

ETHICS AND APPELLATE PRACTICE

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I. Ethics of Initiating a Criminal Appeal

A. Duty to Perfect Appeal

1. Must consult with client. Roe v. Flores-Ortega, 528 U.S. 470 (2000) (counsel has a duty to consult with client about filing appeal)
2. Must appeal, if asked.

B. Frivolous Appeals – Duties of Counsel

1. Anders v. California, 386 U.S. 738 (1967) (cannot simply withdraw without briefing arguable issues of merit)
2. Penson v. Ohio, 488 U.S. 75 (1988) (must represent client throughout appeal)
3. Ethical failures
 - a. Smith v. Robbins, 528 U.S. 259 (2000) (claim that counsel neglected to file a merits brief on appeal)
 - b. Smith v. Murray, 477 U.S. 527(1986) (claim that counsel failed to make a particular argument on appeal)
 - c. United States v. Gomez Perez, 215 F.3d 315 (2nd Cir. 2000) (failure to file response to government's motion to dismiss based on appellate waiver)

C. Ethics of Waivers of Appeal and Post-Conviction Relief

1. United States v. Timothy John Vanderwerff, No. 12-cr-00069 (D. Col. June 28, 2012) (Kane, J.) (rejecting proposed plea agreement including waiver of appeal)
2. Florida Bar, Advisory Ethics Opinion 12-1 (June 22, 2012),

(Ethical impropriety of plea agreement including waivers of ineffective assistance of counsel and prosecutorial misconduct)¹

3. Innocence Project Report: “Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases,” Prepared by Dr. Emily M. West, Director of Research Innocence Project (Sept. 2010) ²
4. U.S. Department of Justice Memorandum for All Federal Prosecutors, Department Policy on Waivers of Ineffective Assistance of Counsel (Oct. 14, 2014) (“Federal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel, whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal.”)³

II. Disputes with Clients About Issues on Appeal

- A. ABA Model Rule 1.2, “Scope Of Representation And Allocation Of Authority Between Client And Lawyer”
 - (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
 - (b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

¹ Available at <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS+OPINION,+12-1>

² Available at <http://www.innocenceproject.org>

³ Available at <http://www.justice.gov/file/70111/download>

- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

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[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

- B. Caveat – Remember to preserve error for later review and to avoid procedural defaults
 - 1. Cullen v. Pinholster, 563 U.S. ___ (2011) (later collateral review issues limited by what was raised and preserved at trial and on appeal)
 - 2. O'Sullivan v. Boerckel, 526 U.S. 838 (1999) (to satisfy the exhaustion requirement, state prisoner must present claims to a

state supreme court in a petition for discretionary review when that review is part of the State's ordinary appellate review procedure)

C. Candor to Tribunal – Facts and Controlling Law

1. Nix v. Whiteside, 475 U.S. 157 (1986) (duty of counsel to prevent frauds upon the court)
2. ABA Model 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 or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;**

(2) **fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;** or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

III. The Fool's Client - No Right to Self-Representation on Appeal

- A. A client has a right to represent himself at trial. Faretta v. California, 422 U.S. 806 (1975).
- B. **But**, Faretta does not extend to self-representation on appeal. Martinez v. Court of Appeal, California, 528 U.S. 152 (2000).

IV. Ethics of Supreme Court Review

- A. No duty to file frivolous cert petition. United States v. Austin, 513 U.S. 5 (1994) (per curiam)
- B. Lawyer has duty to write the petition plainly – and don't let the client write it. In re Howard Neil Shipley, No. 14D2827, 135 S. Ct ___ (Mar. 23, 2015) (“All Members of the Bar are reminded, however, that they are responsible – as Officers of the Court – for compliance with the requirement of Supreme Court Rule 14.3 that petitions for certiorari be stated ‘in plain terms,’ and may not delegate that responsibility to the client.”)

V. Post-Conviction Ethics

- A. File timely petition and don't lie about having filed it. Holland v. Florida, 560 U.S. ___ (2010) (lying to client about having filed petition)
- B. Continue to monitor habeas petition as it progresses in order to perfect timely federal petitions and appeals. Maples v. Thomas, 566 U.S. ___ (2012) (big firm musical chairs plus clerk's notice to unknown addressee)

VI. Attorney as the Accused – Responding to Complaints

- A. Client's attorney-client communications and “secrets” are protected from disclosure.
- B. ABA Model Rule 1.6, “Confidentiality of Information”
 - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
 - (b) A lawyer may reveal information relating to the representation of a

client to the extent the lawyer reasonably believes necessary:

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

Comment

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

- C. Client's privilege remains intact during IAC claims, unless court orders otherwise. American Bar Association Formal Opinion 10-456 (July 14, 2010) "Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim"⁴
- D. Client's privilege lasts until death and after. Swidler & Berlin v United States, 524 U.S. 399 (1998).

⁴ Available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_456.authcheckdam.pdf