

What if...  ?

Common Questions and Criminal Defense Ethical Conundrums

FEDERAL CRIMINAL DEFENSE TRAINING 2024

RULES OF PROFESSIONAL CONDUCT

PREAMBLE

A lawyer, as a member of the legal profession, is

- ▶ representative of clients
- ▶ officer of the legal system
- ▶ public citizen

RULES OF PROFESSIONAL CONDUCT

PREAMBLE

As a representative of clients, a lawyer is:

- ▶ advisor
- ▶ advocate
- ▶ negotiator
- ▶ evaluator

RULES OF PROFESSIONAL CONDUCT

PREAMBLE

In all professional functions a lawyer should be:

- ▶ competent
- ▶ prompt
- ▶ diligent

RULE 1.1 COMPETENCE

Competent representation requires:

- ▶ legal knowledge
- ▶ skill
- ▶ thoroughness
- ▶ preparation

What if... my client wants to appeal and I have never done one?

- ▶ File Notice of Appeal within 14 days of sentencing
- ▶ Gain Competence
 - ▶ Rule 1.1 cmt. [2]: A lawyer can provide adequate representation in a wholly novel field through necessary study.
 - ▶ Rule 1.1 cmt. [4]: A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.



What if... I am scheduled for oral argument and I have never done one?

- ▶ Contact the FPD to arrange a moot

What if... my client wants to appeal but I don't want to figure out the Third Circuit?

- ▶ File Motion to Withdraw in District Court & Attach proposed Notice of Appeal within 14 days of sentencing
- ▶ Rule 6.2 Accepting Appointments Cmt. [2]: For good cause a lawyer may seek to decline an appointment . . . Good cause exists if the lawyer could not handle the matter competently. . . .

What if... my client wants to appeal and there are no viable issues?

- ▶ *Anders v. CA – 3d Cir. Local Appellate Rule 109.2 – Penson v. OH*
 - ▶ Where, upon review of the district court record, counsel is persuaded that the appeal presents no issue of even arguable merit, counsel may file a motion to withdraw and supporting brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), which must be served upon the appellant and the United States. The United States must file a brief in response. Appellant may also file a brief in response pro se. After all briefs have been filed, the clerk will refer the case to a merits panel.
- ▶ **MOST RECENT CASE** - Counsel not obligated to include/respond to every frivolous argument client has identified. Client can in pro se supplemental brief, 3d Cir. Local Appellate Rule 109.2. *U.S. v. Langley*, 52 F.4th 564, 566 (3d Cir. 2022)
- ▶ Good issues & frivolous ones? Quasi-*Anders* brief & hybrid representation are NOT permitted. *U.S. v. Turner*, 677 F.3d 570, 577-79 (3d Cir. 2012)
- ▶ Do you have to file *Petition for Rehearing En Banc* and/or *Cert. Petition*? No, appointed counsel is not required to file petitions for discretionary review. Follow the procedure in 3d Cir. L.A.R. 109.2(b) & (c). *U.S. v. Coney*, 120 F.3d 26, 27-28 (3d Cir. 1997)

What if... my client wants to appeal and there are no viable issues?

- ▶ What's an *Anders* brief require?
 - ▶ *U.S. v. Marvin*, 211 F.3d 778, 780-81 (3d Cir. 2000) – goal of *Anders* brief:
 - ▶ “(1) to satisfy the court that [counsel] has thoroughly scoured the record in search of appealable issues; and (2) to explain why the issues are frivolous.”
 - ▶ 2 pages, no case law. INSUFFICIENT-*U.S. v. Youla*, 241 F.3d 296, 300 (3d Cir. 2001)
- ▶ Low hanging fruit:
 - ▶ Indictment – all elements; statute of limitations; unconstitutional conviction
 - ▶ Plea – Fed. R. Crim. P. 11; *Boykin v. AL* (1969); *U.S. v. Dominguez Benitez* (2004) – substantial compliance v. reasonable probability but-for the Rule 11 error D would not have pleaded guilty
 - ▶ Sentencing – Fed. R. Crim. P. 32; *United States v. Tomko*, 562 F.3d 558, 567-68 (3d Cir. 2009) (en banc) lists types of Procedural Sent. Error & test for Substantive Sent. Error
- ▶ *Penson* review may result in affirmance, even if *Anders* brief is insufficient. *U.S. v. Coleman*, 575 F.3d 316, 321-22 (3d Cir. 2009)

What if... my client asks me to appeal on Day 14 and there is an appellate waiver?

