

## FACING THE INEVITABLE: ETHICAL ISSUES IN DRUG CASES

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A telling commentary, when discussing ethical issues concerning lawyers involved in major criminal cases, particularly drug cases, is the sad fact - but nevertheless very real - that sometimes the public has to be reminded that the word “criminal” in criminal lawyer - like the word “baby” in baby doctor - is a description not of the professional, but rather, of the clientele. There seems to be an exponentially growing increase of incidents where criminal lawyers are finding themselves the targets of governmental scrutiny - up to and including indictment - as a result of their representation of persons accused of crime. Although some of the problems encountered by attorneys are self-induced in various fashions, there definitely exists a governmental bent to further prosecutorial maneuvering by involving criminal lawyers in investigations and prosecutions of their clients through IRS Summonses, Grand Jury Subpoenas, and Contempt Proceedings. The point is this; the criminal defense bar is at risk, the plethora of hurdles, obstacles, and pitfalls seem to increase continually, and the old saw “an ounce of prevention is worth a pound of cure” rises up, shakes the dust off itself, and exudes present day significance. The multitude of issues confronting the professional responsibility of the criminal defense bar is beyond the scope of this or any other short manuscript, however, hopefully a few issues will be addressed that may give some practical guidance in dealing with some of the more frequently encountered problems. For an exhaustive, all-inclusive examination of virtually every issue that could conceivably confront a criminal practitioner, it is wholeheartedly recommended that you consult John Wesley Hall, Jr.’s treatise, Professional Responsibility of the Criminal Lawyer, Second Edition (1996, Clark Boardman Callaghan, New York, New York).

Since the title of this manuscript is “Facing the Inevitable: Ethical Issues in Drug Cases” and, because an attorney’s zeal or vigor in representing a client often leads to an attorney being confronted with some official inquiry or potential sanctions, an examination of a criminal defense lawyer’s duty to his or her client is in order. The original ABA Canons of Professional Ethics (1908) spoke to the lawyer owing the client’s cause “warm zeal”, zeal being traditionally defined as fervor for a person or cause or enthusiastic diligence. The almost ninety years that have elapsed since the “warm zeal” days have not provided a great deal more guidance. Canon 7 of the Code of Professional Responsibility states “A Lawyer Should Represent a Client Zealously Within The Bounds of the Law.” Obviously, this statement is susceptible of numerous interpretations depending on one’s own moral, philosophical, and even constitutional principles. Although perhaps the very nature of the beast does not lend itself to precise, finite definition, perhaps some insight can be gleaned from examining several different areas of concern.

Client perjury is something every criminal defense lawyer has confronted and probably wrestled with, in terms of what exactly are counsel’s ethical considerations. Client perjury is at the crossroads of the right to effective assistance of counsel, the principles of confidentiality, the lawyer’s duties of zeal and fairness, as well as the law relative to subornation of perjury. The accused in a criminal case has a right to testify or not, as he so chooses. If however, he chooses to testify, he has a duty to testify truthfully. Harvis v. New York, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971); Nix v. Whiteside, 475 U.S. 157, 89 L.Ed. 2d 123, 106 S.Ct. 988 (1986). If the defendant testifies falsely, he can be impeached even by evidence which was illegally seized. United States v. Havens, 446 U.S. 620, 64 L.Ed. 2d 559, 100 S.Ct. 1912 (1980). Accordingly, there is no constitutional right for the accused to commit perjury in his own defense; one must testify truthfully or suffer the consequences. Additionally, “the right to counsel includes no right to have a lawyer

who will cooperate with planned perjury.” Nix v. Whiteside, supra at 173.

When a criminal defense lawyer permits a client to testify to a false story after failing to convince the client of the error of his ways, has the lawyer acted “within the bounds of the law”? John Wesley Hall answers that question emphatically in the affirmative and gives some guidance as to how to handle such a situation. Please note the distinction of the criminal law prohibition that an attorney who aids the client in committing perjury also participates in the perjury either as an aider and abetter or an accessory or in suborning perjury.

