THE ETHICS PRESENTATION

Ethics for Public Defense

Ethics for Public Defense: What are the Rules?

Attorney/Client Relationship
- Confidences
- Rights

Attorney/Others Relationship
- Honesty and Candor
- Overreaching
Rule 1.6 (a) Lawyer may not reveal information acquired during professional relationship without consent, unless permitted by (b)

Exceptions?
- RPC/court order
- Commission of a crime
- Reasonably certain death or bodily harm
- Prevent or mitigate client’s crime or fraud in using lawyer services

Competing Obligations:
Rule 1.2 (d) - Shall not counsel a client to engage in conduct lawyer knows to be criminal or fraudulent, but may discuss the legal consequences of any proposed course of conduct.

Competing Obligations:
Rule 3.1 - May not assert factually or legally frivolous positions, but a criminal defense lawyer may defend a proceeding by requiring that all element of the case be established.
Competing Obligations:
Rule 3.3 - Candor Toward Tribunal: may not make false statement of material fact or offer evidence that the lawyer knows to be false
• may refuse to offer evidence she reasonably believes to be false
• Exception: defendant’s testimony

Competing Obligations:
Rule 4.1 - Truthfulness In Statements to Others. Must be truthful, but no obligation to inform opposing party of relevant facts.

Cases and Rulings
• CPR 313 (lawyer may not volunteer confidential information about client’s prior conviction)
• RPC 33 (1988) (Attorney has no affirmative duty to disclose client’s false name and record but cannot allow client to commit perjury)
• 98 FEO 5 (lawyer may remain silent when ADA misrepresents client’s record but may not seek limited privilege)
• 2008 FEO 1 (lawyer may not offer evidence using undisclosed alias of client, at least in civil case)
Rule 1.14 Client With Diminished Capacity:
(a) As far as reasonable, maintain a normal client-lawyer relationship
(b) When client is at risk of substantial physical, financial or other harm and cannot act in own interest, lawyer may take protective action
(c) Must keep client’s information confidential, and is only authorized to reveal information about client to extent necessary to protect client’s interests.

2014 Formal Ethics Opinion 5:
In civil case, attorney must advise client regarding legal impact of postings on social media sites. If counsel determines that removing existing postings does not constitute spoilation, counsel may advise client to remove postings, but should advise client to retain a copy. Counsel may advise client to increase privacy settings if such advice does not violate the law or a court order. (But see Rule 3.4)

98 Formal Ethics Opinion 2: Attorney may explain the effects of service of process but may not advise client to evade service
Cases and Rulings
Rule 3.4 A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

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Cases and Rulings
RPC 221 (1995) – Absent legal authority, lawyer may
• take possession,
• examine,
• return evidence to its source, and
• advise source of legal consequences of possession or destruction of evidence)

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Cases and Rulings
RPC 221 (1995) – Absent legal authority, lawyer may
• take possession,
• examine,
• return evidence to its source, and
• advise source of legal consequences of possession or destruction of evidence)
BUT
2007 FEO 2 – lawyer may not take possession of contraband)
Rule 1.2(a)(1): defendant has the authority to decide
- Plead guilty/go to trial
- Testify after consultation with the lawyer

Rule 1.4: attorney must keep client informed
- Giving client sufficient information to make informed decisions
  - can fulfill by providing a summary and consulting with the client about relevance
Cases and Rulings

Rule 1.2(a)(1): defendant has the authority to decide
• Plead guilty/go to trial
• Testify after consultation with the lawyer

Rule 1.4: attorney must keep client informed
• Giving client sufficient information to make informed decisions
  can fulfill by providing a summary and consulting with the client about relevance unless client objects to summary

Rule 3.4: A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Cases and Rulings

Rule 1.7 Conflict of Interest: Current Clients
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) the representation of one or more clients may be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.
Cases and Rulings
Rule 1.7 Conflict of Interest: Current Clients
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if the lawyer:
• reasonably believes she can provide competent and diligent representation to each affected client
AND the representation is
• not prohibited by law
• does not involve a claim by one client against the other AND
AND the client
• gives written informed consent

Cases and Rulings
Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Cases and Rulings
Rule 1.9 Duties to Former Clients
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
Cases and Rulings

Rule 1.9 Duties to Former Clients
(c) A lawyer who has formerly represented a client in a matter shall not:
• use information relating to the representation to the disadvantage of the former client except as the rules allow or require, or when the information has become generally known; or
• reveal information relating to the representation except as the rules allow or require

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Cases and Rulings

2010 Formal Ethics Opinion 3: A lawyer who represents a client who is a witness in a matter in which the lawyer represents another client, and to effectively represent the client on trial the lawyer must cross-examine the client-witness, then there is a concurrent conflict of interest, and that conflict cannot be waived

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Cases and Rulings

2011 Formal Ethics Opinion 2: Delay on the part of a former client in objecting to conflict of interest is not, by itself, a waiver of the conflict, but is one factor to consider in whether the lawyer must now withdraw from representing their current client

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Cases and Rulings

2011 Formal Ethics Opinion 3: You may not assist client in fraudulent conduct, but under Rule 1(d) may advise client on consequences of any proposed course of conduct. You may therefore tell client that posting bond may speed up deportation and result in dismissal of the case.

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Cases and Rulings

2011 Formal Ethics Opinion 3: You may not enter a notice of appeal simply for delay or for a frivolous reasons. Seeking to enforce your client’s constitutional right to a trial de novo is not simply for delay or frivolous and therefore you may enter notice of appeal.

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Cases and Rulings

2005 Formal Ethics Opinion 3: Attorney may not threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5: Attorney may seek information about immigration status in discovery, but may not report status to ICE unless required to do so by law.

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Cases and Rulings

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Rule 4.2. (A) - During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless with consent of other lawyer or authorized by law.

RPC 93 - Counsel may not speak with represented persons, even when not technically co-defendants, and even when persons initiate contact, without permission of their counsel.
Rule 3.4 - A Lawyer shall not: (f) request a person, other than a client, to refrain from voluntarily giving relevant information to another party unless that person is an employee or relative of the client and the lawyer reasonably believes the person will not be adversely affected by not giving the information.

Cases and Rulings
79 DHC 10: (Censured for informing party that his client would not testify against him if other party would also plead the Fifth)

State Bar v. Graves, 50 N.C. App. 450 (1981) (although it is not unethical to advise a witness to take the Fifth, it is unethical to tell witness that if they do not testify, the defendant will also not testify)

In re Palmer, 296 N.C. 638 - (1979) (censuring lawyer for not moving to withdraw when learned of “scheme” in which co-defendants agreed to switch who was driver in fatal accident)

State v. Rogers, 68 N.C. App. 358 - (1984) (affirming conviction of attorney for telling them they could leave court after agreeing to pay damages)