence, is subject to disclosure under *Brady*. *United States v. Bagley*, 473 U.S. 667 (1985)
- MRPC 3.8 – Special Responsibilities of a Prosecutor proscribes for disclosure of Brady material and sentencing mitigation

► *United States v. Giglio*, 405 U.S. 150 (1972)

- Court held that the prosecution's failure to inform the jury that a witness had been promised not to be prosecuted in exchange for his testimony was a failure to fulfill the duty to present all material evidence to the jury, and constituted a violation of due process, requiring a new trial. This is the case even if the failure to disclose was a matter of negligence and not intent.
- The case extended the Court's holding in *Brady v. Maryland*, requiring such agreements to be disclosed to defense counsel. As a result of this case, the term *Giglio material* is sometimes used to refer to any information pertaining to deals that witnesses in a criminal case may have entered into with the government.

► *Jencks v. United States*, 353 U.S. 657 (1957) and 18 U.S.C. 3500

- Provides that the prosecutor is required to produce a verbatim statement or report made by a government witness or prospective government witness (other than the defendant), but only after the witness has testified
- The material is generally *inculpatory*, favoring the United States government's prosecution of a defendant. The Jencks Act also covers other documents related to the testimony, or relied upon by government witnesses at trial.
- Typically, the material may consist of police notes, memoranda, reports, summaries, letters, related to an indictment or verbatim transcripts used by government agents or employees to testify at trial. This also includes a witness's grand jury testimony, if the witness testified at trial. Fed. R. Crim. Pro. 6

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Defendant's Discovery Disclosure Obligations

➤ Federal Rule of Criminal Procedure 16(b)

➤ 30 days from Order for defense

- If defendant requests and Government complies
 - Defendant must allow Government to inspect or copy any document/tangible item IF
 - In possession and intended to use in defendant's case in chief
 - Reports of Examinations/Tests
 - Expert Witnesses – summary of findings
- Not subject to disclosure
 - Work product or defendant notes
 - Statements made to defendant or defense counsel by defendant, any witness, or prospective witness

➤ 5 days prior to trial

- List of prospective witnesses
- All Jencks statements
 - Exception – if AUSA has same witness, then defense must only provide statement of that witness prior to direct examination
 - Being understood that the omission of a witness from the witness list shall not result in excluding that witness from testifying, if the omission was not due to deliberate concealment by the defense, in which the defense is required to notify AUSA at earliest opportunity

(b) The defendant shall provide to the United States Attorney a list of prospective witnesses expected to be used in its case in chief, and all statements of those witnesses as that term is defined in Rule 26.2, Fed.R.Crim.P., and Section 3500(e), Title 18, United States Code, (except that if the United States Attorney has listed an expected defense witness as an expected United States Attorney witness, then the defendant has no obligation to provide a statement of the witness until just prior to direct examination of that witness during the defendant's case in chief), at least five (5) calendar days prior to trial on the merits; it being understood that the omission of a witness(es) from the list shall not result in excluding that witness from testifying, if the omission was not due to deliberate concealment by the defendant, in which event the defendant is required to notify the United States Attorney at the earliest opportunity of the name of the omitted witness;

Classic interview

- ▶ **Do we have a duty to disclose**
 - ▶ No universal answer! (of course)
 - ▶ ABA has changed position over
 - ▶ 1936 – yes disclosure is required; c
 - ▶ 1980 – no duty to report when no
 - ▶ 1984 – withdrew 1980 opinion due
 - ▶ Florida – yes duty to disclose in t
an attorney may not divulge inf
disclose if, prior to the court dat
is a willful and irreversible fact o
 - ▶ New York/Utah/Illinois/Nebraska
 - ▶ **Most recent opinion – 2011 from**

The more difficult issue is whether Attorney is permitted to say anything at all in response to the court's question regarding whether she "had any idea why her client was not there." If Attorney answers in the negative, she is in violation of her duty of candor to the court . . . because she does have an idea, as relayed by Client's mother the night before. If, however, Attorney answers "yes," she arguably violates her duty of confidentiality . . . because that answer would cause a harmful inference to be drawn to the detriment of her client, thus violating Attorney's duty not to reveal client confidential information. Certainly if there were an exculpatory and unexceptional reason Attorney's client was not in court, Attorney would be free to reveal that information, because it would not qualify as information "which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client"

Under our facts, Attorney's only ethical option is to inform the court respectfully that due to applicable ethical rules she is not at liberty to answer the question.