In a situation where the client informs the lawyer that the client will be lying on the stand, defense counsel has an obligation to seek to prevent the perjury from occurring. The first thing the attorney should do is tell the client that perjury is a crime and that trial perjury can be considered by the sentencing court - as in the U.S. Sentencing Guidelines. If the client is bent on providing perjured testimony, some authorities suggest that counsel should withdraw. Other Courts have suggested that the appropriate manner of handling such a situation is the “free narrative” approach where the defendant tells his story on his own and defense counsel cannot and does not argue the perjury to the jury. Whiteside v. Scurr, 744 F.2d 1323 (8<sup>th</sup> Cir. 1984), rev’d, 475 U.S. 157, 89 L.Ed. 2d 123; 106 S.Ct. 988 (1986). The most controversial approach is for counsel to advance the client’s perjury as any other evidence, however, this appears to be highly problematic.

The best solution appears to be for the attorney to not withdraw because the situation is likely to recur with another lawyer. Additionally, if counsel moves to withdraw, the Court invariably will seek to determine the reason and perhaps even the exact nature of the perjury. The obvious effect will be to prejudice the client and to violate the duty of loyalty to that client. If counsel does decide that withdrawal is mandated, what happens if the Trial Court orders the lawyer to disclose the perjury? Counsel should risk contempt and protect the client’s confidence. Sanborn v. State, 474

So.2d 309 (1985). In all cases of intended perjury, counsel is, of course, barred by the duty of confidentiality from disclosing it to the Court. The lawyer's duties to his client and the Court are best served if the lawyer tells the client in no uncertain terms that perjury is not the only unethical for the lawyer, it is a crime for all participants. The lawyer should then, if possible, continue with the case and take whatever measures possible to prevent the perjury, including refusing to call the client as a witness. In some cases it may be possible to put the client on and keep him or her away from the question and answer that would cause the perjury. The client needs to be told how easy it is to insult the intelligence of a jury and, generally, just how shallow and/or preposterous the planned perjury is anyway and how those facts will likely be reflected in any verdict and sentence. If common sense fails after full disclosure and admonition, the "free narrative" approach is available to those clients who insist on exacerbating an already bad situation. [Note: The rule differs greatly from criminal to civil cases. In civil cases, counsel must immediately withdraw, even in the midst of trial. In re Hardenbrook, 135 A.D. 634, 2 Civ. Proc. N.S. 8, 121 N.Y.S. 250 (1909), *aff'd*, 199 N.Y. 539, 92 N.E. 1086 (1910).]

A burgeoning number of cases involve the criminal defense bar and currency transaction reports, and even potential money laundering offenses. Money laundering is a crime under 18 U.S.C. Section 1956-57 and lawyers can be convicted of money laundering if they receive ill-gotten gain as a fee with reason to know what it is and for failure to report cash fees or for structuring cash transactions to avoid reporting requirements. In one case, a lawyer was convicted of a money laundering-type offense for creating a corporation to disguise drug profits for the client. United States v. Popkin, 943 F.2d 1535 (11<sup>th</sup> Cir. 1991), *cert. denied*, 503 U.S. 1004, 118 L.Ed. 2d 423, 112 S.Ct. 1760 (1992) (26 U.S.C. Section 7212; attorney also created false tax returns to hide drug profits).

The Form 8300s have become, in effect, a vastly more valuable and extensively used law enforcement tool than was originally anticipated. As everyone is now aware (hopefully) every “trade or business” receiving more than \$10,000 in “cash” in a transaction or a group of related transactions must file a currency transaction report (CTR) with the IRS on a Form 8300. Since the investigatory value of these forms became evident, case law has been generated, much of it having implications for attorneys. A lawyer filing a Form 8300 about a client in a pending case could very well be revealing confidential and privileged information which would sacrifice the 5<sup>th</sup> and 6<sup>th</sup> Amendment rights of one’s client. Aside from the client’s rights, an attorney who fails to report a reportable transaction when he or she knows to do so or who structures a transaction to avoid the reporting requirements has committed a crime. Additionally, a lawyer aiding a client to avoid a CTR may be guilty as a conspirator or aider or abetter or as a money launderer. Willful failure to file a Form 8300 when required or structuring a transaction to evade reporting is a crime. In addition to civil penalties, 26 U.S.C. Section 7203 provides:

Any person required under this title to pay any estimated tax...or...tax, or required by this title or by regulations made under authority thereof to make a return, keep any record, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such record, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more that \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more that 1 year, or both, together with the costs of prosecution.... In the case of a willful violation of any provision of Section 60501I, the first sentence of this section shall be applied by substituting “felony” for “misdemeanor” and “5 years” for “1 year”.