File a timely Notice of Appeal

- ▶ *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) (finding that *Strickland* prejudice is presumed when counsel's constitutionally deficient performance deprives a defendant of an appeal he would have otherwise taken, even when the defendant has signed an appeal waiver)

Look for a Reason to Avoid the Waiver

- ▶ *U.S. v. Icker*, 13 F.4th 321 (3d Cir. 2021) (didn't knowingly and voluntarily waive challenge to SORNA condition)
- ▶ *U.S. v. Cruz*, No. 23-1192, 2024 WL 997591 (3d Cir. Mar. 8, 2024) (prosecution breach of plea agreement)
- ▶ *U.S. v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (Miscarriage of justice if appeal waiver is enforced; factors to consider)

What if... there is no viable reason to avoid an appellate waiver?

Discuss withdrawing the appeal

- ▶ What did your client get out of the plea K? Is it worth risk of Gov't invoking NUCLEAR OPTION:
- ▶ *United States v. Erwin*, 765 F.3d 219 (3d Cir. 2014) (finding, when a defendant cannot circumvent the waiver, the Court may order appropriate remedies including a de novo resentencing and excusing the government from its obligation to move for a downward departure)

Government will move to summarily dismiss

- ▶ opportunity to respond

What if. . . my client tells me he is going to lie on the witness stand?

Rule 3.3 (a)(3) – Candor Toward the Tribunal:

- ▶ A lawyer shall not knowingly offer evidence that the lawyer *knows* to be false.
- ▶ A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer *reasonably believes* is false.

What if. . . my client wants me to press a witness?

- ▶ Meetings with the witness
- ▶ Prison phone calls

What if . . . I have 5 minutes to talk to a witness before she takes the stand?

ABA Formal Opinion 508 issued August 5, 2023:

- remind the witness that he or she will be under oath;
- emphasize the importance of telling the truth;
- explain that telling the truth can include a truthful answer of “I do not recall”;
- explain case strategy and procedure, including the nature of the testimonial process or the purpose of the testimony or deposition;

Third Circuit Opinions from March 8

- ▶ *Wharton v. Superintendent*, No. 22-2839, 2024 WL 998036
 - ▶ “Courts rely on lawyers’ honesty; lawyers may not mislead them.”
 - ▶ “Lawyers are officers of the court. They must be completely truthful. Pennsylvania’s ethics rules forbid ‘dishonesty, fraud, deceit or misrepresentation.’”
 - ▶ “As officers of the court, lawyers must not mislead courts. So before they state facts, they must investigate reasonably.”
- ▶ *Lacombe v. Warden*, No. 21-1886, 2024 WL 998028
 - ▶ “The government, like all of us, must keep its word. This is especially true in the context of plea bargaining, where the government’s word leads criminal defendants to surrender a host of constitutional rights”
- ▶ *U.S. v. Cruz*, No. 23-1192, 2024 WL 997591
 - ▶ “no matter what the plea agreement says, [lawyers] may not lie or mislead the court.”

Rule 6.2

Accepting Appointments

Cmt. [3]: An appointed lawyer has the same obligations as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

What if. . . I am tempted to use AI to write a brief?

- ▶ Rule 3.3 (a)(1):
 - ▶ A lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal.
- ▶ *Mata v. Avianca, Inc.*, 22-CV-1461 (S.D.N.Y. June 22, 2023)
 - ▶ Attorney did not take necessary care in preparation of documents filed and abused the judicial system
 - ▶ Rule 11 sanctions imposed

What if. . . I am tempted to use AI to write a closing argument?

U.S. v. Prakazrel Michel, 1:19-CR-0148 (D.D.C. June 22, 2023)

- ▶ Motion for a new trial alleging that defense counsel used an experimental AI program to write his closing argument which made frivolous arguments, conflated the fraud schemes and failed to highlight key weaknesses in the government's case
- ▶ Defense counsel had a conflict of interest by using an experimental AI program in which they had a financial stake and touted that the program turned hours or days of legal work into seconds

What if... my client is charged with 922(g)?

