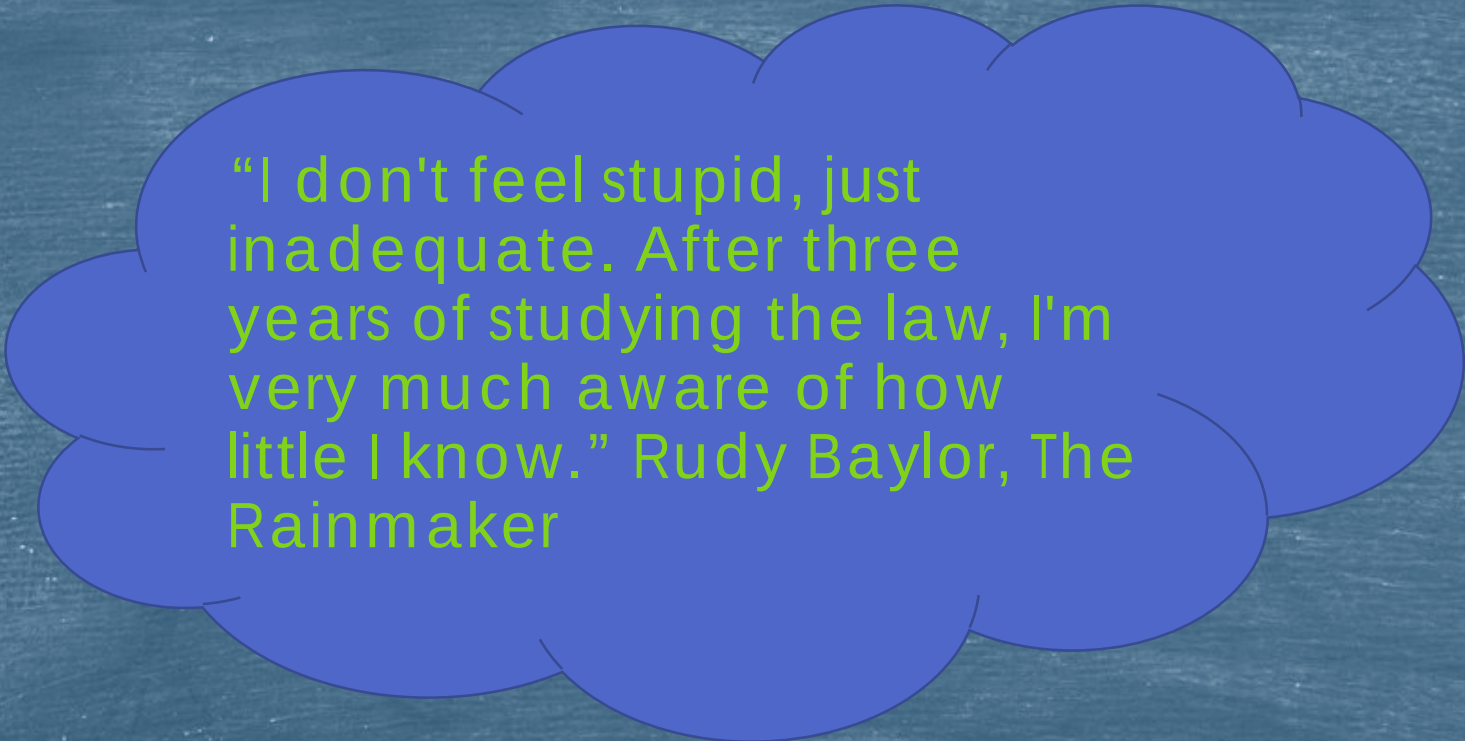




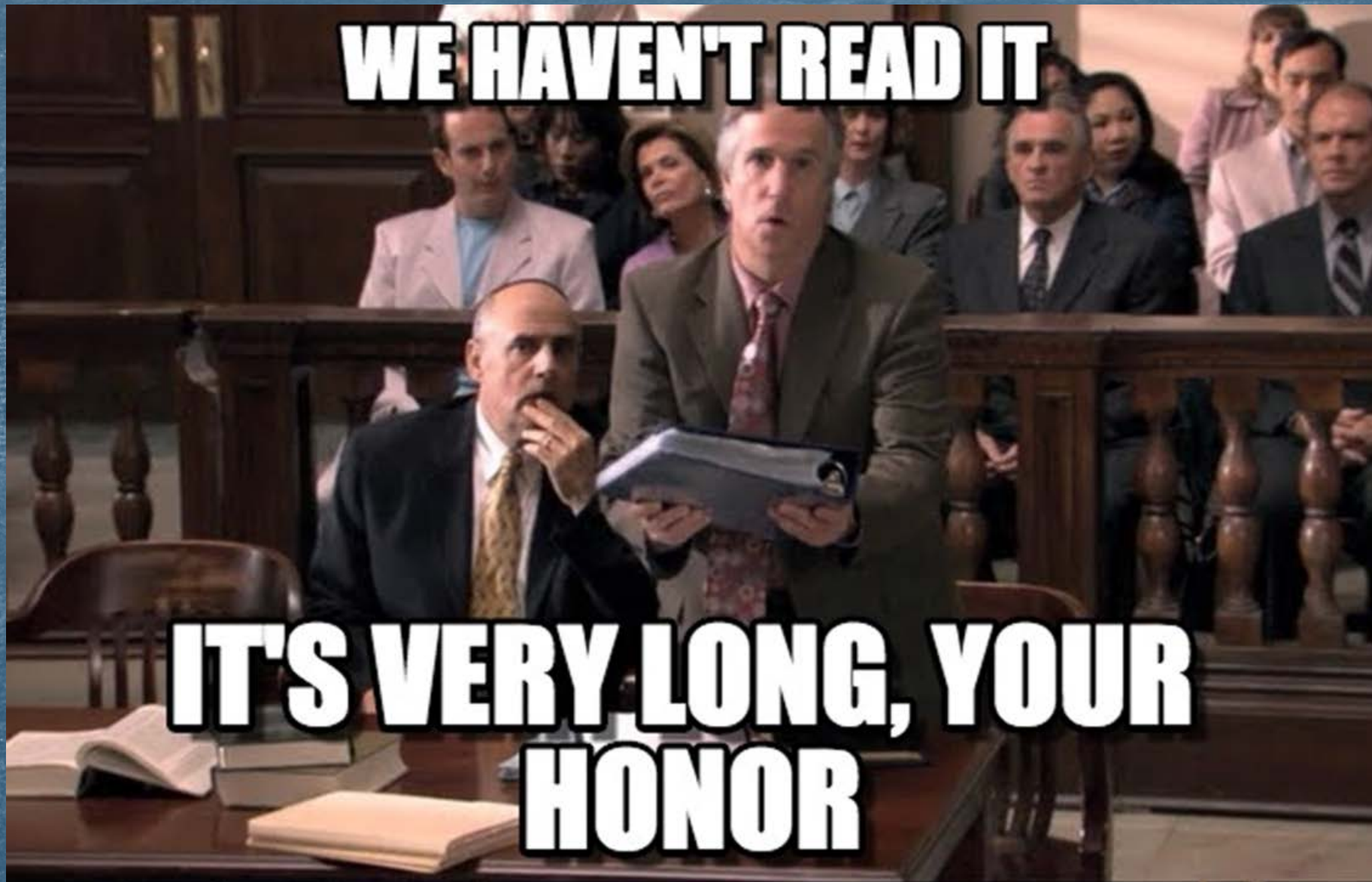
“I don't feel stupid, just inadequate. After three years of studying the law, I'm very much aware of how little I know.” Rudy Baylor, The Rainmaker

Ethical Considerations

With a Focus on Discovery and Disclosure



Lionel Hutz, The Simpsons



Barry Zuckerkorn, Arrested
Development

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

Criminal No:

SCHEDULING ORDER

The defendant has been arraigned in open court or has waived formal arraignment and has entered a plea of not guilty. The following scheduling order will govern in this action.

