

**NATIONAL DEFENDER TRAINING PROJECT
2017 PUBLIC DEFENDER
TRIAL ADVOCACY PROGRAM**

University of Dayton School of Law, Dayton, Ohio
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**Doing Right By Your Client While
Doing Right: Ethics and Client-
Centered Representation**

**Jonathan Rapping
Training Center**

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

-- Henry Lord Brougham

As lawyers committed to representing poor people accused of crimes we must constantly strive to simultaneously live up to two important ideals: to be a client-centered lawyer and to be an ethical lawyer. The Rules of Professional Conduct (the Rules) set boundaries, outside of which we may not venture without violating our responsibility to our profession. However, within those boundaries we are often given wide latitude and much discretion. The duty of loyalty that we owe to our clients, people who did not choose us as their representatives and who have nowhere else to turn, dictates that we must strive to resolve all ethical dilemmas in a manner that falls within the range of permissible responses, while at the same time is calculated to maximize the likelihood of achieving the objectives of the representation as explicitly articulated by the client.

I. 7 Principles of Ethical Lawyering

Jack Martin, an outstanding Georgia lawyer who has devoted much of his career to defending indigent defendants charged with the most heinous crimes, articulates seven principles of ethical lawyering. These principles serve as an excellent foundation from which to begin our discussion of ethics and indigent defense¹.

1. You don't have to do this work if you don't want to

This first principle serves as an obvious, yet important, reminder that we chose to do this work and, to therefore, shoulder the special responsibilities that come along with it. We do this work, in part, because we understand that a person's income should not determine the quality of justice s/he receives in our criminal justice system. The indigent defendant does not get to choose his or her attorney. The lawyer is appointed to represent the client without the client having any say in the matter. At a minimum, each client should expect that his or her

¹ While the seven principles come from Jack Martin, the discussion of these principles represents the views of this author.

lawyer will work as hard, and be as loyal, as if the client paid handsomely for the lawyer's services. As was discussed in the chapter on *The Special Role of the Public Defender*, this job is not for everyone. There is no shame in opting for another career path. However, if a lawyer chooses to represent poor people accused of crimes, s/he must always strive to provide the kind of representation s/he would want for his or her own loved ones.

2. If you do take on a client's case, you are ethically obligated to employ every legal means to maximize the outcome for your client

It is not for the lawyer to decide how much justice a client deserves. Every client should receive as much justice as is available under the law. It is the lawyer's duty to ensure that happens. Therefore, unless the law or the Rules of Professional Conduct prohibit it, the lawyer should take any course of action that will advance the client's cause. At times the Rules are permissive; they tell us that a lawyer "may" undertake a course of action. Other times the Rules are mandatory; instructing that the lawyer "shall" undertake a course of action. While the lawyer must always do what the Rules, and the law, require, when there is discretion the criminal defense attorney should always choose the course most likely achieve the client's desired outcome. When the lawyer identifies an outcome or strategy that will benefit the client, it is incumbent upon the lawyer to look for legal avenues to achieve that end.

3. It is your client's case, not yours, so it is unethical to preempt your client's moral judgments

There will be times when the lawyer's moral compass will not be perfectly calibrated with the client's. It is not the lawyer's job to impose his or her moral code upon the client. As long as accomplishing the client's desire does not require the lawyer to violate the law, or the ethical rules, the lawyer should defer to the client. The case will be but one of many for the lawyer. For the client, it represents his or her life. The client should have the ultimate say since it is s/he who will have to live with the outcome. Of course, the lawyer serves as a counselor and advisor. It is the lawyer's duty to discuss the pros and cons of any strategy, and to advise the client about how various decisions will impact the case. However, there will be times when, after all counseling and advising is done, the client will not agree with the lawyer's advice. At these times, the lawyer must respect the client's wishes.

4. The client, in making his or her decisions, has the right to know the law, and the evidence²

This principle reminds me of a training session I facilitated for a group of young law firm associates who were preparing to handle some pro bono misdemeanor cases. The topic was client interviewing and relationship building. I posited that before asking the client for his or her version of events, you should begin by letting the client know the evidence the state has and the possible defenses to the charges. I opined that to ask the client to jump into his or her version of events before knowing anything about the case, the law, or the lawyer, would invite a distrustful client to give a version that s/he assumed would be favorable. This might lead to the client feeling wed to a narrative that is neither truthful nor helpful.

One of the lawyers in the audience suggested that to provide the client with this information without first ferreting out what s/he claims happened is tantamount to coaching the client. The lawyer argued that the client would then tailor his or her account based on the knowledge the lawyer provided. Suddenly, a young lawyer from the firm interrupted, implying that the other lawyer was employing a double standard. The younger lawyer reminded the audience that the firm represents white collar defendants and that these wealthy clients routinely walk into a firm lawyer's office demanding to know the charges against them, the evidence against them, and the possible defenses. The white collar client wants this information before he says a word. The younger lawyer suggested that not a lawyer in the room would refuse to provide the requested information until the client first committed to a story. The younger lawyer went further and said that if any firm lawyer did so, the client would simply go elsewhere and the lawyer would be appropriately chastised for his handling of the matter. The young lawyer concluded by asking, "Why should our more criminally sophisticated clients receive a better quality of representation than the less fortunate clientele we are volunteering to represent?"

