

FEDERAL CRIMINAL DEFENSE TRAINING
Monday, July 20, 2020
Harrisburg, PA

Notes about this presentation

The Ethics Rules discussed during this talk are from the Pennsylvania Rules of Professional Conduct and the ABA Code and Model Rules of Professional Responsibility

Advisory Ethics opinions are from the Pennsylvania Bar's Legal Ethics and Professional Responsibility Committee

Questions regarding ethics issues, opinions and Rules? Contact the Pennsylvania Bar's Legal Ethics and Professional Responsibility Committee. To reach the State Bar Ethics Hotline, call 800-932-0311 or 717-238-6715.

General Ethical Duties of CJA Counsel

Local Rules for the Middle District of Pennsylvania, LR 83.23.2 indicate that the standards of conduct prescribed by the Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of Pennsylvania, except as these standards may be modified by the court

CJA Plan for the MDPA, Part VIII.B. -- Attorneys appointed under the CJA must conform to the highest standards of professional conduct, including but not limited to the provisions of Pennsylvania Rule of Professional Conduct.

Determination of Eligibility for Appointed Counsel in MDPA

The determination of eligibility for representation under the CJA is a judicial function to be performed by a judge after making appropriate inquiries concerning the person's financial condition. Plan § IV.D.1

Title 18 U.S.C. § 3006A

(f). Receipt of other payments.

Whenever the United States magistrate judge or the court finds that funds are available for payment from or on behalf of a person furnished representation . . .

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) [as related to Candor Toward the Tribunal stated in Rule 3.3]

(c) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Communication - Rule 1.4

a) A lawyer shall: . . . (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Explaining Matters

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.

THREE QUESTIONS (+)

Plead guilty or proceed to trial?

Trial before a jury or just the judge?

Testify or remain silent?

[+Whether to Appeal?]

[+With some limitations, whether to act as her/his own advocate?]

See ABA Rules Prof. Cond. 1.2, Comment

Rule 1.2(a): Scope of Representation

A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14. The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

Client With Diminished Capacity Rule 1.14

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.

The Ethics of cross examination

Justice Byron White in *United States v. Wade*, 388 U.S. 218, 241-59 (1967), candidly discussed the search for truth as it relates to advocates for the criminal defendant: Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.

To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.

Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

General Ethical Limitations

- cannot suborn perjury
- cannot engage in conduct involving dishonesty, fraud, deceit or misrepresentation
- cannot allude to any matter that is not supported by admissible evidence or which will lead to admissible evidence

Before asking a question

- must have a good faith legal basis
- and a good faith factual basis
- outright harassment, abuse, or humiliation of a witness for its own sake runs afoul of several Rules and those state codes which demand a certain level of decorum

Ethical Cross

The criminal defense lawyer is not a disinterested truth-seeker

Trial is not, in fact, a search for the truth. Whether the witness is perceived to be an ally, an enemy, or neutral, the cross-examiner should not pass up the opportunity to use leading questions to draw from the witness any bit of evidence that will support or corroborate the client's theory of the case, or contradict that of the prosecution.

The criminal defense attorney's job during cross examination is to fashion and present questions and try to elicit answers that convey a version of the truth - **the client's version.**

As part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

Good Faith Basis

The good faith basis rule, in addition to being an actual ethics rule, also exists as a rule of evidence.

Arguably, Federal Rule of Evidence 403 and its prohibition on evidence that would represent unfair prejudice encompasses the good faith basis rule. Rule 3.4(e) is silent with respect to what level of proof constitutes "admissible evidence" decisional law has provided that a "reasonable suspicion" that the facts implied by the question are true will suffice to satisfy an attorney's ethical obligations.

Two-part test requires both factual and legal basis for questions

- Factual basis requires some objective indication that the fact you seek to elicit is true
- Legal basis means evidence must be admissible or lead to admissible evidence with proper foundation, and questions in proper form

Discrediting the truthful witness

There are two goals in cross-examination.

- elicit favorable testimony from an adverse witness to strengthen your case
- discredit the witness to weaken that of the opponent. The following discussion focuses on the second of those goals.

Whether it is ethically permissible to suggest that a truthful witness is lying during cross-examination has been famously characterized as one of the 'three hardest questions in terms of the ethical dilemmas faced in the practice of law. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469, 1469 (1966). The other two are: Is it proper to put a witness on the stand when you know he will commit perjury? [and] Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?

During a criminal proceeding, defense counsel may attack an adverse witness' credibility through cross-examination. "[T]he cross-examiner seeks to show that the witness is unworthy of belief as a person. . . . [by bringing] out those things . . . that affect [the witness'] credibility. . . ." See, Fred Lane, *Goldstein Trial Technique* §19.14 (3d ed. 1998). Even when an attorney "has no doubt of the accuracy and honesty" of an adverse witness,

an experienced lawyer will prey on the witness' weaknesses "in order to confuse the witness and make it appear that he is concealing significant facts." Jerome Frank, *Courts On Trial: Myth and Reality in American Justice* at page 82 (1949).