Additionally, under Section 2S1.3 of U.S.S.G., willful failure to file a Form 8300 is a level 6 offense plus it is increased according to amounts. If the funds were the proceeds of unlawful activity, the offense level is increased by two. Make no mistake about it, the Government is increasingly investigating and prosecuting attorneys on CTR offenses.

The general rule of reporting transaction is simple: when in doubt, file a report. It is

relatively easy and it is said better to be safe than sorry. There is a wholly separate issue about asserting a privilege on the form if necessary; those matters will be discussed hereafter. The basics of the Form 8300 ask for a substantial amount of information about the payor of the money (which the recipient is required to obtain), the person or business receiving the money, the nature and amount of the transaction, and the method of payment. The Form must be filed within 15 days of the triggering transaction, must be provided to the payor, and must be kept of record for five years. Once again, when in doubt, file a report. If the payor's identity should not be disclosed because of confidentiality or other considerations, assert the privilege but still file the report. The penalties are too onerous to run the risk that the client will not report the fee paid to the lawyer in an effort to get leniency or a reward (31 U.S.C. Section 5323 re: rewards to informants).

John Wesley Hall, Jr.'s Professional Responsibility of the Criminal Lawyer's opening chapter has a simple, but, as often in cases of simplicity, a true and valid checklist of rules for an ethical and profitable criminal defense practice. Rule No. 1: The lawyer should not be the one to go to jail. Rule N. 2: Whom should you trust? Never trust the client, his or her friends, witnesses, or relatives. Rule No. 3: Say nothing or do nothing that you would be afraid to read in the newspaper or in a transcript or hear in a courtroom some day. Rule No. 4: Avoid being sucked into conspiracies and other crimes. Rule No. 5: Always be fair and honest to the client, the Court, your opponent, and yourself. With these sententious rules in mind, an examination of a factually accurate scenario might reveal some insights into a plight encountered by at least one criminal defense attorney. The facts are essentially thus: attorney was approached by father to represent son, both father and son recently having been indicted on a multiple count federal drug conspiracy. Father wants to retain attorney for son and agrees to pay attorney's \$30,000 retainer but requests that attorney not report this cash transaction at this time, since it could be implicative of conspiratorial activity.

Additionally, would attorney abandoning his usual, proper methods of becoming involved in a case, agrees to the scenario, goes to the apartment, picks up the cash and stashes it in a safety deposit box. The attorney made an appearance for son, and began his representation with zeal and diligence. Unfortunately, both father and son decided to plead guilty and, in the course of doing so, “rolled” on attorney, who is now being aggressively pursued for not only a CTR violation, but also money laundering and, potentially tax evasion. All of this notwithstanding attorney’s heretofore excellent reputation in all Courts in numerous serious endeavors.

This factually accurate story concerning an out-of-state attorney was discussed hypothetically with an IRS - CID Agent who confirmed that, yes indeed, he would recommend prosecution on the CTR and money laundering and was last heard from ruminating wistfully on the possibility of a tax evasion case against the attorney. The probe of the attorney quickly jettisoned over and above the large scale narcotics case involving father and son, as prosecutor and agents brought another “target” defendant within their scopes’ sights.