This anecdote helps to illuminate the fact that many of us, whether consciously or sub-consciously, have a different standard for the indigent client. Some of us are more willing to assume that the poor client is going to concoct a lie if given the information with which to do so. Others are of the view that a client who is sophisticated enough to ask for the information that would allow him to craft a creative defense is entitled to it but that there is something wrong with the lawyer educating the ignorant client so that he can make the same decisions. However, it is our job to educate the client about the law and the facts that will impact the case. It is not our job to decide which clients are able to responsibly handle

² Jack Martin's 4th principle only addresses the client's right to know the law but it is equally true that the client has the right to know all of the information about the case that the lawyer knows whether from informal discussions with the prosecutor, discovery, investigation, or another source.

having certain information. Ultimately, the case is the client's and we work for him or her.

The American Bar Association Model Rule of Professional Conduct 1.43, governing the lawyer's duty of communication, supports this view. In requiring that the lawyer "promptly comply with reasonable requests for information," it is clear that if the client were savvy enough to ask for the information, the lawyer would have to provide it. Part of our responsibility in representing poor clients, who are often less educated, is to ensure they are equipped with the information and knowledge that a more sophisticated client may have so that justice is not determined by one's ability to maneuver in the criminal justice arena. Comment [7] to Rule 1.4 mandates that, while there may be extraordinary circumstances where sharing information with a client might not happen immediately, a lawyer may never "withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person." If a lawyer assumes the worst in the client, s/he is not giving the client the representation s/he deserves. If the lawyer believes that s/he needs to withhold information from the client in order to protect the client from his own shortcomings, the lawyer would do well to remember Principle #1: You don't have to do this work if you don't want to.

5. Never lie to or mislead a client, especially as to the confidentiality of communications

It is never okay to lie to, or to mislead a client. Imagine if you hired a lawyer, only to find out that s/he had been withholding information from you or lying to you about what s/he knows. You would likely fire that lawyer. Indigent defendants deserve no less than we expect from our agents and representatives. The lawyer must always be honest with his or her clients, even when the lawyer fears that doing so may upset the client or cause disharmony within the defense team. Successful representation requires that the client be able to trust his or her lawyer. The client must understand that the lawyer works for the client and has the client's interests at heart. Only then will the client have the confidence in the lawyer necessary for a successful attorney-client relationship.

One way in which lawyers violate this principle is by withholding information, or lying about what they know, because they fear that disclosure will cause the client to make a choice with which the lawyer does not agree. Perhaps the lawyer has been advocating one defense theory over another and it has taken a while to get the client to agree with the lawyer's view. Suppose the lawyer later

³ When we refer to the Rules of Professional Conduct, and related commentary, throughout this article, we will be referring to the American Bar Association Model Rules of Professional Conduct and the comments to those Rules. While the Model Rules are not binding on any state, they serve as the model of the codes of professional conduct adopted by almost every state.

learns some information that the lawyer believes a jury will give little weight but that s/he fears will cause the client to gravitate back to the less desirable theory. There may be a temptation to not fully disclose the information. But this information belongs to the client, as it was learned during the course of the representation. Not sharing this information with the client, or lying about what we learned, is not an option. Lawyers must operate with full and honest disclosure, serving as counselor and advisor to help the client make the best decisions to achieve his or her goals.

A second way that lawyers frequently mislead clients is by disclosing confidential information. This is frequently done without the lawyer realizing s/he is violating a duty to the client because lawyers often do not appreciate the breadth of the obligation. Other times lawyers disclose confidential information because they believe it will help the client's cause. This is always permissible with the client's express permission, after consultation. But a lawyer may never preempt the client's decision about whether to reveal confidential information.

Confidentiality, as defined by Rule 1.6, is much broader than privileged information learned directly from the client. As the Comment makes clear, "the confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."⁴ Therefore, the Rules protect all information, whether learned through the client, investigation, discovery, or even public records, as long as that information relates to the representation.

When a lawyer undertakes the representation of a client, s/he makes a promise not to disclose any confidential information without the client's "informed consent."⁵ S/he must never break that promise to the client.

6. Preserving client confidences preserves the truth finding process

Those who do not understand the defense function in our criminal justice system are sometimes critical of the defense lawyer's obligation to protect confidential information. These critics argue that this Rule keeps the truth from surfacing. They suggest that once a lawyer knows information that will shed light on important details, it thwarts the ends of justice to keep those facts confidential. This conclusion is the product of flawed thinking. In fact, preserving client confidences promotes the truth seeking process.

During the course of defending a criminal case, the defense attorney learns a lot of information that is not in the possession of the prosecution. Much of this information may come from direct conversations with the client. This is information that can only be learned if the client chooses to reveal it. Other

⁴ Rule 1.6, Comment [3]

⁵ Rule 1.6(a).

important facts are gathered through the investigative process. Much of these investigative fruits ultimately trace back to leads acquired through communications with the client. Without the client's involvement, there are often important details that would never be discovered. Frequently, it is the defense that is introducing evidence at trial that would otherwise remain hidden.