Whether the criminal defense attorney may ethically discredit the truthful witness on cross-examination and later seize upon it again during closing argument has long been an area of controversy in legal ethics. See e.g., W. Bradley Wendel, *Whose Truth? Objective And Subjective Perspectives On Truthfulness In Advocacy*, 28 Yale J.L. & Human 105 (2016); Albert Alschuler, *How To Win The Trial Of The Century: The Ethics Of Lord Brougham and The O.J. Simpson Defense Team*, 29 McGeorge L. Rev. 291, 291-92 (1998). While requiring zealous advocacy even for the guiltiest of defendants, care must always be taken to stay within the bounds of ethics. But can you intentionally create a false impression through the selective use of evidence, trickery, and half-truths? For example, is it proper to discredit a witness whom you know to be telling the truth, leaving the jury with the false impression that the witness is mistaken?

The defense attorney is not only permitted but may actually be required to attack the reliability or credibility of the witness. "Vigorous advocacy by defense counsel may properly entail impeaching or confusing a witness, even if counsel thinks the witness is truthful, and refraining from presenting evidence even if he knows the truth." *United States v. Thoreen*, 653 F.2d 1332, 1338-39 (9th Cir. 1981), cert. denied, 455 U.S. 938 (1982).

Decades ago ethicists believed no client is entitled to have his lawyer score a triumph by superior wits over a witness who the lawyer believes is telling the truth. Francis L. Wellman, *The Art of Cross-Examination* 204-05 (4th ed. 1936).

But should it be so when your client's liberty is at stake? Doesn't a criminal defense lawyer owe a higher duty to the Constitutional mandate of effective representation, to the Rule requiring competent representation, and to the principle that in an adversary criminal justice system the defense must make the prosecution establish guilt beyond a reasonable doubt?

Some have answered the question with a complex moral bromide. In the abstract, every lawyer must weigh whether his or her actions during the course of trial conform with a high moral standard, but that calculus must include the requirements of ethics and the law in the context of the constitutional duty to the client. In most cases, cross-examination is not a weapon to get criminals off but it is a tool for the defense to put the government to its proof. When a lawyer encounters someone he knows to be telling the truth, the integrity of the witness should always be taken in consideration, but that should not be

the overarching concern. Likewise, faced with a weakened or damaged witness, the advocate must still go about the task of cross-examination fearlessly and forcefully.

Armed with a good faith basis and seeking to discredit the witness, should a lawyer cross examine someone he/she may literally destroy? The answer should always be 'yes' where, if you do not do it, an innocent client might stand to face conviction or the prosecution's burden of proof beyond a reasonable doubt is lessened to a mere platitude. One has an obligation to cross-examine even the emotionally or psychologically weak witness, and not pull any fair punches.

A pertinent cinematic characterization of this point comes from *The Caine Mutiny*, with Humphrey Bogart as Captain Queeg and Jose Ferrer as defense attorney Barney Greenwald. Lt. Steve Maryck, first officer aboard the U.S.S. Caine, relieved Queeg of command when the Captain panicked and froze on the bridge during a typhoon due to what Maryck perceived was a mental breakdown. Maryck is now on trial on the charge of causing mutiny. A team of psychiatrists has pronounced Queeg "completely sane." In fact, suffering from what appear to be classic PTSD symptoms, Queeg is emotionally unstable.

An ethical dilemma exists when there are two morally correct courses of action but they conflict with one another and cannot both be followed. There is no ethical dilemma here, but fictional Defense Attorney Greenwald senses a moral one.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system. . . . The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Pennsylvania Rules of Prof. Conduct Preamble, cmt. [9], and Scope, cmt. [15].

It is common for criminal defense lawyers to be faced with an ethical dilemma and to feel like they are between a rock and a hard place. If the lawyer is forced to discredit a witness, the attorney's need to do the right thing for the client is met but the witness' right to an unblemished reputation is negated. The criminal defense lawyer would be doing something right and wrong at the same time. Because it is an adversarial system cast in the light of constitutional obligations, within the bounds of the Rules of Ethics and the law, the appropriate moral stance for the lawyer representing a criminal defendant client is to do what needs to be done. You do not have to like it. You may later feel uneasy. "But this is the business we've chosen." Hyman Roth (Lee Strasberg) in *The Godfather, Part II* (1974), directed by Francis Ford Coppola, book and screenplay by Mario Puzo, production by Paramount Pictures and The Coppola Company.

Conclusion

Trial lawyers in criminal cases are obliged to recognize and preserve the right to a fair trial while diligently representing their clients, applying legal principles to the facts. Concepts of fairness and professionalism are not mere formalities. Rather, they are "an atmosphere in which justice can be done." *Code of Pretrial and Trial Conduct*, ACTL, 2009.

A portion of the closing argument by fictional attorney Frank Galvin in the 1982 film *The Verdict* is worth consideration in this discussion of ethical responsibilities and the moral demands of the profession:

You are the law. Not some book, not the lawyers, not the trappings of the court. See those are just symbols of our desire to be just. They are, in fact, a prayer: a fervent and frightened prayer. In my religion, they say, "Act as if ye had faith . . . and faith will be given to you." If we are to have faith in justice, we need only to believe in ourselves. And act with justice. See, I believe there is justice in our hearts.

Ethics is about following the rules, and integrity is about doing the right thing, regardless of the rules. Most of us are just trying to stay out of trouble because the rules have been spelled out and generally clear, and to do other than following the applicable Rules of Ethics would warrant an end to one's career. That doesn't mean we wouldn't charge ahead with those same behaviors if they were not prohibited. Integrity comes from a greater depth of character and a knowledge of what it means to be an honorable representative of the criminal accused. Experienced criminal defense trial lawyers, masters of the art of advocacy, must develop the highest standards of ethical conduct, professionalism and civility in all aspects of the practice.