ETHICS GAME SHOW, ROUND V

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DISCUSSION OVERVIEW

Note: Paper print-outs of the PowerPoint slides will be available for pick-up at the conclusion of this session and will also be available at the following link: http://vae.fd.org/content/training.

Jeopardy Categories

Who Controls What
Confidences & Secrets
RPC Rules
Local Rules
Grab Bag

I. Disclosure and Fairness

A. RPC 3.4 (Fairness to Opposing Party and Counsel)
B. RPC 3.8 (Responsibilities of a Prosecutor)
C. LEO 1862 (2012) (Timely Disclosure of Exculpatory Evidence)

II. Confidentiality, Diligence, and Candor

A. RPC 1.6 (Confidentiality of Information)
B. RPC 1.3 (Diligence)
C. RPC 3.3 (Candor Toward the Tribunal)
D. RPC 3.4 (Fairness to Opposing Party and Counsel)

III. Candor Toward the Tribunal, Confidentiality, and Meritorious Claims (Role Play)

A. RPC 1.2 (Scope of Representation)
B. RPC 1.3 (Diligence)
C. RPC 1.6 (Confidentiality of Information)
D. RPC 1.16 (Termination of Representation)
E. RPC 3.3 (Candor Toward the Tribunal)
F. RPC 3.4 (Fairness to Opposing Party and Counsel)
G. RPC 4.1 (Truthfulness in Statements to Others)
H. RPC 8.4 (Misconduct)
I. LEO 542 (1984) (Revealing a Contemplated Crime)

IV. Files

A. RPC 1.16 (Termination of Representation)
B. LEO 1366 (1990) (Files - Duty to Client)
C. LEO 1790 (2004) (Client Files - Refusal to Release PSR)

V. Plea Bargaining

A. RPC 1.3 (Diligence)
B. RPC 1.7 (Conflict of Interest)
C. RPC 8.4 (Misconduct)
D. LEO 1857 (2011) (Waiver of Prospective IAC Claim)

VI. Judicial Criticism

A. RPC 3.5 (Impartiality & Decorum of the Tribunal)
B. RPC 8.2 (Judicial Officials)

Committee Opinion
March 1, 1984

LEGAL ETHICS OPINION 542 — CONFIDENTIALITY – REVEALING A CONTEMPLATED CRIME.

Client was charged with a first offense of driving under the influence as initially represented to the attorney. However, attorney subsequently determined that his client had been driving a brother's car and had been charged in the brother's name based upon the registration of the car. Client later admitted this to the attorney, stated that he would admit same in court, and asked the attorney to notify the court. Attorney was subsequently asked to postpone the notification to the court. The driving record of the client revealed an extensive list of convictions including a suspension and a second instance of driving under the influence.

Under the requirements of DR:4-101(D), an attorney is required to reveal the intention of his client to commit a crime; first, however, the attorney may try to dissuade his client from the criminal act and encourage the client to notify the court of the error in charges. If the client cannot be dissuaded and the crime involves perjury, the attorney must reveal the error to the court and withdraw from further representation.

If the client commits perjury despite assurances to his lawyer that he would not, the attorney has the duty to disclose the commission of the crime to the court.

The attorney has no obligation to reveal his client's driving record to the court or to the commonwealth's attorney, nor does he have an obligation to reveal his client's perjury to the commonwealth's attorney. [DR:4-101(D), DR:7-101(A)(3), LE Op. 341]

Committee Opinion
March 1, 1984

Committee Opinion
July 24, 1990

LEGAL ETHICS OPINION 1366 — FILES – DUTY TO CLIENT: CONTENTS OF FILE TO WHICH THE CLIENT IS ENTITLED.

You have indicated that former clients have requested the entire contents of all files relating to legal services performed for them over a period of several years, which files include notes, multiple drafts and other documents which led to final documents or resulted in advice given as to a particular matter. You have also noted that the former clients in question were sent copies of all relevant documents prepared for them throughout the course of the firm's representation. You advise that your firm recognizes that any client has a right to receive all documents that it would have reason to need, including "work product" created for the client, and that you are willing to copy such documents at your (firm's) cost. Finally, you indicate that your former clients (and their new counsel) have declined your invitation to review all material of any kind that was prepared in representing them and, if that review uncovered any needed documents, those documents would be given to the former clients.

You have asked that the Committee opine as to whether, under the circumstances you describe, the "work product" to which the former client is entitled includes multiple drafts of documents and attorney's notes and internal memoranda.