The Rule protecting client confidences is the reason the defense lawyer is able to learn anything from the client. Clients would frequently be unwilling to provide information and leads if they believed that they would have no say in whether the fruits would be provided to the prosecution. It is the confidence in knowing that the defense team will decide whether and how to reveal details learned during the course of its investigation that promotes candid communications between the client and the lawyer. While the defense attorney is not at liberty to disclose everything s/he learns while preparing the case, much of what the defense does disclose would never be learned otherwise.

Every time a defense lawyer violates the confidentiality rules, the client becomes more distrustful of the lawyer and is less willing to share information. The lawyer, in turn, is rendered a less effective vehicle through which important information about the case can be unearthed. By remaining faithful to the confidentiality rules the lawyer maximizes his or her ability to learn about the case, thereby increasing the likelihood that the defense will be a vehicle through which otherwise unknown information is learned.

Furthermore, comment [2] of the ABA Model Rules suggests that the confidentiality rules encourage individuals to seek legal advice and to openly reveal "legally damaging subject matter." This, in turn, allows lawyers to give appropriate legal advice. The commentators conclude that the facilitation of this relationship helps to uphold the law, as individuals will more often err on the side of violating the law if forced to make decisions without the counsel of an attorney.

7. To practice defense law defensively is unethical, because by definition you are then conflicted counsel

The Henry Lord Brougham quote at the start of this article brings home the truism that in order to be an effective advocate for one's client, the lawyer cannot consider any potential personal cost. The lawyer who considers how a course of action will impact him or her personally, is practicing defensively. This lawyer has pitted his or her own interests against those of the client. By definition, the lawyer is conflicted and, therefore, incompetent to represent that client.

This phenomenon manifests itself in many ways. We see it when a lawyer requires a client to sign a letter acknowledging that the lawyer relayed a plea offer and the client rejects it. This is usually done because the lawyer thinks the client should have taken the plea and is worried that the client will later claim the lawyer never conveyed it. We see it when a client insists that a certain argument

be made and the lawyer prefaces the argument with a disclaimer that s/he is only making the argument because the client insists. This is usually the result of a lawyer who is more concerned about his or her reputation with the judge than making the best argument for the client. We see it when lawyers fail to file necessary motions or litigate important issues because they are afraid that the judge, whose primary interest is moving the docket along quickly, will become angry.

In each of these scenarios, the lawyer has failed to appreciate his or her constitutional obligation to provide zealous and loyal representation; that “the highest claim on the most noble advocate [is] . . . unquestioned, continuing fidelity to the client.”⁶ By allowing his or her own interests, or those of others, to interfere with the zealous defense of the client, the lawyer is conflicted.⁷ This lawyer will be unable to fulfill his or her obligations as an advocate.

III. Review of the Rules Most Relevant to Our Practice

There are several Rules that are implicated in our practice most frequently. In this section we will quickly review the most relevant lessons from these rules. We are only examining aspects of certain rules that come up most often in the public defenders practice. Every lawyer must thoroughly review all of the rules to ensure that s/he is in compliance. Keep in mind that we are reviewing the ABA Model Rules and that any given jurisdiction may have made modifications to these Rules. You should be sure to consult the Rules in the jurisdiction where you are practicing.

1. Rules 1.1 and 1.3 – Competence and Diligence

Combined, Rules 1.1 and 1.3 place an obligation upon the lawyer to have the appropriate expertise and time to competently represent the client in a diligent manner. A lawyer may be rendered incompetent because s/he does not have the experience or skill to handle a particular matter. Obviously, some cases are more complex than others, either because of the charges involved or the evidence at issue. A new lawyer should not endeavor to handle a serious felony where the stakes are high and there is a great need to be skilled in many facets of practice. Likewise, a lawyer who has no understanding of a complicated issue like DNA should not take on a case where that issue is central to the prosecution.

A lawyer may also be rendered incompetent because s/he does not have the time to thoroughly study and prepare for the representation. Every client is entitled to a lawyer who will have the time to research up to date law relating to issues in the case and thoroughly investigate the relevant facts. Even the least

⁶ *Nix v. Whiteside*, 475 U.S. 157, 189 (1986).

⁷ Rule 1.7(a)(2) tells us that whenever the lawyer’s personal interest materially limits his responsibilities to a client, the lawyer is conflicted.

complicated representation involves a significant investment of time devoted to investigation, legal research, discovery, drafting motions, client meetings, and other preparation.

Rule 1.3 requires that the lawyer have the time to fulfill these obligations promptly, so that the client does not have the burden of a pending criminal charge hanging over his or her head longer than necessary and so that the benefit of prompt attention, like pursuing investigative leads while they are still warm, does not fade.