1. The trial of the above case is set before U.S. District Judge XXX at XXX a.m. on XXX, 2016, in XXX, Mississippi.
2. Non-dispositive motions, that is, motions listed in Section I.E.(6)(h) of the Northern District Speedy Trial Plan, must be filed no later than XXX, 2016, and submitted to U.S. Magistrate Judge XXX.
3. Dispositive motions must be filed no later than XXX, 2016, and submitted to U.S. District Judge XXX.
4. Witness subpoenas in CJA cases must be requested sufficiently in advance to allow the Marshal's Service at least 14 days before trial for service.
5. Motions for writs for prisoners housed in Mississippi must be submitted sufficiently in advance to allow issuance of the writ at least 14 days before trial. Motions for writs for prisoners housed in other states must be submitted sufficiently in advance to allow issuance of the writ at least 28 days before trial.
6. Plea agreements, if any, must be submitted to the court by XXX, 2016, 14 days before trial, and the court will accept no plea agreements filed after that date except for good cause shown.
7. Discovery and inspection of evidence:
 - (a) Requests for discovery required by FED. R. CRIM. P. 16 are hereby entered for the defendants by this order, and unless a defendant, in writing, affirmatively refuses discoverable material beforehand, then within 14 days of the entry of this order the United States Attorney must make available to the defendant any materials described in Rule 16(a)(1) which the United States intends to offer in evidence during its case-in-chief, and which are material to preparing the defense, or were obtained from or belong to the defendant. Should a defendant refuse to accept discoverable materials the United States is relieved of any discovery obligations to the defendant imposed by FED. R. CRIM. P. 16.

Scheduling Order for the Northern District of Mississippi

(g) Decision by Magistrate Judge. Full-time magistrate judges will hear and dispose of the following types of motions:

- (i) Motions under Rule 7, FEDERAL RULES OF CRIMINAL PROCEDURE, to strike surplusage from an indictment or information, to amend an information, or for a bill of particulars;
 - (ii) Motions under Rule 15, FEDERAL RULES OF CRIMINAL PROCEDURE, to take depositions of witnesses and for production at such depositions of designated books, papers, documents, recordings, or other material not privileged;
 - (iii) Motions for discovery and inspection and for protective and modifying orders under Rule 16, FEDERAL RULES OF CRIMINAL PROCEDURE;
 - (iv) Motions under Rule 17(b), FEDERAL RULES OF CRIMINAL PROCEDURE, for issuance and service of defense witness subpoena at government expense and to quash or modify subpoena under Rule 17(c), FEDERAL RULES OF CRIMINAL PROCEDURE.
- (h) If such motions have been served on opposing counsel seven days before arraignment, or if the opposing party is prepared to reply, the court will hear the motions on the date of arraignment. Any motions not heard at the arraignment will be decided by the magistrate judge promptly upon full briefing.

Discovery: AUSA obligations to disclose

- **Federal Rule of Criminal Procedure 16**
 - **Government's Disclosure – 14 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

7. Discovery and inspection of evidence:

- (a) Requests for discovery required by FED. R. CRIM. P. 16 are hereby entered for the defendants by this order, and unless a defendant, in writing, affirmatively refuses discoverable material beforehand, then within 14 days of the entry of this order the United States Attorney must make available to the defendant any materials described in Rule 16(a)(1) which the United States intends to offer in evidence during its case-in-chief, and which are material to preparing the defense, or were obtained from or belong to the defendant. Should a defendant refuse to accept discoverable materials the United States is relieved of any discovery obligations to the defendant imposed by FED. R. CRIM. P. 16.

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

(b) Within 30 days of the entry of this order, the defendant must make available to the United States any materials described in Rule 16(b)(1), Federal Rules of Criminal Procedure, which the defendant intends to introduce into evidence during the case-in-chief of either the United States or defendant.

404(b) Evidence and Continuing Duty

- (c) Within 30 days of the entry of this order, the United States must provide to the defendant notice of intent and the general nature of any evidence intended to be offered under Rule 404(b), Federal Rules of Criminal Procedure, except for good cause shown.
- (d) The parties understand that each has a continuing duty to supplement promptly the disclosure of evidence and materials under Rule 16(c), Federal Rules of Criminal Procedure.

Witness Statements

8. Witness statements.

- (a) At least 7 days before trial the parties must provide to one another all statements of prospective witnesses intended to be called during each party's case-in-chief as defined by FED. R. CRIM. P. 26.2 and 18 U.S.C. § 3500(e), including a witness's testimony before the federal grand jury.
- (b) Counsel for the parties must hold and use all statements of prospective witnesses as contemplated by Rule 26.2 and 18 U.S.C. §§ 3500(b) and (c), and may not show them to any person, except the representatives and agents of the parties. Counsel, and representatives and agents of the parties must retain the statements and any copies of them. This provision does not prohibit a party from showing a witness his or her statement in preparation for any hearing or trial.