For purposes of this opinion, the Committee assumes that no fees are owing to the firm as a result of its representation of the former clients.

The appropriate and controlling Disciplinary Rule relevant to your inquiry is DR:2-108(D) which, while permitting the lawyer to "retain papers relating to the client to the extent permitted by applicable law," requires that, upon termination of representation, the lawyer deliver to the client all papers and property to which the client is entitled. The operative concept involved in the pertinent Disciplinary Rule is meant to ensure that the former lawyer does not prejudice his former client in any way.

The Committee has earlier opined that the "applicable law" to which DR:2-108(D) refers is that which relates to an attorney's lien for legal fees owed by the client. See LE Op. 1171. Thus, under the assumption that your former client does not owe any fees, the Committee further assumes that no statutory or common-law possessory lien arises upon which you or your firm may base any retention of any materials in the client's file.

The Committee is of the view that any legal definition of "work product," as applied in the Rules of Evidence or elsewhere in a legal context is inapposite to the question of delivery of a client's file since a file may contain additional materials which were not prepared in anticipation of litigation or for trial. Rather, the Committee opines that the term's plain meaning is applicable and refers to all materials prepared or collected by the attorney, or at the attorney's direction, in relation to any legal services for which the client engaged the attorney or the law firm over the entire period of the provision of such services. Thus, the Committee is of the opinion that, with relation to the ownership of a

client's file, where no fees are outstanding, "work product" includes, as you have enumerated, attorney's notes, internal memoranda and multiple drafts and other documents which lead to final documents or result in advice given as to a particular matter.

Thus, the Committee is of the further opinion that the client is entitled to the entire contents of his file and the attorney is not entitled to refuse to turn over that file or any portion thereof. The Committee reiterates its view that the entire file is "property to which the client is entitled," thereby eliminating any necessity for a determination by anyone other than the client as to what the client may need. Futhermore, such ownership of the file is irrespective of any earlier provision of copies to the client. LE Op. 1171; Scroggins v. Powell, Goldstein, Frazier and Murphy, 15 B.R. 232, 241 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 B.R. 729 (N.D. Ga. 1982). See also Vargas v. United States, 727 F.2d 941, 944 (10th Cir. 1984), cert. denied, 469 U.S. 819 (1984).

Committee Opinion
July 24, 1990

Legal Ethics Committee Notes. – Rule 1.16(e) governs a lawyer’s duty to provide files to a former client.

Committee Opinion
January 5, 2004

LEGAL ETHICS OPINION 1790 — CLIENT FILES – REFUSAL OF ATTORNEY TO RELEASE A COPY OF THE DEFENDANT'S PRE-SENTENCE REPORT TO THE DEFENDANT.

Your request presented a hypothetical situation involving a client requesting a copy of his file from an attorney. Specifically, the attorney had represented the client in a criminal matter. The client was convicted in a Virginia circuit court. The trial judge set a sentencing hearing and ordered a probation officer to prepare a pre-sentence report for use at that hearing. The officer forwards a copy of the report to the attorney, who reviews it with his client. One day after the sentencing hearing, the client informs the attorney that the client will be petitioning the Supreme Court of Virginia for a writ of *habeas corpus.* The client requests that the attorney provide the file to the client, including the pre-sentence report.

The question raised by your hypothetical is whether the attorney has a duty to provide the pre-sentence report to the client. The pertinent provision of the Rules of Professional Conduct is Rule 1.16(e), which specifically governs the lawyer's duty to transmit the client's file upon termination of the relationship and at the request of the client. Whether the attorney must provide a copy or an original of the contents depends on the nature of each document; however, paragraph (e) does require provision of the client's *entire* file, except for one narrow category:

> Billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts, staffing considerations, or difficulties arising from the lawyer-client relationship.

A pre-sentence report is not the sort of internal document described by the exception. Therefore, the general requirement from this provision would apply: that the lawyer provide file contents or, in many instances, *copies* of those contents, to the client. Comment 11, however, sets forth an important limitation:

> The requirements of paragraph (e) should not be interpreted to require disclosure of materials where the disclosure is prohibited by law.

Your request references Attorney General Jerry W. Kilgore's Advisory Opinion, dated March 31, 2003, which interprets Virginia Code §19.2-299, as addressing the legal issue of whether disclosure of pre-sentencing reports by attorneys to their clients is prohibited by law. The exclusive purview of this committee is to interpret the Rules of Professional Conduct; it would be outside that purview for this committee to analyze other legal authority regarding disclosure of pre-sentence reports. This committee, therefore, declines to do so.