2. Rule 1.2 – Authority to Make Decisions

While some lawyers divide the universe of decisions in a case into two categories: “lawyer decisions” and “client decisions,” this is based on a misunderstanding of Rule 1.2. This Rule does explicitly set forth three decisions for which the client has the final word: whether to take a plea offer, whether to waive a jury trial, and whether to testify. However, these must obviously be made with the advice of counsel after gaining a full appreciation for the consequences of the decision. Likewise, Rule 1.2 mandates that the client determine the “objectives” of the representation. Generally this refers to the outcome, or result, the client would like to achieve, or what the client would like to have happen in his or her life with respect to the case. Again, the client should be armed with counsel’s advice when making this critical call.

The Rule then requires that the lawyer “consult with the client as to the means by which [the objectives] are to be pursued.” This does not mean these decisions are “lawyer decisions.” It explicitly means they are decision to be made jointly after consultation⁸. While a lawyer who preempts a client’s decision about a particular strategy for accomplishing the client’s stated objective may not be in violation of Rule 1.2, nothing in the Rule requires the lawyer to substitute his or her judgment for the client’s. A client-centered lawyer may (and, I would argue, should) defer to the client where the two disagree about a course of action. Of course, the lawyer should spend as much time and energy as is necessary to ensure the client fully appreciates the ramifications of his or her choice, but in the end it is the client’s life that hangs in the balance. As long as the lawyer is confident that s/he has adequately explained the pros and cons of each potential course of action, where the lawyer and client disagree about a strategy, the greater impact the result will have on the client’s life militates in favor of giving the client great deference. Nothing in Rule 1.2 prohibits the lawyer from doing so.

⁸ The requirement that the client be allowed to play a central role in these decisions is further supported by Rule 1.4, Comment [5], which discusses the lawyer’s obligation to consult with the client in these matters.

Furthermore, the duty of the lawyer to explain a matter to the client to the extent necessary to allow the client to make informed decisions is laid out in Rule 1.4, the topic of the next section.

3. Rule 1.4 – Duty to Communicate With Client

One of the most important responsibilities the defense lawyer has is to communicate with the client. Rule 1.4 requires that the lawyer consult with the client about strategy, keep the client informed of developments in the case, and comply with requests for information. Attorney-client communication is critical to an effective working relationship. The lawyer who prefers to prepare and litigate a case without any input from the client, or who thinks clients interfere with their ability to do their job, fails to appreciate the central role the Rules envision the client playing in guiding the representation. Communication is the foundation of client-centered representation.

4. Rule 1.6 – Confidentiality of Information

For reasons discussed above, Rule 1.6 is absolutely fundamental to preserving the ability of lawyers to represent clients and to achieve just outcomes in our criminal justice system. The Rule is incredibly broad, applying to “all information relating to the representation, whatever its source.”⁹ A lawyer can never be compelled to disclose confidential information. The Rule makes clear that as a general matter, the lawyer **shall** never reveal confidential information without the client’s permission. The Rule then sets forth some situations in which the lawyer **may** reveal a confidence. However, under the ABA Rules, there is **never** a time when the lawyer must reveal a confidence. Even under this framework, the exceptions to the rule prohibiting disclosure are narrow. For example, the lawyer may not disclose information that would prevent physical harm to another unless disclosure would “prevent reasonably certain death or substantial bodily injury.”

5. Rule 1.7, 1.9, and 1.10 – Conflicts of Interest

Rule 1.7 prohibits a lawyer from representing a client if doing so would directly and adversely impact another client. It also prohibits a lawyer from taking on a case where there is a significant risk that doing so would materially limit the lawyer’s ability to fulfill his or her obligations to another client. Rule 1.9, dealing with responsibilities to former clients, prohibits a lawyer from taking on the representation of a client whose interests are materially adverse to those of a former client. And Rule 1.10 commands that lawyers who are part of the same office are treated as the same lawyer for conflicts purposes (i.e. if one lawyer would be conflicted, the others are as well).

The two situations where this comes up the most are when two lawyers in the same office represent co-defendants, or where one client is a witness against another client in a different matter, and when lawyers have more cases than they can responsibly handle. Lawyers must be diligent about ensuring that they are checking to ensure that co-defendants are not represented by a lawyer in the

⁹ Rule 1.6, Comment [3]

same office. Lawyers must also keep an eye out for state's witnesses who may have a pending case and are represented by a co-worker. When either of these situations occurs, the lawyer must know to whom in the office they should report the conflict so that it can be resolved. Lawyers must also be conscious of when their caseload begins to materially impact their ability to fulfill all of their ethical obligations to their other clients, including the duty to be competent and diligent in every case.

6. Rule 1.16 – Declining or Terminating Representation

Rule 1.16(b) mandates that, absent a narrow set of exceptions, a lawyer may not withdraw from a case if doing so would have a materially adverse impact on the interests of the client. However, pursuant to Rule 1.16(a), withdrawal is mandated if the representation would result in a violation of the Rules of Professional Conduct. Therefore, when a lawyer comes to realize that his or her caseload is causing him or her to fall below the standards set forth in these Rules, withdrawal will be necessary. Obviously, the lawyer should seek to withdraw from those cases in which withdrawal will not materially adversely impact the client.

