



Ethical Issues in Criminal Defense

Scott Davis
scott_davis@fd.org



Attorney decisions vs. client decisions

- Client decides:
 - Whether to enter a plea or go to trial
 - Whether to testify on his or her own behalf
 - Whether to appeal



Decision to appeal

Your client enters a plea agreement that includes a waiver of his right to appeal his sentence. The judge imposes a guideline sentence. Your client demands that you pursue an appeal. What do you do?

Decision to appeal

- *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)
 - Failure to file a requested notice of appeal is *per se* ineffective assistance of counsel.
- *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007)
 - Same is true even when defendant has waived right to direct appeal and collateral review.

Decision to appeal

- *Nunez v. United States*, 546 F.3d 450 (7th Cir. 2008)
 - “Once a defendant has waived his right to appeal not only in writing but also in open court under Rule 11(b)(1)(N), the Sixth Amendment does not require counsel to disregard the waiver. The regimen of *Strickland* applies: the defendant must show both objectively deficient performance and prejudice. Unless a non-frivolous issue could be raised on appeal, counsel should protect the client’s interest in retaining the benefit of the plea bargain. To the extent that other circuits disable counsel from making such a professional judgment, we disagree with them.”
 - *See also United States v. Mabry*, 536 F.3d 231 (3d Cir. 2008)

Decision to appeal

- Duty to consult regarding appeal?
- *United States v. Cong Van Pham*, 722 F.3d 320 (5th Cir. 2013)
 - Failure to consult with a client regarding whether to pursue an appeal, even when there is a waiver, constitutes ineffective assistance of counsel.
- *Otero v. United States*, 499 F.3d 1267 (11th Cir. 2007)
 - No constitutional obligation to consult with client about whether to appeal where the client had agreed to a broad waiver and did not communicate to counsel a desire to appeal.

Attorney decisions vs. client decisions

- Client decides:
 - Whether to enter a plea or go to trial
 - Whether to testify on his or her own behalf
 - Whether to appeal
 - Whether to represent himself or herself.

Self-representation

I have a
Constitutional
right to
represent
myself.



And I have a
Constitutional
duty to advise you
that exercising
that right makes
you an idiot.



Self-representation

- *Faretta v. California*, 422 U.S. 806 (1975)
 - Defendant cannot be forced to accept appointed attorney.
- *In re Hipp, Inc.*, 5 F.3d 109 (5th Cir. 1993)
 - Request to proceed *pro se* must be clear and unequivocal.
- *Indiana v. Edwards*, 554 U.S. 164 (2008)
 - “the Constitution permits the States to insist upon representation by counsel for those competent to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”

Attorney decisions vs. client decisions

- Attorney decides:
 - Which witnesses to decide
 - Whether and how to conduct cross-examination
 - Which jurors to accept or strike
 - Which motions to make
 - All other strategic or tactical decisions
 - Which issues to raise on appeal

Appeal decisions

Your client asks you to appeal, and you timely file a notice of appeal. Your client then sends you a 30-page letter detailing 15 issues he wants raised. Some of them you deem frivolous. Do you have to raise them?

Others you think might have some merit to them. Do you have to raise every nonfrivolous issue requested by your client?

Appeal decisions

- *Jones v. Barnes*, 463 U.S. 745 (1983)
 - Counsel on appeal has no constitutional duty to raise every nonfrivolous issue requested by the defendant.
- *Mayo v. Lynaugh*, 882 F.2d 134 (5th Cir. 1989)
 - Which issues to raise on appeal is counsel's decision.
- *Smith v. Robbins*, 528 U.S. 259 (2000)
 - Still possible for defendant to bring an ineffectiveness claim for failing to raise an issue on appeal, but it's a difficult burden to meet.

Appeal decisions

During appellate process, your client asks for copies of all the transcripts in his case. Are you compelled to provide them?

- *United States v. Ward*, 610 F.2d 294 (5th Cir. 1980)
 - No obligation – defendant not entitled to personal copies of the transcripts in his case.

Appeal decisions

Your appeal is denied, the conviction and sentence is affirmed. Your client wants you to file a petition for rehearing. Do you have a duty to do so?

- *United States v. Coney*, 120 F.3d 26 (3d Cir. 1997)
- *United States v. Hawkins*, 505 F.3d 613 (7th Cir. 2007)
 - No obligation

40.1 **Copies.** *Four copies of all petitions for rehearing will be filed. A party seeking panel rehearing must attach to the petition an unmarked copy of the opinion or order sought to be reviewed. If the party contemporaneously files a petition for rehearing en banc and attaches a copy of the opinion or order required by 5TH CIR. R. 35.2.10, the party does not have to attach a copy to the petition for panel rehearing.*

40.2 **Limited Nature of Petition for Panel Rehearing.** *A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is not used for reargument of the issue previously presented or to attack the court's well-settled summary calendar procedures. Petitions for rehearing of panel decisions are reviewed by panel members only.*

Communication with Prospective Witnesses

You are interviewing a witness, not your client, in preparation for testimony at trial. You are concerned that the witness's testimony may be self-incriminating. Do you have a responsibility to advise the person of the possibility of self-incrimination? Or to advise the person of his or her need for an attorney?