This opinion is advisory only, based solely on the facts you presented and not binding on any court or tribunal.

Committee Opinion
January 5, 2004

LEGAL ETHICS OPINION 1857 — MAY A PROSECUTOR OFFER, AND MAY A CRIMINAL DEFENSE LAWYER ADVISE HIS CLIENT TO ACCEPT, A PLEA AGREEMENT THAT REQUIRES A WAIVER OF THE RIGHT TO LATER CLAIM INEFFECTIVE ASSISTANCE OF COUNSEL?

In this hypothetical, a defense lawyer represents a client who intends to plead guilty. The plea agreement provides that "I waive any right I may have to collaterally attack, in any future proceeding, any order issued in this matter and agree I will not file any document which seeks to disturb any such order. I agree and understand that if I file any court document seeking to disturb, in any way, any order imposed in my case, such action shall constitute a failure to comply with a provision of this agreement." This provision is standard in all plea agreements offered by the prosecutor's office, however, defense counsel has concerns that this provision may have the legal effect of waiving the client's right to later claim ineffective assistance of counsel. The defense lawyer asks whether he can ethically advise his client as to whether to waive that right and whether the prosecutor can ethically require this waiver as a term of a plea agreement.

QUESTIONS PRESENTED

1. May a defense lawyer advise a client to enter into a plea agreement with language that may effectively waive the right to allege ineffective assistance of counsel as part of a waiver of the right to collaterally attack a conviction covered by a plea agreement?

2. If the defendant's lawyer declines to advise him on the issue, does the prosecutor's suggestion that the defendant agree to the provision knowingly take advantage of an unrepresented defendant?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 1.3(c)[1], Rule 1.7(a)(2)[2], Rule 1.8(h)[3], and Rule 8.4(a)[4]. Additionally, Legal Ethics Opinions 1122, 1558, and 1817 are relevant to the conflict of interest analysis.

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[1] Rule 1.3 Diligence

* * *

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

[2] Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

* * *

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[3] Rule 1.8 Conflict of Interest: Prohibited Transactions

* * *

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to the client for malpractice.

* * *

[4] Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

ANALYSIS

Federal courts have consistently held that such a provision is legally enforceable against the defendant. In *U.S. v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005), the court held that there is no reason to distinguish between a waiver of direct appeal rights and a waiver of collateral attack rights, and therefore a waiver of all collateral attack rights is valid so long as the waiver is knowing and voluntary. In general, a defense lawyer may counsel a client to enter into a lawful plea agreement; however, in this case, the content of the plea agreement raises ethical concerns, to the extent that the language of the plea agreement has the intent and effect of waiving the client's right to claim ineffective assistance of counsel.

Though they are not in full agreement on the rationale for their opinions, several states have found that it is unethical for a defense lawyer to advise his client to accept such a plea bargain provision, and that it is unethical for a prosecutor to propose such a provision.[5] Only one state has found such a provision ethically permissible, on the grounds that Rule 1.8(h) applies exclusively to waivers of malpractice liability.[6]

Defense lawyer's duties

The Committee agrees with the majority of states that have considered this issue that, to the extent that a plea agreement provision operates as a waiver of the client's right to claim ineffective assistance of counsel, a defense lawyer may not ethically counsel his client to accept that provision. There is a concurrent conflict of interest as defined by Rule 1.7(a)(2) between the lawyer's personal interests and the interests of the client. Defense counsel undoubtedly has a personal interest in the issue of whether he has been constitutionally ineffective, and cannot reasonably be expected to provide his client with an objective evaluation of his representation in an ongoing case. This conflict was discussed in LEO 1122, which concluded that a lawyer should not represent a client on appeal when the issue is the lawyer's own ineffective assistance because "he would have to assert a position which would expose him to personal liability." Likewise, LEO 1558 concluded that a lawyer could not argue that he had improperly pressured his client into accepting a guilty plea, because of the conflict between the interests of the client and the lawyer's interest in protecting himself. Further, both conflicts cannot be cured even with client consent. LEO 1817 recently reaffirmed the accuracy of this conflict of interest analysis.

A defense lawyer who counsels his client to agree to this provision also violates Rule 1.3(c). The client has a constitutional right to the effective assistance of counsel and the defense lawyer's recommendation to bargain that right away prejudices the client.