7. Rule 3.1 – Meritorious Claims

Litigating motions is an essential component to the representation of any client. Unfortunately it is a practice that often goes underused. Some lawyers who are guilty of sporadically filing motions point to their obligation to not file "frivolous" motions. Whether they understand this or not, they are likely relying on Rule 3.1 for authority. Rule 3.1 dictates that a lawyer "not assert ... an issue ... unless there is a basis in law and fact for doing so that is not frivolous." Because the criminal defense attorney often has so little information about the case at the time motions are due, it is easy for the lazy lawyer to conclude that they have no basis in either law or fact for filing any motions. The version of events laid out in a police report will almost never make out a valid constitutional claim. If the officer violated the constitution, s/he likely knows enough to write the police report in order to mask the transgression.

However, the comments to Rule 3.1 are not so stringent as to require that the defense has already verified the facts that give rise to a motion. Comment [2] instructs us that a motion "is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." All that is required is that the lawyer determines that s/he can make a good faith argument in support of his or her client's position. The fact that the lawyer does not expect to prevail should not prevent the lawyer from raising the issue. A lawyer should never rule out filing a motion until s/he has educated the client about the relevant law, discussed the types of information that might give rise to a claim, and thoroughly investigated whether that evidence exists or might be developed through discovery. After taking these steps, the

lawyer should only decide to not file the motion if s/he concludes that s/he could not in good faith even argue the position (again, the standard is not whether the lawyer believes s/he will prevail). Furthermore, the lawyer need not have personal knowledge of the facts asserted. The Rules explicitly recognize that assertions in the pleadings, giving rise to a good faith basis, often come from the client or other sources. See Rule 3.3, Comment [3].

8. Rule 3.3 – Candor Towards the Tribunal

Obviously, a lawyer may not knowingly make a false statement of fact or law to a judge. This prohibition comes from Rule 3.3. There are times when there appears to be a conflict between Rule 3.3 and another obligation under the Rules. Most notably Rule 1.6. If a judge asks for information that is confidential, the lawyer may not lie about the answer. However, the lawyer may refuse to answer on the grounds that to do so would violate Rule 1.6 (and the thoughtful lawyer will consider ways to do so without implying that the lawyer is withholding damaging information). Therefore, the tension is not as great as it may appear. Rule 3.3 requires that if the lawyer makes a statement to the Court concerning a fact or the law, the lawyer must be truthful.

This rule also deals with the lawyer's obligations with respect to offering evidence. It distinguishes between evidence that the lawyer *knows* to be false, versus evidence that the lawyer *reasonably believes* to be false. It also distinguishes between the defendant's testimony and all other evidence.

A lawyer may not offer evidence that the lawyer *knows* to be false. A lawyer has discretion about whether to offer evidence s/he *reasonably believes* to be false, *other than the defendant's testimony*. With respect to this category of evidence, the Rule says a lawyer "may refuse to offer [it]." A lawyer may not refuse to offer a defendant's testimony, even if the lawyer *reasonably believes* it is untruthful. The client's constitutional right to testify is the reason for a different analysis when it comes to the defendant.

Where the lawyer *knows* the defendant wishes to testify falsely (assuming the lawyer could know such a thing) the ABA Rules prohibit the lawyer from presenting the testimony. The Comments point out that this is not the case in every jurisdiction. In some jurisdictions the lawyer would still be required to allow the client to testify while in others the Rules would require the lawyer to allow the client to testify in a narrative fashion.

While a conscientious lawyer should try to dissuade a client from testifying falsely (if for no other reason than it is likely a bad tactical move because a good cross examination will reveal the untruths and destroy the client's credibility), should the client insist on testifying, and where the Rules give the lawyer an option, the client-centered lawyer should always choose the alternative that best protects the client.

9. Rule 3.4 – Fairness to Opposing Counsel

Rule 3.4 prohibits a lawyer from unlawfully obstructing another party's access to evidence or from unlawfully altering, destroying or concealing a document or other material having evidentiary value. This obviously does not mean that a lawyer may not keep files that include items with evidentiary value. These items may or may not be producible pursuant to discovery or a subpoena and the law relating to those vehicles of discovery would govern. Obviously, the prosecutor gathers evidence all the time. Some of that evidence is discoverable, and some is not. Investigation and evidence collection is obviously not tantamount to obstructing access to evidence or concealing evidence. Likewise, the defense has an obligation to investigate and gather evidence. However, when the defense team collects evidence that has evidentiary value, it must maintain it in such a way that it will be available should there be a basis for the state to gain access to it (such as discovery or subpoena). The Comments to this rule make clear that the goal of this rule is to ensure that efforts to lawfully obtain evidence from another party through these vehicles will not be frustrated because the other side altered or destroyed the evidence. This Rule should not cause the defense attorney to shy away from investigating and collecting evidence of evidentiary value for fear that removing an item with evidentiary value from the public sphere and placing it in the client's file is tantamount to concealment. Clearly it is not.

A second important issue is raised in Rule 3.4(f). The rule prohibits a party from advising a witness to refrain from voluntarily giving information to the other side. Unfortunately, some prosecutors advise witnesses not to talk to the defense. When the defense learns this has happened, the lawyer should consider filing a motion for relief, arguing that the conduct violates Rule 3.4.10 This prohibition does not apply to the client (you may, **and should**, advise your client against providing information to the prosecution). It also does not apply to the client's family members as long as the lawyer reasonably believes the family members interests will not be adversely impacted by refusing to voluntarily provide information.