Challenge the Statute

- ▶ *U.S. v. Rahimi*, No. 22-915 (U.S.) (argued Nov. 7, 2023; opinion by June 2024)
- ▶ *Range v. Att'y Gen.*, 56 F.4th 992 (3d Cir. 2023) cert. filed (U.S. Oct. 5, 2023) (No. 23-374)
- ▶ *U.S. v. Quailes*, No. 23-2533 (3d Cir.); *U.S. v. Harper*, No. 23-2604 (3d Cir.) (held c.a.v. pending *Rahimi* & *Range*)

Rule 3.1

Meritorious Claims

A lawyer shall not . . . assert . . . an issue . . . unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Cmt. [1]: in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

What if... my client might be an Armed Career Criminal?

- ▶ Priors committed on “different occasions”
 - ▶ *Wooden v. U.S.*, 142 S. Ct. 1063 (2022)
- ▶ “Different occasions” charged as an element
 - ▶ *Erlinger v. U.S.*, No. 23-370 (argument 3/27/24)



Rule 3.1

Meritorious Claims

A lawyer for the defendant in a criminal proceeding . . . may . . . defend the proceeding as to require that every element of the case be established.

What if... my client is an Armed Career Criminal with PA Agg Assault (§ 2702)?

GET THE RECORDS!

- (a)(1) = no (*U.S. v. Harris*, 68 F.4th 140 (3d Cir. 2023))
- (a)(2) = argue no (*Borden v. U.S.*, 593 U.S. 420 (2021))
- (a)(3) = no (*U.S. v. Jenkins*, 68 F.4th 148 (3d Cir. 2023))
- (a)(4) = yes (*U.S. v. Ramos*, 892 F.3d 599 (3d Cir. 2018))
- (a)(5) = argue no (*Jenkins* same elements different people)
- (a)(6) = argue no (*U.S. v. Magobet*, No. 23-2824 (3d Cir.))

What if... my client is a Career Offender with a PA Agg Assault (§ 2702) prior?

Does the subsection match the generic offense from *U.S. v. Brasby*, 61 F.4th 127 (3d Cir. 2023)?

(a)(1) = yes

- ▶ *U.S. v. Olinsky*, No. 21-1659, 2023 WL 2945899 (3d Cir. Apr. 14, 2023)

(a)(2), (3), (5) = no by govt concession

- ▶ *U.S. v. Amos*, No. 20-3298, ECF No. 59 at 23 n.6 (3d Cir.)

(a)(6) = argue no

- ▶ *U.S. v. Magobet*, No. 23-2824 (3d Cir.)

What if... my client is an Armed Career Criminal with PA Robbery(§ 3701(a)(1))?

(i) & (iii) = no by govt concession

- *U.S. v. Harris*, No. 17-1861, ECF No. 239 at 2, 9 (3d Cir. July 26, 2021)
- *U.S. v. Ruffin*, 3:12-CR-0138, 2022 WL 1485283 (W.D. Pa. May 11, 2022)

(ii) = yes

- *U.S. v. Henderson*, 80 F.4th 207 (3d Cir. 2023) (guidelines)
- *U.S. v. Cann*, No. 22-2525, 2023 WL 5275054 (3d Cir. Aug. 16, 2023)

(iv) = no by govt concession

- *U.S. v. Small*, No. 22-1469, 2023 WL 4399212, at *2 n.5 (3d Cir. July 7, 2023)

(v) = ?

- *U.S. v. Peppers*, 899 F.3d 211 (3d Cir. 2018) (no)
- But see *Stokeling v. U.S.*, 139 S. Ct. 544 (2019) (“overcome the victim’s resistance”)
- *U.S. v. Carey*, No. 3:18-CR-0037 (M.D. Pa. Apr. 30, 2020) (Mannion, J.) (yes post *Stokeling*)

What if... my client is a Career Offender with PA Robbery (§ 3701(a)(1))?