San Diego County Bar

Client and False Testimony

- ▶ Disclosure to the court where client insists on testifying falsely
 - ▶ There is no constitutional right to testify falsely, *Nix v. Whiteside*, 475 U.S. 157 (1986)
 - ▶ If client insists on testifying falsely, the attorney has a duty to disclose the truth to the court
 - ▶ Counsel should always strongly advise the client of the consequences of perjury
 - ▶ Can lead in narrative form
 - ▶ Can move to withdraw
 - ▶ *if perjury does occur, counsel has a duty to take remedial measures; even disclosure of true facts may not be sufficient
 - ▶ *think about Rules here too – 3.3 c

ETHICS OPINION NUMBER 205 OF THE MISSISSIPPI BAR RENDERED OCTOBER 30, 1992

CLIENT MISCONDUCT/ATTORNEY RESPONSIBILITY - An attorney is under an obligation to report the criminal misconduct of a nonclient which prejudices the administration of justice; the client's attorney is under an obligation to remonstrate with the client, and if unsuccessful, disclose the conduct to the tribunal.

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court to decide whether to accept the disclosure and what to do about it.

Furthermore, the attorney has a duty to advise his client to take the proper course and to assist the client in doing so. If the client insists on testifying falsely, the attorney is in violation of M.R.P.C. 1.6(b)(1).

Therefore, it is the opinion of the Board that an attorney under an obligation to disclose the truth to the court if perjury has been committed by the client and the attorney to withdraw if the client insists on testifying falsely.



Attorney

- ▶ MPRC 1.6 –
- ▶ Attorney-client privilege – clients who
- ▶ *In re Auclair* – cannot waive

SHALL NOT reveal

- Unless client is informed and consents
- Impliedly authorized in order to carry out representation



and prospective
prospective clients

harm;
reasonably certain to result
of another and in
lawyer's services;
interests or property of
ed from the client's
the client has used the

these rules;
a controversy between the

Client A

- ▶ Just pled guilty to felon-in-possession with sentencing enhancement of robbery
- ▶ Allegedly robbed someone of their cellphone at gunpoint
- ▶ Received a sentence greater than expected
- ▶ Client A wants to know how he can lower his sentence
- ▶ Client A tells you about a recent shooting
- ▶ Client A is a member of the rival gang involved in the shooting where Client B stands accused of homicide
- ▶ Client A tells you that the person was killed by friendly-fire; Client B did not kill anyone
- ▶ Client A does not want to help any member of another gang

Client B

- ▶ Former client who recently had federal case dismissed
- ▶ Facing state charges of homicide
- ▶ Accused of killing a rival gang member

Attorney/Client Controver

- Attorney-client privilege does not prohibit defense counsel from revealing confidential information in a judicial setting with appropriate safeguards
- A/C privilege is waived by the client when the client:
 - *Laughner v. United States*, 373 F.2d 326 (5th Cir. 1967)
 - *Browning Mfg. Div. of Emerson Elec. Co.*, 953 F.2d 1012 (5th Cir. 1992) (attorney waives privilege)
 - Scope of the waiver applies to all communications, not just those related to the breach of the duty
- ABA Opinion 10-456 – an IAC claim waives the A/C privilege; confidential information may not be disclosed in response to a proper request at a disciplinary hearing

The committee is, therefore, of the opinion that a lawyer may be required by court order to reveal communications and discussions with his client when the client has accused the lawyer of wrongful conduct.

ETHICS OPINION NUMBER 124 OF THE MISSISSIPPI BAR RENDERED SEPTEMBER 5, 1986 AMENDED APRIL 6, 2013

CLIENT CONFIDENCES - An attorney may reveal communications with his client when required by court order and the lawyer is accused of wrongful conduct.

The Ethics Committee of The Mississippi Bar has been requested to render an opinion on the following facts:

A lawyer represented a client in a criminal case. After a trial, the client was convicted and sentenced to the Mississippi Department of Corrections. After commencing his sentence, the client moved pro se in the trial court for an out-of-time appeal, and alleged that his lawyer failed to appeal his conviction as he requested. In considering the motion, the court ordered the lawyer to submit an affidavit concerning his discussions with the client concerning an appeal.

Without violating Mississippi Rules of Professional Conduct (MRPC), may the lawyer reveal communications with his former client in an affidavit required by court order?

This inquiry is governed, in part, Rule 1.6(b)(6), MRPC, which provides that a lawyer may reveal confidences or secrets when required by law or court order. *See also* Ethics Opinion No. 95 of The Mississippi Bar.

The committee has been attacked for its failure to protect the confidentiality of the client. This is not the case; it should apply the same standard to the conduct of a lawyer and the confidentiality of a lawyer and his client. The committee has then have the lips of that lawyer sealed. Fairness should require a full exploration of facts surrounding a lawyer's work for a convicted client.