10. Rule 3.7 – Lawyer as Witness

Rule 3.7 prohibits a lawyer from representing a client in a matter in which the lawyer is likely to be a witness. Because of this, it is imperative that whenever a lawyer interviews a witness in a case, s/he has an investigator or a colleague with him or her so that if the need to impeach the witness arises, the lawyer will not have to be the impeaching witness. Because one never knows when a witness may say something at trial that differs from what s/he told the defense previously, a lawyer should never interview a witness alone. It is not worth the

¹⁰ This conduct raises constitutional concerns. See Gregory v. United States, 125 U.S. App. D. C. 140, 369 F.2^d 185 (1966). Jurisdiction specific research must be conducted.

risk that the lawyer will have to withdraw from the case. Note that Rule 3.7 allows another lawyer in the same office to be a witness. Therefore, a lawyer may investigate with a colleague (as long as the colleague is not co-counsel on the case they are investigating).

11. Rule 4.1 – Truthfulness to Others

Rule 4.1 essentially commands that a lawyer not lie when dealing with other parties. But the commentary also makes clear that the lawyer does not have an affirmative duty to inform others of relevant facts. As a matter of fact, often times such revelations will run afoul of Rule 1.6.

12. Rule 4.2 – Dealing With Represented Parties

Rule 4.2 deals with attempts to interview a person who is represented by a lawyer. The Rule does not allow a lawyer to talk to a represented party about the subject of the representation. It does allow the lawyer to talk to the person about matters other than those that are the subject of the representation. So, suppose Mark Lawyer wants to talk to Jimmy Witness about what Jimmy saw during a robbery with which Mark's client is charged. Jimmy has a pending drug case and is represented by a lawyer in that matter. Mark may discuss the robbery with Jimmy (Jimmy is not represented in any matter concerning the robbery) but he may not ask Jimmy about the drug offense with which he is charged and represented. Suppose, however, that Jimmy is charged as a co-defendant in the robbery and represented in that case. Mark may not talk to Jimmy about the robbery, without his lawyer's permission, because Jimmy is represented in that matter.

Because Rule 4.2 only protects a defendant from being questioned about the subject matter of his representation, a lawyer must always advise his or her client not to talk about any matters with prosecutors or police without counsel being present. Of course, this Rule supplements the protections afforded under the Fifth and Sixth Amendments.

13. Rule 4.3 – Dealing With Unrepresented Parties

When a lawyer deals with an unrepresented party, the lawyer must be honest about his or her role in the case. Rule 4.3 instructs that when dealing with a person who is not represented by counsel, the lawyer must not imply in any way that s/he is disinterested in the matter. If a lawyer reasonably knows that the person misunderstands the lawyer's role, the lawyer should make reasonable efforts to correct the misunderstanding.

If the party asks a questions that calls for legal advice, how the lawyer may handle it depends on the party. If there is a reasonable possibility that the party's interests will be in conflict with the client's, the lawyer may only advise the party

to secure counsel. Otherwise, the rule does not prohibit the lawyer from answering the question.

14. Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistants

Defense lawyers depend on non-legal assistants whether they be investigators, paralegals, administrative assistants, or interns. These assistants are bound by the Rules of Professional Conduct. It is incumbent upon the supervising attorney to provide non-legal assistants the training, instruction, and supervision to ensure that they comply with these rules.

II. Resolving Ethical Challenges in a Client-Centered Way

With Jack Martin's 7 principles as a guide, and an understanding of the Rules most relevant to indigent defense practice, we now turn to a model that will help us to resolve ethical dilemmas in a manner that is both client-centered and ethical. We can view reactions to any ethical challenge along a spectrum, which is represented in Figure 1 below. On one end of the spectrum are those reactions that are purely the result of the instinct to curry favor with a third party (most likely a judge) or to protect oneself rather than the client. This end of the spectrum is represented by the word "Lawyer" because the motivation is often selfish. On the other end of the spectrum are those reactions that are purely the result of an instinct to achieve the client's desired outcome at all costs, without regard to the law or the ethical rules. This end of the spectrum is represented by the word "Client." At each end of the spectrum, the lawyer will often find himself behaving in violation of the rules of professional conduct. In the model the lawyer begins to engage in unethical behavior once s/he moves beyond the broken line at either end. There will then be a range of responses along the spectrum that are ethical, some which err more towards catering to the lawyer's interest, of those of a third party, and others which lean more towards protecting the client. The ethical client-centered lawyer will resolve ethical dilemmas in the latter range. In other words, we must always strive to achieve the client's goals in a manner that is ethical and lawful. The instinct to protect the client is the right instinct but, if unchecked by legal and ethical boundaries, can lead to troublesome results. On the other hand, the instinct to protect oneself, or to cater to the desires of parties other than the client, will ultimately violate principle #7 and result in unethical behavior. The lawyer with this instinct should consider referring back to principle #1 and seek employment elsewhere.