In analyzing this example, it is difficult to find a truly viable defense to the CTR violation. This situation is a perfect example of the maxim “when in doubt file and assert the privilege”. As far as the money laundering count, the IRS would have to prove that attorney knew the cash came from illegal activity and that attorney did something to further or conceal that activity. Hopefully this would be an uphill battle although the IRS would define the payment as a financial transaction. The tax evasion aspect is largely prosecutorial wishful thinking under these facts. The lesson to be learned is to be mindful of Hall’s Rules and that there are limited defenses to failing to file a Form 8300 and multitude of problems attendant to such a failure. Conviction for failure to file CTRs can result in discipline. In In re Ettinger, 159 A.D.2d 187, 559 N.Y.S.2d2 (1<sup>st</sup> Dep’t 1990) (only censure imposed because of cooperation); In re Perlmutter, 141 A.D.2d 253, 533 N.Y.S.2d 860 (1<sup>st</sup> Dep’t

1988) (treated as analogous to misdemeanor of falsifying business record under state law, but is still a serious crime). Additionally, once a lawyer goes to jail for a CTR violation, disciplinary action will likely follow as a matter of course.

-THE LAWYER AS “FEE POLICE”-

The Government continues in its quest to force defense counsel to become witnesses against their clients, principally around the issues as to the amount and source of counsel’s fees, as required to be reported on the Form 8300's.

The National Association of Criminal Defense Lawyers, numerous bar ethics committees, and untold criminal defense practitioners are of the opinion that disclosure of the client information required in Form 8300 violates the lawyer’s duty of client confidentiality and the attorney-client privilege and the client’s right to counsel (of choice) and the privilege of self-incrimination. This is decidedly the better view when a case is still pending. At least as to reports due while a case is pending, the lawyer then should file an amended Form 8300. United States v. Sindel, 53 F. 3<sup>rd</sup> 874, 75 A.F.T.R.2d (P-H), 95-1894 (8<sup>th</sup> Cir. Mo. 1995) reh’g denied, 1995 U.S. App. Lexis 16550 (8<sup>th</sup> Cir. Mo. July 6, 1995); United States v. Gertner, 873 F. Supp. 729 (1<sup>st</sup> Cir. 1995). Accordingly, when a criminal defense lawyer prepares a Form 8300 for filing, to report the receipt of over \$10,000 in “cash”, as he or she must, the client identifying information may, depending on the totality of the circumstances confronting the lawyer, have to be withheld from the Government. It is necessary to tell the IRS why one is withholding client identifying information and to advise that an amended Form may be provided at a later, more appropriate time. Once the case is closed, the lawyer has a probable duty under Section 6050I to file supplemental report on Form 8300 and to disclose the previously withheld information. Depending on the facts and overall situation, it may be necessary in some cases to continue to plead privilege after the case is closed if “exceptional

circumstances” exist and the cases do not foreclose this possibility.

An excellent article concerning Court rulings on these and related issues appeared in The Champion, Jan./Feb. 1996, the publication of the National Association of Criminal Defense Lawyers. The fact that the article in question was authored by this author’s co-chair, Thomas Maher, in no way influences the preceding statement. The article speaks for itself.

A favorite decision was one by the First Circuit, wherein the IRS was required to follow the procedure for obtaining a John Doe summons when seeking the identity of a client who paid funds that were reported on a Form 8300. United States v. Gertner, 65 F.3rd 963 (1<sup>st</sup> Cir. 1995). In that case the District Court had refused to enforce an IRS summons to defense counsel who had filed an 8300 without the client identifying information, asserting attorney-client privilege. The Massachusetts Bar Association Ethics Committee informed counsel that the summons must be resisted. The First Circuit held that the District Court could find, without an evidentiary hearing, that the IRS claim that it was investigating defense counsel and not the client, was pretextual. Although the District Court had ruled that the summoned information was attorney-client privilege, unfortunately, the First Circuit did not reach that issue. The decision in Gertner (Id.) is a beautifully reasoned and written opinion by Circuit Judge Selya. The opinion guides the reader through an astute analysis of these issues, all of it written in an immensely readable format. Resort to this opinion recommended for any defense lawyer contemplating asserting privilege on a Form 8300.