- ▶ Compare to generic offense
 - ▶ *U.S. v. Graves*, 877 F.3d 494 (3d Cir. 2017) (de minimis)
 - ▶ *U.S. v. McCants*, 952 F.3d 416 (3d Cir. 2020)
- ▶ Subsection (i) stay tuned
 - ▶ *U.S. v. Jivens*, No. 18-3218 (3d Cir.)
- ▶ Subsection (v) counts
 - ▶ *U.S. v. Carey*, No. 20-2723, 2021 WL 2936741 (3d Cir. July 13, 2021)

What if... my client is an Armed Career Criminal with a PA PWID?

Some issues are still alive:

Timing

U.S. v. Brown, No. 22-6389 (U.S.): when to compare the state law to the federal schedule - at state offense, at federal offense or at federal sentencing

Offer to Sell

U.S. v. Magobet, No. 23-2824 (3d Cir)

What if... my client is charged with 924(c) and Hobbs Act robbery?

- ▶ Hobbs Act robbery is a COV
U.S. v. Stoney, 62 F.4th 108 (3d Cir. 2023)
- ▶ Attempted Hobbs Act robbery is not a COV
U.S. v. Taylor, 142 S. Ct. 2015 (2022)
- ▶ Aiding and Abetting Hobbs Act robbery is a COV
U.S. v. Stevens, 70 F.4th 653 (3d Cir. 2023)

What if... my client is charged with 924(c) and bank robbery?

- ▶ *U.S. v. Jordan*, 88 F.4th 435 (3d Cir. 2023) (petition for rehrg filed 2/23/24)

What if. . .my client wants to cooperate?

THINGS EVERY COOPERATOR SHOULD KNOW:

- ▶ The government is stingy with 5K motions
- ▶ You will have to produce paperwork when you get to the BOP
- ▶ Correctional Officers do not keep secrets

What if. . .probation jacks up the enhancements in the PSR?

- ▶ Hold the Govt to the Plea Agreement
- ▶ *U.S. v. Cruz*, No. 23-1192, 2024 WL 997591 (3d Cir. Mar. 8, 2024)

“Prosecutors must keep their promises. And if they do not, they must make things right quickly, clearly, and fully.”

What if... I am dealing with a statute or guideline that uses “and” instead of “or”?

Pulsifer v. US, No. 22-340 (Mar. 15, 2023)

What if. . . Co-defendant's counsel sends me an email with co-defendant copied?

Rule 4.2 Communication with Person Represented by Counsel

ABA Formal Opinion 503 “Reply All” in Electronic Communications

- ▶ Copying a client on emails and texts is implied consent to a reply all response



What if. . . the magistrate says your client has to be detained before holding a probable cause hearing?

- ▶ Taking a fresh look at Rule 32.1

What if. . . I have a detention hearing and I don't know what to present?

- ▶ Try Google Earth for visuals
- ▶ Try a PowerPoint

USA v. Mule

A man of modest means alleged to be a mule

18 U.S.C. § 3142(b) – Presumption of Detention

Places burden of production onto defendant, but not persuasion. This can be overcome by “some credible evidence.”

U.S. v. Carbone, 793 F.2d 559, 560 (3d Cir. 1986)

Mr. Mule lives in a
modest duplex,
he is not
a king pin.







Family Ties

This Court can
be reasonably
assured that he
will appear in
Court.

He has a stable home

Wife who can serve as third party custodian

He's held a job with the same employer since 2018,
and pays taxes

Prior conviction over 15 years old

What if. . . my client asks me about designation by the BOP?

- ▶ BOP decision from Grand Prairie
- ▶ Program Statement 5100.08 (Sept. 12, 2006), CN-1 (Sept. 4, 2019)
- ▶ Designation Estimate

What if. . . my client asks me about First Step Act credits?

- ▶ 18 U.S.C. § 3632
- ▶ Program Statement 5410.01 (Nov. 18, 2022), CN-1 (Feb. 6, 2023), CN-2 (Mar. 10, 2023)
- ▶ Cheat Sheet from Sentencing Resource Counsel

What if...I have more questions?

- ▶ Federal Public Defender's Office: 717-782-2237
- ▶ CJA Attorney Hotline: 800-788-9908