Although other states have interpreted their versions of Rule 1.8(h) to bar the defense lawyer from advising his client on this issue,[7] Virginia's Rule 1.8(h) does not apply in this situation because the defense lawyer is not making the agreement in this case – he is advising his client whether to enter into an agreement sought by the government.

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

* * *

[5] Advisory Committee of the Supreme Court of Missouri, Formal Opinion 126 (2009); The North Carolina State Bar Ethics Commission, Formal Opinion RPC 129 (1993); Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6 (2001); Vermont Bar Association, Advisory Ethics Opinion 95-04 (1995).

[6] State Bar of Arizona Commission on the Rules of Professional Conduct, Opinion 95-08 (1995).

[7] The North Carolina State Bar Ethics Commission, Formal Opinion RPC 129 (1993); Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6 (2001); Vermont Bar Association, Advisory Ethics Opinion 95-04 (1995).

Prosecutor's duties

Your second question presented addresses the prosecutor's role in seeking this waiver. The Committee is of the opinion that it is a violation of Rule 8.4(a) for the prosecutor to offer a plea agreement containing a provision that has the intent and legal effect of waiving the defendant's right to claim ineffective assistance of counsel. Because the prosecutor refuses to offer a plea agreement that does not include this provision, he is implicitly requesting that the defense lawyer counsel his client to accept this provision, which is an inducement to the defense lawyer to violate Rules 1.3(c) and 1.7.

This opinion is advisory only based upon the facts as presented, and not binding on any court or tribunal.

Committee Opinion
July 21, 2011

LEGAL ETHICS OPINION 1862 ”TIMELY DISCLOSURE” OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS

In this hypothetical, in a pending criminal prosecution, the prosecutor is aware of exculpatory evidence, in the form of witness statements accusing another individual of the offense with which the defendant is charged. The prosecutor is also aware that the primary inculpatory witness, an eyewitness to the offense, has died and therefore will not be available to testify in future proceedings in the case. There is an upcoming preliminary hearing scheduled in the case, although the prosecutor has offered a plea bargain in which the defendant would plead guilty to a lesser offense and waive the preliminary hearing. The prosecutor has not disclosed either the exculpatory evidence or the death of the primary witness.

QUESTION PRESENTED

1. Is the “timely disclosure” of exculpatory evidence, as required by Rule 3.8(d), broader than the disclosure mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and other case law interpreting the Due Process clause of the Constitution? If so, what constitutes “timely disclosure” for the purpose of Rule 3.8(d)?

2. During plea negotiations, does a prosecutor have a duty to disclose the death or unavailability of a primary witness for the prosecution?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 3.8(d)[1], Rule 3.3(a)(1)[2], Rule 4.1[3], and Rule 8.4(c)[4].

ANALYSIS

Pursuant to *Brady v. Maryland* and subsequent cases, a prosecutor has the *legal* obligation to disclose material exculpatory evidence to a defendant in time for the defendant to make use of it at trial. A number of cases interpreting this legal obligation have noted that the

[1] Rule 3.8 Additional Responsibilities Of A Prosecutor
A lawyer engaged in a prosecutorial function shall:
***
(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court;

[2] Rule 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal;

[3] Rule 4.1 Truthfulness In Statements To Others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of fact or law; or
(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

[4] Rule 8.4 Misconduct
It is professional misconduct for a lawyer to:
***
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law;

prosecutor's *ethical* duty to disclose exculpatory evidence is broader than the legal duty arising from the Due Process clause, although they have not explored the contours of that ethical duty.[5]

Rule 3.8(d) does not refer to or incorporate, in the language of the Rule or its comments, the *Brady* standard for disclosure. The standard established by the Rule is also significantly different from the *Brady* standard in at least two ways: first, the Rule is not limited to "material" evidence, but rather applies to all evidence which has some exculpatory effect on the defendant's guilt or sentence; second, the Rule only requires disclosure when the prosecutor has actual knowledge of the evidence and its exculpatory nature[6], while *Brady* imputes knowledge of other state actors, such as the police, to the prosecutor. These differences from the *Brady* standard raise the further question of whether Rule 3.8(d) requires earlier disclosure than the *Brady* standard, which requires only that the evidence be disclosed in time for the defendant to make effective use of it. Thus, the prosecutor has complied with the legal disclosure requirement if the evidence is disclosed in the midst of trial so long as the defendant has an opportunity to put on the relevant evidence.[7]

