ETHICAL QUANDARIES IN CRIMINAL DEFENSE PRACTICE

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NOTES

Note: Only the hypotheticals are reproduced in this book. The hypos with Mr. Spahn’s thorough analyses are available at the following link: http://vae.fd.org/content/training.
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Litigation Ethics

Hypotheticals

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Hypothetical 1

You work with a civil rights group that takes an active role litigating discrimination cases, including issues involving discrimination in police traffic stops and in criminal trial jury selection. The media normally follows the lawsuits that your group files, and you wonder to what extent you and your colleagues can publicly comment on the lawsuits.

Should there be any limits on lawyers' public communications about matters they are handling (other than their duty of confidentiality to clients, duty to obey court orders, avoiding torts such as defamation, etc.)?

YES  NO
Hypothetical 2

Your civil rights group which actively litigates cases arranged for a young associate to research possible ethics limits on you and your colleagues' public statements about the discrimination cases your group pursues. She has determined that the ethics rules contain limits, and now you must fine-tune your analysis of what you and your colleagues may and may not say.

(a) Do limits on lawyers' public communications about their cases apply to all lawyers, (rather than just lawyers engaged in litigation)?

YES  NO

(b) Do limits on lawyers' public communications about their cases apply only to criminal cases?

YES  NO

(c) Do limits on lawyers' public communications about their cases apply only to jury cases?

YES  NO

(d) Do limits on lawyers' public communications about their cases apply only to pending cases?

YES  NO

(e) Even if it would otherwise violate the limit on lawyers' public communications, are lawyers permitted to issue public statements defending their clients from anonymous news stories containing false facts or accusations about their clients?

YES  NO
Hypothetical 3

You and your colleagues working with a civil rights group have familiarized yourself with the ethics rules limiting your public statements about pending cases. You occasionally deal with aggressive criminal prosecutors pursuing criminal charges against your clients involved in demonstrations. You wonder whether the prosecutors face the same limits you do on making public statements about pending cases.

Are prosecutors' public communications about criminal cases more severely restricted than criminal defense lawyers' statements?

YES

NO
Lawyers' Communications About Judges

Hypothetical 4

You and your civil rights group pursue discrimination cases and represent criminal defendants in some civil rights cases. Although some judges are more sympathetic to your efforts than others, one judge has been very hostile -- making statements in court critical of your goals, and consistently ruling against you with surprisingly harsh language. You know that the ethics rules limit what lawyers can say about their cases, and now you wonder what limits apply to lawyers' criticism of judges.

(a) Are lawyers totally prohibited from criticizing judicial opinions?

   YES   NO

(b) Are lawyers totally prohibited from criticizing judges?

   YES   NO

(c) Are any limitations on lawyers' criticism of judges applicable to nonpublic criticism?

   YES   NO

(d) Are any limits on lawyers' public communications about judges based on the lawyers' subjective belief in the truth of what she says (as opposed to an objective standard)?

   YES   NO

(e) Are any limits on lawyers' public communications about judges applicable only to the wording used (as opposed to the substance of the statement)?

   YES   NO
Hypothetical 5

A potentially important alibi witness has told you that he is very reluctant to testify because he might miss work. Although you could subpoena him to testify, you worry that he might be less inclined to provide favorable testimony if you compel him in that way.

May you compensate a fact witness for the amount of pay he will lose if he testifies?

YES

NO
Hypothetical 6

You represent a company executive charged with fraud. One of his company's retired executives initially wanted $5,000 to "tell the truth" as a fact witness in your client's defense. When you balked at his request, he dropped his demand to $2,500 -- and tells you that he won't insist on being paid unless you are successful in the trial.

May you pay a fact witness an amount contingent on the case's outcome?

YES          NO
Hypothetical 7

From your many years as a commercial litigator, you know that lawyers representing litigants in civil litigation cannot offer money or any other benefit to fact witnesses -- based either on the content of their testimony or the case’s outcome. You have begun to represent criminal defendants, and you wonder whether the same rules apply in the criminal context.

May government prosecutors offer a benefit to fact witnesses, based either on their testimony's content or the criminal case's outcome?

YES

NO
Hypothetical 8

You have had some trouble finding a testifying expert to support your theory in a criminal case coming to trial soon. You recently hired an agency which advertised its ability to find experts in nearly any topic. You eventually find a mediocre expert, and you worry that he will not do a very good job.

(a) May you enter into an arrangement in which the testifying expert's fee is contingent on the outcome of the case?

YES \hspace{1cm} NO

(b) May you enter into an arrangement in which the agency's fee is contingent on the outcome of the case?

YES \hspace{1cm} NO
Hypothetical 9

You represent a wealthy individual in a child custody case. At your first meeting with the client, you begin to ask him background facts about how he treated his children. Apparently concerned about criminal consequences flowing from that treatment, the client stops you and asks the following question: "Before I tell you how I treated my children, why don't you tell me the law governing child custody."

May you answer your client's question before examining him about the factual background?

YES  NO