Communication with Prospective Witnesses

- ABA Standards, § 4-4.3(c)
 - No obligation.
 - Rule does not apply to prosecutors, and they must provide such advice in a manner that is not coercive.



“Perhaps you would like to rephrase your last answer.”

Communication with Prospective Witnesses

Attorney Lonnie Weber wants to interview a witness, but he is worried that if he identifies himself as the defense attorney, the witness might not be completely forthcoming. Can Lonnie contact this witness, an unrepresented third party, without identifying his role in the case?

Communication with Prospective Witnesses

- ABA Model Rules impose upon attorneys dealing with unrepresented third parties the obligation:
 - to make clear that they are not disinterested; and
 - not to “use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such . . . persons.”
 - AMRPC, Rule 4.4(a); Miss. RPC, Rule 4.3.

Communication with Prospective Witnesses

- *In re Paulter*, 47 P.3d 1175 (Colo. 2002) (en banc)
 - Prosecutor misrepresented himself as a criminal defense lawyer in order to get an accused murderer to turn himself in.
- *Attorney Grievance Comm'n of Maryland v. Smith*, 950 A.2d 101 (Md. 2008)
 - Defense attorney misrepresented himself to be a police officer in a phone call with a person he believed to be a prosecution witness.

Communication with Prospective Witnesses



Communication with Prospective Witnesses

Lonnie wants to gain access to information on a potential witnesses Facebook profile. However, the profile is secured, and can only be accessed by friends. Lonnie instructs his investigator to send a “friend request” from the investigator’s personal Facebook account.

What if Lonnie sends the friend request from his own Facebook account?

Communication with Prospective Witnesses

- New York City Bar Ass'n Comm. On Professional and Judicial Ethics, Formal Op. 2010-2 (Sept. 2010).
 - Neither attorney nor her agent may directly or indirectly use deceptive behavior or trickery in sending a “friend request” to gain information from a potential witness.
 - But, may use the attorney’s real name and profile to send a “friend request” to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request.

Communication with Prospective Witnesses

- *Office of Lawyer Regulation v. Stephen P. Hurley*, No. 2007AP478-D (Wisc. Sup. Ct. Feb. 11, 2009)
 - Client charged with sexual assault of a child, exhibiting harmful materials to a child, possession of child pornography.
 - Attorney directed investigator to conduct an undercover investigation that tricked child and his mother into giving up the child's computer so the attorney could examine its hard drive.
 - Did not violate rules of professional ethics.
- Two states recognize that a lawyer may conduct or supervise covert investigative activities (WI & OR).

Bail jumping client



Bail jumping client

Lonnie's client is granted pre-trial release. Two days after his release, Lonnie gets a text from his client that reads, "Headed to Mexico. I hear Monterrey is nice this time of year. Peace."

Does Lonnie have to alert the court or anyone else that his client has absconded?

Once it is known that he has jumped his bond, does Lonnie have to disclose his client's whereabouts?

Bail jumping client

- No universal answer.
- 1936 – ABA says attorney's must disclose whereabouts of fugitive client.
- 1980 – opinion withdraw because it was “inconsistent with both the Model Rules of Professional Conduct and the former Model Code of Professional Responsibility.” ABA Formal Op. 84-349 (1984)

Bail jumping client

- Florida – originally required disclosure as soon as attorney knew the client had fled with intention of jumping bail. Later changed its standard, saying that an attorney may not divulge such information until required to do so by the court at the time of a scheduled court appearance.
- Florida Ethics Op. 90-1, 1990 WL 446957 (July 15, 1990), amended (Feb. 29, 1996)

Bail jumping client

- New York – information respecting the client's whereabouts gained as part of the professional relationship squarely falls within the general ethical obligation of preserving the confidentiality of client secrets.
- New York Ethics Op. 528, 1981 WL 27589 (Feb. 17, 1981)

Bail jumping client

- Utah – attorney may not reveal phone number of fugitive client to authorities (even if they have a valid arrest warrant), and refusing to do so does not constitute assisting the client in illegal or fraudulent activity.
- Utah State Bar Ethics Advisory Op. Comm., Op. No. 97-02, 1997 WL 45141 (Jan. 24, 1997)