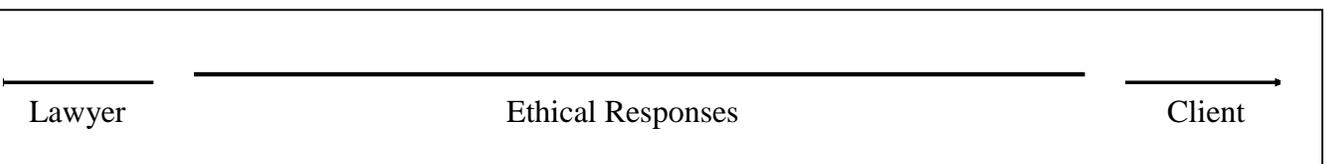


FIG. 1: In this model the far left end of the spectrum represents unethical behavior caused by a desire to please others (the judge) or protect the lawyer. The far right end of the spectrum represents an ethical behavior caused by a desire to achieve the client's desired outcome at all costs. The area in the middle represents a range of ethical responses which vary in their degree of client-centeredness.

By looking at two examples we can see how different responses to ethical challenges can lead to behavior that falls at various points along the model described above. We can also better understand how to resolve these dilemmas in a client-centered and ethical manner.

1. **EXAMPLE #1: Judge asks for confidential information**

Assume that Jane Lawyer is appointed a new client, Mike Client, who is charged with distribution of cocaine. As Ms. Lawyer prepares to handle the initial hearing, which will include a bond determination, she meets Mr. Client in the courthouse cellblock. During this initial interview, Ms. Lawyer asks Mr. Client if he has ever been convicted of any crime before. Mr. Client replies that he has two prior convictions for distribution of cocaine. When Ms. Lawyer receives the bail report that is given to the judge, she notes that it is silent regarding any criminal history. At the initial hearing the judge is considering the amount of the bond to be set. The Judge turns to Ms. Lawyer and asks, “Do you have any information about your client’s prior criminal history, counsel?”

Consider the following possible responses:

- a. Yes I do your honor, while I have not verified this, it is my understanding that he has two prior convictions for distribution of cocaine.
- b. Your Honor, this is Mr. Client’s first time ever being arrested.
- c. I don’t have to tell you anything, if you want to know go find out yourself.
- d. I do not have any information *that I am able to provide the Court* to supplement the bail report. There is no criminal history reflected in the bail report and I would ask the Court to rely on that for the purposes of this hearing.

This example raises a recurring dilemma in our line of work; one that pits the obligation to hold inviolate all client confidences pursuant to Rule 1.6 and the duty of candor to the tribunal under Rule 3.3. Rule 3.3 prohibits a lawyer from “mak[ing] a false statement of fact or law to a tribunal.” Therefore, if a lawyer chooses to answer a question posed by a judge, the answer must be truthful. However, refusing to answer a question, where doing so would violate a competing ethical obligation, does not run afoul of Rule 3.3.

In the above hypothetical, the first option is a clear example of the lawyer who is more interested in currying favor with the judge than protecting her client. While the lawyer was certainly candid with the judge, she violated Rule 1.6 which

prohibits the lawyer from disclosing confidential information. This behavior certainly falls on the far left end of the spectrum in the above model. The second option falls on the far right end of the spectrum. While it is an obvious way to maximize the chance of getting an immediate benefit for the client (an affordable bond), it requires that Ms. Lawyer be dishonest with the Court, a violation of Rule 3.3. While Ms. Lawyer is prohibited from disclosing what she learned from Mr. Client, she may not lie to the Court.

The third option violates neither Rule 1.6 nor Rule 3.3 but it is an ineffective way to achieve what the client's goal (low bond). It signals that the lawyer has some bad information that she is unwilling to share and prompts the judge to delve further, likely discovering the prior convictions.

The fourth option is a much better answer. Notice the italicized language, "*that I am able to provide the Court.*" This language makes all the difference in the world. If Ms. Lawyer simply said, "I do not have any information," that would be dishonest. She does have some information. However, it is true that she is unable to disclose this information pursuant to Rule 1.6. Therefore, to say "I do not have any information that I am able to provide the Court," is both true and protective of the confidence. Other possible responses might be, "I have not been able to verify anything different from the bail report," or "the bail report certainly does not reflect any, your Honor."

Words matter! As lawyers we must select words carefully. The difference between Jane Lawyer saying, "I have no information about a prior record," and "I have not been able to verify my client's prior record," is the difference between ethical and unethical lawyering.

For a twist on Example #1, assume that Joe Client does not reveal his past criminal history but that Jane Lawyer learns of Client's two prior convictions because she obtained a printout of his criminal history at the courthouse. Assume further that this document is a public record, accessible to anyone interested. For the purposes of this hypothetical problem, assume the bail record is again silent regarding any criminal history. Again, the Judge asks Lawyer, "Do you have any information about your client's prior criminal history, counsel?" Does it matter that Jane Lawyer learned this information through a public record rather than a privileged client communication. No. Remember that confidences are much broader than client communications and include information that is learned through the public record. **Do not confuse Rule 1.6 confidences with information that is considered privileged due to the attorney-client relationship.** It would violate Rule 1.6 for Lawyer to respond, "According to the criminal history I obtained through the court, Mr. Client has two prior convictions." The fourth option above is still the best answer.