➤ **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

Exculpatory and Impeachment Materials

9. Exculpatory and Impeachment materials.

- (a) Promptly after the United States learns of or obtains exculpatory information or materials, the United States must reveal it to the defendant and allow defendant to copy it. Exculpatory information or materials are those which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), *Kyle v. Whitley*, 115 S. Ct. 1555 (1995) and their progeny.

► *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)
 - Nondisclosure constitutes constitutional error and requires reversal of the conviction only if the evidence is material in the sense that its suppression might have affected the outcome of the trial

► *United States v. Agurs*, 427 U.S. 97 (1976) (distinguished from *Bagley*)

- A prosecutor does not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial
- The proper standard of materiality of undisclosed evidence, and the standard applied by the trial judge in this case, is that, if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed.

► *Kyle v. Whitley*, 115 S. Ct. 1555 (1995)

- Held that a prosecutor has an affirmative duty to disclose evidence favorable to a defendant.
- Reaffirmed *Brady* and *Bagley*; evidence is considered cumulatively

- (b) At least 7 days before trial, the United States must disclose to the defendant the existence and nature of any impeachment materials or information known to the United States, that is, materials or information relevant to the credibility of a government witness who it intends to call during the United States's case-in-chief including, but not limited to, bias, lack of candor or truthfulness, payments, promises of immunity, leniency, preferential treatment or other inducements made to prospective government witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972), *Napue v. Illinois*, 360 U.S. 264 (1959) and their progeny.
- (c) The United States understands that it has a continuing obligation to produce the above materials should they be discovered after the time frames above.

► ***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.

► ***Napue v. Illinois*, 360 U.S. 264 (1959)**

- The failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment.

Motions

10. Motions.

- (a) Any party which in good faith believes it will be aggrieved by any of the deadlines or disclosure requirements set forth in this Order must promptly file a written motion with the court.
- (b) The opposing party may respond to such motion(s). If no response is filed, the court will assume there is no objection to the motion.
- (c) The parties may seek *in camera* review if they are uncertain of whether any material constitutes *Brady* or *Giglio* information.
- (d) The parties must comply with Local Uniform Criminal Rule 47(A), which requires conference with opposing counsel in a good faith attempt to resolve certain matters without court intervention.

Sentencing Order

3. The probation officer shall disclose the completed report to counsel for the defendant and counsel for the government on or before XXXX. Except for proposed special ns, will be

6. The presentence report, in final form, including any unresolved objections, will be delivered to the Court and the parties on or before XXXX. Fed. R. Crim. P. 32(g) and U.S.S.G. § 6A1.2 (c).

7. The Court will resolve objections to the presentence report at the sentencing hearing. Fed. R. Crim. P. 32(i) and U.S.S.G. § 6A1.3.

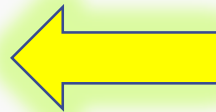
8. All parties that intend to have witnesses testify at sentencing shall give notice to the Court ten (10) days prior to the sentencing date.

relevant sentencing issues, including reference letters and motions for departure, shall be filed as restricted documents by the appropriate party on or before XXXX. Any unresolved objections will be included in the presentence report; objections should not be included in a sentencing memorandum.

Criminal Events

Sentencing

[Sentencing Documents](#)



Motions and Related Filings

[Motions](#)

[Responses and Replies](#)

Other Filings

[Discovery Documents](#)

[Waivers](#)

[Service of Process](#)

[Notices](#)

[Trial Documents](#)

[Appeal Documents](#)

[Other Documents](#)

Sentencing Documents

Start typing to find an event.

Available Events (click to select an event)

- Objection to Presentence Investigation Report
- Response to Objection to Presentence Investigation Report
- Sentencing Memorandum
- Sentencing Reference Letters

Next

Clear

Selected Event





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 advocate has a duty to disclose the misconduct to the court
 - ▶ Counsel should always strongly advise the client of the consequences
 - ▶ 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 action to take.

Furthermore, the advocate has a duty to advise his client to take appropriate action and is in violation of M.R.P.C. 1.6(b)(1) if he fails to do so.

Therefore, it is the opinion of the Board that an attorney under an obligation to disclose the perjury committed by a nonclient to the attorney to withdraw.



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

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 1081 (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.

It has been attacked information to the aim of defense on the client. This is a right; it should apply to the conduct. It would be a breach of a lawyer and

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 1008 (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

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.

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”