Although the Committee has never definitively addressed the question, it opines today that the duty of timely disclosure of exculpatory evidence requires earlier disclosure than the *Brady* standard, which is necessarily retrospective, requires. This conclusion is largely based on the response to *Read v. Virginia State Bar*, in which the Supreme Court of Virginia reversed the Virginia State Bar Disciplinary Board's order revoking a prosecutor's license, finding that the prosecutor had complied with his legal obligations under *Brady* and therefore had complied with the correlative ethics rule in force at that time. The disciplinary rule in effect at that time was DR 8-102 of the Virginia Code of Professional Responsibility which read, "The prosecutor in a criminal case or a government lawyer shall . . . [d]isclose to a defendant all information required by law."

At the time of the conduct at issue, Beverly Read was a Commonwealth's Attorney. Read was conducting the prosecution of an arson case. During the investigation, the Commonwealth discovered two witnesses, Sils and Dunbar, who both identified the defendant at the scene of the crime. Sils had second thoughts after he identified the defendant in a line-up and later became convinced that the defendant was not the person Sils had observed at the scene of the crime. Sils disclosed to Read that the defendant was definitely not the man observed at the scene of the crime. Read told Sils that he would not be called as a witness and that his presence was no longer necessary. Read concluded his case and rested without disclosing that the two witnesses had changed their statements. When Sils went home and had further discussions with the other witness, Dunbar, both became convinced that the defendant was not the man they saw. They returned to the courthouse during the trial the following day and agreed to testify for the defense. Read then attempted to pass a message to defense counsel that would have disclosed the exculpatory information but defense counsel refused to accept the writing. Unsuccessful in passing this information to defense counsel, Read then read into the record that the two witnesses had recanted and would testify that the defendant was not the man they saw at the scene of the crime. After this exchange, defense counsel moved to dismiss for prosecutorial misconduct.

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[5] *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing* Rule 3.8(d); Kyles v. Whitley, 514 U.S. 419, 436 (1995) (noting that *Brady* "requires less of the prosecution than" Rule 3.8(d)).

[6] As Comment [4] to Rule 3.8 explains, "[p]aragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence…"

[7] *See e.g.*, *Read v. Virginia State Bar*, 233 Va. 560, 357 S.E.2d 544 (1987).

The motion to dismiss was denied. A complaint against Read was made with the Virginia State Bar and a disciplinary proceeding ensued.

Read's counsel argued that his client had complied with *Brady* because the information was available to use during trial, and therefore had disclosed "all information required by law." In spite of the Board's finding that Read had willfully intended to see the defendant tried without the disclosure that the two witnesses had recanted, the Supreme Court of Virginia agreed that Read had complied with the disciplinary rule, reversed the Disciplinary Board's decision, and entered final judgment that Read had not engaged in any misconduct. Following this decision, the Bar rewrote the relevant rule, replacing the *Brady* standard with the standard now found in Rule 3.8(d), clarifying that the prosecutor's ethical duty under that rule is not coextensive with the prosecutor's legal duty under *Brady.*

In light of the conclusion that Rule 3.8(d) requires earlier disclosure than the *Brady* standard, the Committee next turns to the meaning of "timely disclosure." In general, "timely" is defined as "occurring at a suitable or opportune time" or "coming early or at the right time." Thus, a timely disclosure is one that is made as soon as practicable considering all the facts and circumstances of the case. On the other hand, the duty to make a timely disclosure is violated when a prosecutor intentionally delays making the disclosure without lawful justification or good cause.

The text of the Rule makes clear that a court order is sufficient to delay or excuse disclosure of information that would otherwise have to be turned over to the defendant. Thus, where the disclosure of particular facts at a particular time may jeopardize the investigation or a witness, the prosecutor should immediately seek a protective order or other guidance from the court in order to avoid those potential risks. As specified by the Rule, however, disclosure must be "precluded or modified *by order of a court*" (emphasis added) in order for the prosecutor to be excused from disclosure.

Because this is not a bright-line rule, the Committee cannot give a definitive answer to the question of whether the prosecutor must immediately turn over the exculpatory evidence at issue in the hypothetical; however, the prosecutor may not withhold the evidence merely because his legal obligations pursuant to *Brady* have not yet been triggered.

As to the second question, assuming that the witness's unavailability does not come within the scope of Rule 3.8(d), other rules might obligate the prosecutor to disclose this information during plea negotiations or when the plea bargain is being presented to the court.