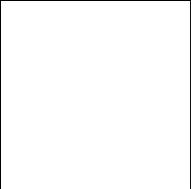
2. EXAMPLE #2: Client with a bench warrant

Assume that Joe Client failed to appear for a trial resulting in the judge issuing a bench warrant (a warrant for the client's arrest). Jane Lawyer has no idea where Mr. Client is. Jane Lawyer knows that if Mr. Client turns himself in it will reflect more favorably upon him than if he is arrested and returned to court forcibly, but also believes that either way Client will spend a significant amount of time in jail. One day Joe Client appears at Jane Lawyer's office to seek advice. He believes he made a mistake not showing up for trial but what's done is done. Client is afraid that if he turns himself in now he will be taken to jail. Client is a single father with two young children and wants to avoid jail until they are old enough to get along without him. Client is considering leaving town with his kids and wants advice about how to handle the situation. The following are some potential responses:

- a. Jane Lawyer excuses herself for a moment saying she needs to use the restroom, then calls the police from another office to report that Client is in her office.
- b. "Leaving town isn't good enough. The best way to avoid jail would be to leave the country, I recommend you get a bus to Mexico and don't come back."
- c. "You need to turn yourself in. If you don't turn yourself in, I will see you when you eventually get picked up. I have nothing else to say about the matter." Jane then ends the conversation.
- d. "Let's talk about the likely consequences of you turning yourself in as well as the likely consequences of deciding to remain on the run." Jane then methodically lays out the pros and cons of each decision and offers to always be available for consultation regardless of which option Client chooses.

The first option is obviously a violation of Rule 1.6, likely motivated by a lawyer who does not understand the ethical rules trying to cover her own back. All of the information reported to the police has been learned during the course of the representation and is, therefore, confidential. This is an example of gravitating across the broken line to the left in the above model.

The second option gravitates too far to the right in the model above. Presumably Lawyer is motivated by a desire to help Client avoid detection so that he may be with his kids. While a lawyer is obligated to render candid legal advice, the lawyer may not advise a client to break the law. Rule 2.1, governing the lawyer's role as advisor, and the accompanying commentary make clear that a lawyer is not limited to providing only legal advice. The lawyer may discuss the "moral, economic, social, and political" ramifications of a course of action, as the legal decisions cannot be made in a vacuum. Therefore, the lawyer may say something like, "You should be aware that when you try to register your kids for school you will have to provide information that will likely lead to your detection. Therefore, moving to another county in [the same state] will not likely save you from being arrested in this matter." The client may conclude from this



conversation that he should turn himself in because it will not be so easy to avoid detection. Alternately, the client may conclude that he should take his kids and leave the country. While the end result may be the same, the lawyer has not advised the client to continue to break the law by remaining a fugitive.

The third option is less clearly an ethical violation than the first, but is certainly not very client-centered. We need to know more of the circumstances to determine whether this course of action violates Rule 2.1. The Rule requires the lawyer to “render candid advice.” However, the commentary makes clear that the lawyer need not offer advice that is not requested. Therefore, if Client persisted in asking for advice about various courses of action and Lawyer refused to provide it, she would be in violation of Rule 2.1. However, if Lawyer recommended that Client turn himself in and Client did not ask any other questions, Lawyer is not required to offer unsolicited advice. In this hypothetical, Client specifically asked Lawyer for advice on how to handle the situation after explaining his concerns and she expressly told him that she had “nothing else to say about the matter,” after advising him to turn himself in. There is a strong argument that Lawyer violated Rule 2.1.

The final option is the most clearly ethical, and client-centered, response. Lawyer is obligated to provide requested advice and is entitled to discuss consequences beyond those that are legal. Without advising Client to undertake an illegal course of action, Lawyer can discuss the pros and cons of the actions Client proposes. Assume, for example, Client asks, “what if I go to Mexico? I have family there. Would they find me there?” Assuming it is consistent with the lawyer’s professional judgment, the lawyer may respond by saying, “You know, for the crime with which you are charged, the authorities will not likely try to find you in Mexico. Most likely, if you go to Mexico and never return to the United States, you will not be pursued. However, if you ever decide to return to the United States, and you get arrested, that decision will certainly have an adverse impact on your legal situation.” While this response may (or may not) encourage Client to go to Mexico, it is qualitatively different from affirmatively recommending that course of action. The lawyer need not, and indeed may not, withhold professional advice because she believes Client will “not do the right thing.”

These two examples help illustrate how the lawyer can try to resolve ethical dilemmas in a way that falls on the right side of the spectrum without crossing the line into unethical behavior. By acting on the instinct to always work to help the client achieve his or her stated objectives, the lawyer will look for client-centered reactions to ethical dilemmas. By understanding the Rules of Professional Conduct, the lawyer will know where the boundaries lie and be able to approach them without crossing them. The result will be ethical, client-centered representation.