



Wait - Can I Do That?

Resolving Ethical Conundrums in Federal Criminal Defense

FEDERAL CRIMINAL DEFENSE TRAINING

FEDERAL PUBLIC DEFENDER FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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PANELISTS:

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CONUNDRUM 1

- ▶ Your client, Gill Bates, has been indicted for wire fraud, mail fraud, and money laundering for selling stock in his computer company that is allegedly worthless.
- ▶ The SEC has been pursuing a parallel civil suit against Mr. Bates for securities fraud for quite some time now.
- ▶ While you are in the courtroom, Mr. Bates requests appointment of the Federal Defender and claims that he is not reasonably able to afford counsel given all of the money he has spent fighting the SEC.
- ▶ The court demands that Mr. Bates fill out a CJA 23 Financial Affidavit, but Mr. Bates refuses to do so invoking his right against self-incrimination.

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- ▶ Can the court refuse to appoint counsel based on Mr. Bates' refusal to fill out the CJA 23 Financial Affidavit?

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- ▶ The Court asks you for your advice on how to handle Mr. Bates' refusal to fill out a CJA 23 Financial Affidavit. What do you tell the Court?

- ▶ Two weeks before his trial, Mr. Bates tells you that he will supplement your salary with \$75,000 that he has hidden away if you will fight extra hard for him at trial.
- ▶ When you laugh this comment off, Mr. Bates takes out his bank statement for his bank account in Panama and proves to you that he can pay you \$75,000.



What, if anything, do you do now?

CONUNDRUM 2

- ▶ You have been appointed to represent Ronald, who has been charged with being a felon in possession of a firearm and has been detained.
- ▶ Ronald has a history of mental illness.
- ▶ Ronald was arrested while placing the firearm into the trunk of his automobile. If Ronald enters a plea of guilty, his Sentencing Guideline range will be 24-30 months.
- ▶ When you visit Ronald, he begins smearing his feces on the wall of the visitors' booth and screams about your work as an FBI agent and your surveillance of him for the past 2 years.

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- ▶ You file a motion to have Ronald examined for a determination of mental competency, and the Court orders that Ronald be sent to Butner Medical Center for an evaluation.
 - ▶ A staff psychologist at Butner contacts you and asks for **all** psychiatric and psychological reports that you have in your file on Ronald.

- ▶ Can you send the reports in your file to the psychologist at Butner?
- ▶ Should you send the reports in your file to the psychologist at Butner?
- ▶ If you had two reports that indicated that Ronald suffered from schizophrenia and was nonviolent and one report that opined that he was a dangerous sociopath malingering mental illness, can you send the two favorable reports and not the third?



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- ▶ Ronald returns from Butner where it was determined that he was incompetent but that he was capable of being restored to competency. After a hearing, the Court agrees and orders that Ronald be returned to Butner so that his competency could be restored.
 - ▶ Ronald has been in custody for 16 months, which is only 8 months short of the low end of the guideline range. You believe that if Ronald is returned to Butner, it will have much longer than 8 months to resolve the case.
 - ▶ Ronald tells you that he wants to plead guilty.

WHAT SHOULD YOU DO?

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- ▶ Assume that the Court orders Ronald to undergo competency restoration at Butner. By the time he returned, he has been in custody for 24 months.
 - ▶ The report from Butner indicates that he is currently competent to proceed.
 - ▶ Ronald is still unable to have meaningful discussions about the case and he continues to question whether you work for the FBI. However, during lucid moments, he indicates if it will get him out of jail, he wants to plead guilty.

Should you seek an independent
psychiatric examination?

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- ▶ You obtain a psychiatric examination of Ronald. Your expert agrees with Butner that Ronald is competent as long as he stays on his medication.
 - ▶ The prosecutor offers a plea bargain of time served (now 27 months) and three years of supervised release.
 - ▶ Based on your discussions with your expert, you believe that as soon as Ronald is released he will go off of his medications and will probably threaten someone.

What should or can you do, if anything?

CONUNDRUM 3

- ▶ Your client, Cynthia, is charge with conspiracy to commit bank fraud along with 3 other co-defendants. Cynthia is free on bond and insists on going to trial.
- ▶ On the internet, you go to Cynthia's Facebook page and discover that it has a picture of the bank allegedly defrauded and the following caption under it: "Cash money the easy way – Cha-ching!"

Do you ask Cynthia to remove the picture and caption?



- ▶ When you receive the list of potential jurors, you :
- ▶ (1) go on the Internet and look at each potential juror's Facebook page to learn about their personal lives and any prejudices that they might have.
- ▶ (2) look at each potential juror's LinkedIn profile, which somehow alerts each potential juror that you were viewing or attempting to view the profile.

Have you violated the rules of professional ethics by taking the actions (1) or in (2)?



- ▶ Prior to trial, you ask your investigator to look into Juanita Gutierrez, who is the bank teller who identified your client as the person who opened bank accounts in fictitious names.
- ▶ Your investigator poses as a 20-year-old female named Miley Cyprus and gets Juanita to accept her as her friend on Facebook. Your investigator then gathers impeaching information from Juanita's restricted Facebook page.

Have you or your investigator
violated the rules of professional
ethics?



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- ▶ Cyrus Shallow is an Assistant Federal Defender who knows nothing about Facebook, Twitter, LinkedIn or any other social media.
 - ▶ Cyrus has an upcoming bank robbery trial and does not attempt to look at the Facebook pages or other social media sites of any potential jurors or witnesses who will be involved in the trial.

Has Cyrus violated any rules of professional ethics?

CONUNDRUM 4

- ▶ The Government only has unofficial summaries of Wendy's state court documents that will not be admitted into evidence at trial.
- ▶ The summaries also do not clearly show that the actual offense of conviction was and thus whether Wendy should be classified as a tier I or a tier II sex offender.
- ▶ When you meet with Wendy, she gives you the indictment and judgment for her prior conviction, and they clearly show that Wendy is a tier II sex offender.



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- ▶ In a request for reciprocal discovery under Fed. R. Crim. P. 16(b)(1)(A), the AUSA requests that you turn over all documents in your possession pertaining to Wendy's prior conviction.

What should you do and on what legal basis, if any?

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- ▶ Assume that you refuse to comply with the Government's request for reciprocal discovery.
 - ▶ The Government sends you a Subpoena *Duces Tecum* for any and all documents pertaining to Wendy's prior conviction.

What should you do, and on what legal basis, if any.

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- ▶ Assume that Wendy does not have and never gave you any documents pertaining to her prior conviction.
 - ▶ Your investigator obtains certified copies of the judgment and indictment for Wendy's prior sex offense by combing through a warehouse containing old court documents. Again, these documents show that Wendy's prior offense of conviction make her a tier II sex offender.
 - ▶ A federal agent informs the AUSA that the clerk of courts told him that your investigator went to the court's warehouse and left with copies of some documents.

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- ▶ Assume that your investigator did not obtain any certified copies of documents pertaining to Wendy's prior conviction.
 - ▶ Your investigator combs through a warehouse containing old court documents. He finds documents showing that Wendy's prior offense of conviction makes her a tier II sex offender, and he takes notes summarizing the contents of these documents.
 - ▶ A federal agent informs the AUSA that the clerk of courts told him that your investigator went to the court's warehouse and was reviewing and taking notes about the contents of some documents.

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got conundrums?