Specifically, Rules 3.3, 4.1, and 8.4(c) all forbid making false statements or misrepresentations in various circumstances. Rule 4.1(a) generally prohibits making a false statement of fact or law, and Rule 8.4(c) specifically forbids any misrepresentation that "reflects adversely on the lawyer's fitness to practice law." Both of these provisions would apply to any misrepresentation or false statement made in the course of plea negotiations with the defendant/his lawyer. Rule 3.3(a)(1) specifically forbids any false statement of fact or law to a tribunal, which includes any statements made in the course of presenting a plea agreement to the court for approval and entry of the guilty plea. Accordingly, the prosecutor may not make a false statement about the availability of the witness, regardless of whether the unavailability of the witness is evidence that must be timely disclosed pursuant to Rule 3.8(d), either to the opposing lawyer during negotiations or to the court when the plea is entered.[8]

This opinion is advisory only based upon the facts as presented, and not binding on any court or tribunal.

[8] See also Rule 3.8(a), which bars a prosecutor from filing or maintaining a charge that the prosecutor knows is not supported by probable cause.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:06-CR-383
	)	Hon. T.S. Ellis, III
PRINCE ABREFA,	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO COURT'S INQUIRY

In an Order entered on September 29, 2017, the Court offered undersigned counsel the opportunity to submit a brief memorandum detailing the ethical obligations governing counsel's response to the Court's question about whether defense counsel had discussed the hearing date with Mr. Abrefa. Defense counsel appreciates the Court's consideration of this issue, and hereby submits the following brief discussion of the relevant ethical rules and their application in this context.

I. Applicable Rules of Professional Conduct

When defense counsel is asked by a court whether they have conferred with an absent client regarding a hearing date, the answer – whether yes or no – implicates Virginia Rules of Professional Conduct ("RPC") 1.6 (Confidentiality of Information) and 3.3 (Candor Toward the Tribunal). In pertinent part, Rule 1.6 states:

> (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

Of the listed exceptions to the Rule, only one is potentially pertinent here. It provides:

> (b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
>
> (1) such information to comply with a law or a court order.

RPC 1.6(b)(1). The Rule also provides that a lawyer "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule." *Id.* 1.6(d).

Rule 1.6 recognizes that "[a] fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Id.* Cmt. 2b. "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source." *Id.* Cmt. 3.

Rule 3.3 (Candor Toward the Tribunal) provides in pertinent part that:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal;
>
> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

The first comment to the Rule further provides that "[t]he advocate's task is to present the

client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value." RPC 3.3 Cmt. 1.

II. Discussion

When a judge asks a lawyer to inform the Court about whether he has been in communication with a client who has been summoned to court and has nevertheless not appeared, there are two possible truthful answers: "Yes" or "No." Unless the lawyer is able to provide a justification for the client's absence, the former answer would reveal to the Court that the client has been informed of the court date and nonetheless (without good cause) failed to appear.[1]

Likewise, the latter answer would also be "embarrassing or . . . likely . . . detrimental to the client," RPC 1.6(a), because it would reveal that the lawyer's efforts to reach his client have not been successful, and thereby imply that the client has absconded or at least made himself unreachable. *See* RPC 1.4(a) (Communication) (requiring counsel to "keep a client reasonably informed about the status of a matter"). In sum, both answers run the risk of violating Rule 1.6(a) as the answers are based on "information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Counsel also has a duty of candor to the Court, specifically to "not knowingly . . . make a

[1] Disclosure of confidential information that is *helpful* to the client stands on a different footing, since the client is likely to have consented to the disclosure of that information or disclosure of the helpful information would be "impliedly authorized in order to carry out the representation." RPC 1.6(a).

false statement of fact or law to a tribunal." RPC 3.3(a)(1). An attorney who informs the Court that he "makes no representations" as to whether he has discussed the hearing date with his client who has failed to appear is not making a false statement of fact to the Court. He or she is merely respectfully declining to answer the Court's question so as to meet both his duty to his client and his duty to the Court. In responding this way to the Court's question, undersigned counsel meant no disrespect and was simply seeking to comply with the ethical obligation not to disclose information that could be detrimental to the client.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2017, I will electronically file the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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Pursuant to the Electronic Case Filing Policies and Procedures, a courtesy copy of the foregoing pleading will be delivered to Chambers within one business day of the electronic filing.

s/

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