Bail jumping client

- Nebraska – attorney may not reveal the whereabouts of a former client to the U.S. Marshal where such information was received during the course of the professional relationship, but may ethically do so when the attorney determines that the client intends to commit a crime the future, when the client has consented, or when there is a court order requiring it.
- Nebraska State Bar Advisory Op. 90-2

Bail jumping client

- Some courts have held that a lawyer has a duty to disclose the whereabouts of the bail jumping client.
 - *United States v. Del Carpio-Cotrino*, 733 F.Supp. 95 (S.D. Fla 1990)
 - *Commonwealth v. Maguigan*, 511 A.2d 1327 (Pa. Supp. Ct. 1986)
 - *In re Doe*, 420 N.Y.S.2d 996 (N.Y. Sup. Ct. 1979)

Bail jumping client

- Other courts have held that a client's whereabouts are protected by the attorney-client privilege.
 - *In re Nackson*, 555 A.2d 1101 (N.J. Sup. Ct. 1989)
 - *In re Stolar*, 397 F.Supp. 520 (S.D.N.Y. 1975)

Perjurious client



Perjurious client

- Lonnie is prepping his client for testimony at trial. His client says, “Man, you know I did it. I’m gonna lie when I get on that stand.” Lonnie advises that would be perjury, and encourages his client not to lie on the stand. His client, says, “I don’t care.” What should Lonnie do?

Perjurious client

- What about informing the court that the defendant is testifying against the advice of counsel?
- Should not be done in the presence of the jury (though doing so is not necessarily reversible error).
 - *United States v. Campbell*, 616 F.2d 1151 (9th Cir.), cert. denied, 447 U.S. 910 (1980)

Perjurious client

- Does refusal to call the perjurious client to the stand violate the client's constitutional rights?
 - *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984), *cert. denied*, 475 U.S. 1064 (1986)
 - Such refusal did not violate client's constitutional rights.
 - *People v. Johnson*, 72 Cal. Rptr. 2d 805 (Cal. Ct. App), *cert. denied* 119 S.Ct. 262 (1998)
 - Rejected *Curtis* rationale and found that the "narrative approach" was best.

Perjurious client

- Counsel should strongly discourage the defendant from taking the witness stand to testify perjurally and must not assist in the client committing perjury.
 - ABA Standards, § 4-7.5, at 221 (Commentary) & n.1 (noting lack of consensus on what defense counsel should do).

Perjurious client

- If persuasion doesn't work, should the attorney seek to withdraw?
- Counsel may seek to withdraw, but should not inform the court of the reasons for doing so.
 - ABA Standards, § 4-7.5 (Commentary); AMRPC, Rule 1.2, Comment.