An adverse, and scary ruling was pronounced in United States v. Saccoccia, 898 F. Supp. 53 (D. RI. 1995). This case arose as a result of the Government’s request to depose counsel who represented defendants convicted of drug and money laundering offenses. The defendants were ordered to forfeit in excess of 100 million dollars. The Government wanted to depose counsel about the source of their fees, apparently in an attempt to forfeit the same. The District Court approved the

Government's request to take the depositions, and rejected the attorney-client privilege claim. The Court also concluded that even if the fee information would otherwise be confidential because the amounts were derived from the money laundering activities, the crime-fraud exception to the attorney-client privilege would apply because paying with these tainted funds would itself be money laundering under 18 U.S.C. Section 1956, 1957. In essence this Court found that the taking of these fees could be criminal activities by counsel. With that in mind, the Court summarily brushed aside defense counsel's 5<sup>th</sup> Amendment claims. The law in this and related areas is still unsettled, caution is advised. The one thing that can be said with certainty is to file a Form 8300 any time in excess of 10,000 in "cash" crosses your desk, be it lump sum or in installments in related transactions. This rule is true even in a situation where counsel successfully negotiates or litigates for a return of seized cash, even when all of that cash is going back to the client. The corollary to the "always report" rule is that defense counsel can, in appropriate circumstances, rightfully withhold client identifying information on a Form 8300 on a pending case.

The use of grand jury subpoenas to defense lawyers has increased drastically - particularly towards criminal defense lawyers defending drug cases. "The techniques prosecutors are using - grand jury subpoenas, IRS summons processes, actions seeking forfeitures of legal fees, disqualification motions (for conflicts, etc.), unknown, cooperating government witnesses in multi-defendant case meeting, and attempts to entrap attorneys through 'clients' who are in fact working for the Government - are seen by the defense bar as part of a general prosecutorial program to target vigorous and successful attorneys for governmental harassment and to discourage attorneys from representing criminal defendants". Genego, Risky Business: The Hazards of Being a Criminal Defense Lawyer, 1 Criminal Justice 2, 3 (No. 1, Spring, 1986). The rule, however, is that attorneys are not generally exempt from the duty to appear before grand juries. In re Grand Jury Subpoena for

Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, cert. denied, 499 U.S. 959, 113 L.Ed. 2d 646, 111 S.Ct. 1581 (1991). If, in fact, an attorney is subpoenaed before an Grand Jury or to a trial and the information sought is arguably protected by the attorney-client privilege (see, e.g. United States v. Dyer, 722 F.2d 174, 14 Fed. R. Evid. Ser. (LCP) 1368 (5<sup>th</sup> Cir. La. 1983), the attorney has an affirmative duty to assert the attorney-client privilege to preserve the client's privilege until the client makes a decision regarding waiver.

When an attorney is subpoenaed before the Grand Jury to testify about prior representation of a client, whether the subpoena will be enforced under the Sixth Amendment right to counsel depends upon the nature of the information sought. The identity of the client and fee information are very seldom protected by the attorney-client privilege except where it would reveal other privileged information. Re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, supra, 913 F.2d at 1127. Where it appears the subpoena was issued to interfere with the conduct of the defense, the subpoena should be quashed. In re Grand Jury Matters, 751 F.2d 13 (1<sup>st</sup> Cir. 1984). It should be noted that the subpoena can always be objected to as "unreasonable and oppressive" see Rule F.R. Crim. P. 17(c).

In Goodman v. United States (In re Jury Proceedings), 33 F.3d 1060 (9<sup>th</sup> Cir. 1994), the Court held that Sixth Amendment rights could be implicated by subpoenas concerning fee information, if it could be shown that the subpoena was issued for an improper purpose, but showing had not been made in this case. This case involved NACDL Past President Oscar Goodman of Las Vegas and his refusal to divulge client fee information to a Federal Grand Jury. Goodman paid a \$25,000 fine and a daily fine of \$2,500 for ten days prior to producing the records and purging the contempt. These records were ultimately filed in camera and under seal. The Court said that Goodman should have informed his client in advance that fee information is generally unprotected.

It noted further that the subpoena was duces tecum and not directed at Goodman individually. The Court also emphasized that the Government was bending over backwards to permit Goodman to redact any information from the requested fee records which otherwise implicated any confidential communication.