Documents to Client

► What documents should be delivered to client

► In a majority of jurisdictions, the "end product" is the work product

► Iowa, NY, KY, NV, TX, DC

► Minority – work product is the client's property

► 5th Cir – *Spivey v. Zant*, 651 F.2d 1005 (5th Cir. 1980) – work product doctrine . . . does not apply to documents or other tangible things in the course of the representation

► IL, ND, NY, AZ, MS – Fed. Circuit, 127 F.R.D. 473 (S.D. Cal. 1979)

► Mississippi State Bar Opinion 1978-10

IV. Client's File

The ownership of the specific items contained in a file is a matter of law. Informal Opinion ABA No. 790 (Oct. 26, 1964). The client's file consists of the papers and property delivered by the client or which the client caused to be delivered to the lawyer. In addition, the "end product", or in other words, what the lawyer was hired to do, is usually also considered to belong to the client. Wisconsin Bar Bulletin, June 1970 Supplement (Memo Opinion 4-78). On the other hand, the notes and memorandums are usually considered to belong to the lawyer and be his work product. Missouri Bar Bulletin, May 1978, Informal Opinion (Jan. 6, 1978). Contrary opinions can be found which indicate the client has no absolute right to the files. Maryland Opinions Informal Opinion 76-50 (March 1, 1976). This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. San Diego Bar Association, 25 Dicta, May 1978 (Opinion 1977-3). However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.

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4. Philip Banks, FPoBA
3. Jackie Chiles, Seinfeld
2. Ben Matlock, Matlock



Appellate Disclosure Issues

► Disclosure of a

- *Hooks v. Roberts*
proposed copy
► Should probably

► Disclosure of r

- *United States*
counsel on ap
- *Shelton v. Bet*
needed a sep
- *Perry v. Texas*,
personal use)

► MS Bar Opinion

As far as transcripts of proceedings are concerned, the Committee assumes that the transcripts have yet to be transcribed and, thus, the opinion of the Committee relates to the duty of the lawyer to obtain and pay for the transcription. Rule 1.8(e)(2) provides that a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client, however, there is no affirmative duty to advance such costs and expenses of litigation. Therefore, the Committee finds no ethical duty on the part of the attorney to provide the client with a transcript of proceedings. Section 99-105 of the Mississippi Code of 1972, as Amended, makes provisions for preparing the record of the proceedings in a trial court for the purposes of appeal for an appellant who is unable to prepay the costs.

The Committee notes that if, during the course of proceedings copies of transcripts were obtained for use on behalf of the client and retained in the file, then such transcripts would be a part of the end product developed by the lawyer and thus constitute a part of the client's file which should be delivered to the client upon request.

Is there anything defense counsel can withhold?

- ▶ **Not per se, but counsel is not required to tell the client every single detail**
- ▶ General rule – lawyer is required to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information – Rule 1.4
 - ▶ *In some circumstances, lawyers 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; Rule 1.4
 - ▶ On request, lawyer must allow client or former client to inspect and copy any documents possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse; Restatement Third of the Law Governing Lawyers § 46(2)
- ▶ **Examples of documents state bars have found that should be withheld**
 - ▶ PA – Formal Opinion from 2007
 - ▶ When client makes specific request for restricted, confidential materials, the client is entitled to such items unless there are substantial grounds to decline
 - ▶ UT – ethics opinion 2006
 - ▶ Discovery that has been provided with restrictions on dissemination to a client by rule or order may not be released to the client
 - ▶ TX – 2006 ethics opinion
 - ▶ Lawyer should normally give client his notes upon request, **but** may withhold notes, if required to do so by court
 - ▶ WV – case 2012 WL566958 (2012)
 - ▶ Reprimanded CJA attorney for giving defendant copies of grand jury transcript and other investigative materials to client who was in jail
 - ▶ The discovery order prohibited counsel from removing those materials from his office; The order was to prevent witness intimidation

Mentally Incompetent Clients and Disclosure

- ▶ **No specific answer for when counsel should make decisions for incompetent clients, but they do provide guidance**
- ▶ MRPC– 1.14 – Client Under a Disability
 - ▶ Try and maintain normal relationship
 - ▶ May take reasonably necessary protective action, including consulting with other individuals and seeking a guardian
 - ▶ Lawyer may reveal confidential information if protective action is impliedly authorized, but only to an extent reasonably necessary
 - ▶ Lawyer make take protective action, such as seeking professional services
 - ▶ If so, lawyer should be guided by wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into client's decision making autonomy to the least extent feasible, maximizing client capabilities, and respecting the client's family and social connections
 - ▶ However – a criminal defense lawyer with a good-faith doubt about client's competency must raise it with the court
- ▶ ABA Standards for criminal justice – 4.3-6 – “defense counsel should consider all procedural steps which in good faith may be taken, including, for example . . . obtaining psychiatric examination of the accused when the need appears”

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1. LAWYER DOG!