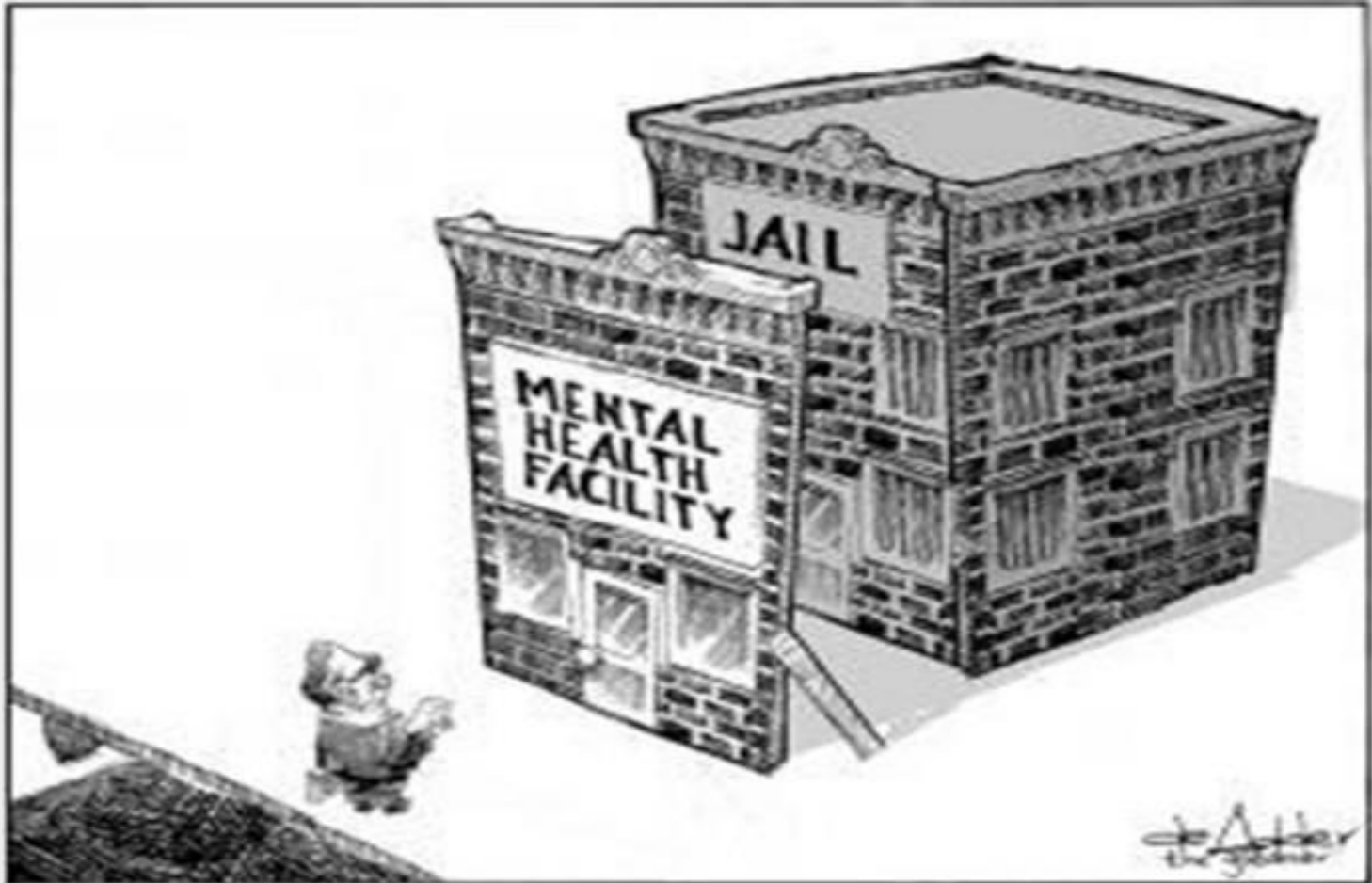
Perjurious client

- The judge does not allow withdrawal. What then?
- If withdrawal is impossible or will not remedy the situation, the advocate should make disclosure to the court.
 - ABA Standards, § 4-7.5 (Commentary); AMRPC Rule 3.3 (Comment).

Perjurious client

- How much does an attorney have to know before concluding that his client's testimony will be perjurious?
- *Commonwealth v. Mitchell*, 781 N.E.2d 1237 (Mass.), *cert. denied*, 539 U.S. 907 (2003)
 - Discusses multiple standards – “good cause,” “compelling support,” “knowledge beyond a reasonable doubt,” “actual knowledge,” “firm factual basis,” and eventually adopts “firm basis in objective fact.”

Mental health issues



Mental health issues

- “Perhaps no area of the criminal defense lawyer’s role is more fraught with confusion and lack of certainty than the question of how to deal with the client is so mentally impaired that he cannot make rational, or completely rational, decisions on his own.”
- “Many lawyers are simply lost dealing with the issue, and justifiably so because their state ethics rules fail to adequately deal with the criminal defense lawyer’s duties to the mentally ill or impaired client and general rules are often difficult to state or apply from case to case.
- John Wesley Hall, Jr. , *Professional Responsibility in Criminal Defense Practice* (2005)

Mental health issues

- *ABA Standards for Criminal Justice – Defense Function, Standard 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 . . .”

Mental health issues

- Mississippi Rule of Professional Conduct
 - Rule 1.14 – Client Under a Disability
- Part (a) instructs that when a client's decision-making ability is impaired, whatever the reason, "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

Mental health issues

- Mississippi Rule of Professional Conduct
 - Rule 1.14 – Client Under a Disability
- Part (b) suggests seeking the appointment of a guardian or taking other protective steps when the lawyer believes that the client cannot act in his or her own interest.

Mental health issues

- Mississippi Rule of Professional Conduct
 - Rule 1.14 – Client Under a Disability
- Part (c) authorizes an attorney to reveal confidential information to the extent necessary to protect the client's interest.

Questions of indigence

Lonnie Weber gets appointed to represent a client found to be indigent. During one of the first meetings, the client says, "Lonnie, if you do me right, I got a big stash of cash buried in my backyard, and I can cut you in on that." Lonnie sees that the client reported no cash on hand on his financial affidavit. What does Lonnie do?

Questions of indigence

- Under Texas law, in this scenario the Rules of Professional Conduct require the disclosure of the facts to the court in order to avoid assisting the client in a criminal or fraudulent act.
- Tex. Comm. on Prof'l Ethics, Op. No. 473, 1992 WL 792966 (May 1992)

Questions of indigence

- What if the disclosures were true at the time of the appointment, and counsel later learns that his client's financial status has changed?
- Same, disclosure required.

Final hypothetical

If you're driving through the Delta, and there's a six-foot tall gorilla holding a banana on the side of the road, should you stop and take your picture with it?



*The
End*