A Fourth Circuit case, In re Special Grand Jury No. 81-1 (Harvey), held that the right to counsel was important enough in the pre-indictment stage to require the Government to make preliminary showing of need in reference to subpoena directed at an attorney. Unfortunately, while rehearing was pending, the target in Harvey was indicted and became a fugitive, and the Fourth Circuit en banc withdrew the panel decision and dismissed the appeal.

As John Wesley Hall, Jr. states: “Subpoenas to defense lawyers are so prevalent and so often abused that defense counsel should never testify ‘against’ the client until there is no longer any choice in the matter. That is, counsel should immediately seek to quash the subpoena to avoid testifying and appeal, if possible, and risk contempt and jail”. Professional Responsibility of the Criminal Lawyer, supra at P. 1010. Hall also suggests that, as a practical matter, the client should intervene in any matter pertaining to a subpoena issued to the client’s defense lawyer to assert the client’s own rights. Once again, for an exhaustive analysis of this and related issues, Hall’s treatise is recommended.

The duty of loyalty to the client is the oldest recognized duty of lawyers. As stated in ABA Stds., the Defense Function Std. 4-1.2.(b): “The basic duty defense counsel owes to the administration of justice and as an officer of the Court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation”. A word of caution however, as to “blind zeal”. A zealous advocate should be just that, and advocate, not an aider and abetter or a co-conspirator. Hall’s Rules, listed earlier in this article, should always be kept

in mind. Legitimate doubts should be resolved in favor of clients and in favor of zealous representation.

As stated by the Court in In re Holloway, 995 F.2d 1080, 1097 (D.C. Cir. 1993) (Mikva, J., dissenting) “[T]rial attorneys are ethically obligated to argue with the Court, to challenge its actions, and to attempt to change its mind.”), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 1537, 128 L.Ed. 2d 190 (1994). An excellent discussion of contempt issues encountered in arguing with the Court is U.S. v. West, 21 F.3rd 607 (1994).

The seminar hypothetical raises an issue pertaining to the duty of loyalty. The payment of attorney fees by others creates potential ethical problems and creates an inherent danger of conflict of interest. Wood v. Georgia, 450 U.S. 261, 67 L.Ed. 2d 220, 101 S.Ct. 1097 (1981), on remand, 158 Ga. App. 309, 280 S.E.2d 439 (1981). All rules require that the client consent to the representation and that the lawyer remain independent from the fee payer in the representation. The loyalty is rightly with the client, not the source of the fee.

There may be some truth to the assertion by Alan Dershowitz that “(t)he real problem with many criminal lawyers is not over-zealousness; it is under-zealousness. Too many lawyers are simply lazy. Their primary concern is their legal fee. They demand their fee in advance, and they know that the up front payment is all they are going to get, regardless of how long or complex the case becomes. Once they get their fee their prime concern is in disposing of the case as quickly as possible so that they can take new cases and earn new fees. There criminal lawyers regard clients the way a department store regards merchandise; the more quickly turned over at a profit, the better.” Dershowitz, The Best Defense, Vintage Books, copyright 1982, p. 411.

One attorney recently earned his way into a “Hall of Shame” of sorts; in Tippins v. Walker, 1996 WL 100770 (2<sup>nd</sup> Cir. (N.Y.)) (March 7, 1996), the Second Circuit affirmed the District Court in

its basic holding that trial counsel rendered ineffective assistance of counsel to the petitioner because he was asleep for a “substantial” portion of the trial, thereby denying petitioner of his Sixth Amendment right to counsel. The Court stopped short of pronouncing a per se rule for sleeping counsel because it did not want to set too broad a precedent because the attorney might start feigning sleep to create grounds for appeal. The case comes complete with a review of a number of sleeping attorney situations.

As stated at the beginning of this text, the public sometimes has difficulty separating the zealous criminal defense attorney from his client; the very fact that a defense lawyer represents a guilty client leads some to conclude that the lawyer must be somehow involved in or condones the client’s activities. Being so regarded is an occupational hazard of all zealous defense attorneys. Such individuals can rightfully take pride in this immutable fact - the zealous defense attorney has historically been shown to be the last bastion of liberty - the final barrier between an overreaching Government and its citizens.