Three Legal Ethics Issues: Complaints, Control, & Role

United States District Court for the Eastern District of Missouri

&

Federal Public Defender Offices of the ED of MO & SD of IL

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Three Ethics Issues

- Ethics Complaints, IAC, & Online Criticism
- Client or Lawyer, Who's in Charge?
- Ethics of Standby Counsel

Ethics Complaints & IAC (2255 Motion)

- Ethics complaints – **duty to cooperate**

- IAC – **"may" defend yourself**, but **must protect client confidentiality** to the extent possible

- Illinois Rule & Missouri Rule 4-1.6 based on ABA Model Rule 1.6 [except Illinois ***requires*** disclosure to prevent reasonably certain death or substantial bodily harm]

(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;

Confidentiality

- Extends to former clients, even after their death

Rule 1.9: (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or **when the information has become generally known**; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

When Is Information of a Former Client Generally Known?

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 479 **December 15, 2017**

The "Generally Known" Exception to Former-Client Confidentiality

A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

“generally known”

- Applies only to use, not to disclosure, of information concerning former client

- Only information that is:

  1) widely recognized by the public in the relevant geographical area; **or**
  2) widely recognized in the former client’s industry, profession, or trade

- Not “generally known” merely because it has been

  - discussed in open court,

  - or is available in court records, libraries, or other public depositories of information

May disclose confidential client information only to the extent the lawyer reasonably necessary.

Do not have to respond to a government request prior to a court supervised response.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-456 **July 14, 2010**

Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

Attorney-Client Privilege vs. Client Confidentiality

- Separate Doctrines
  - Attorney-client privilege = rule of evidence (defined in each jurisdiction)
    no federal rule of evidence substantive definition
    Fed. Rule Evidence 502(g)(1) - "'attorney-client privilege'" means the protection that applicable law provides for confidential attorney-client communications"
  - Client confidentiality = ethics rule, MR 1.6

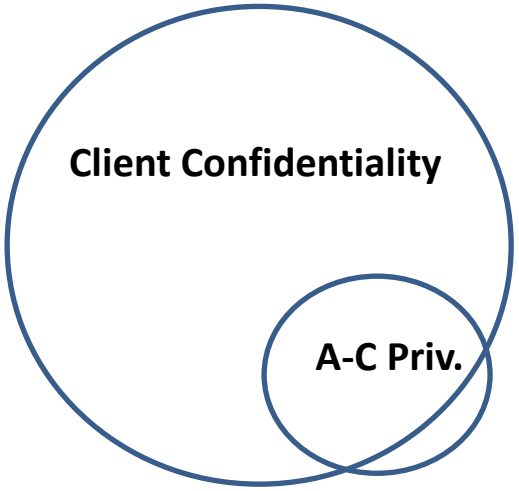
"shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by" some designated exceptions

Recap: 2 different doctrines, similar but different

- Rule 1.6 Duty of Confidentiality (ethics rule & expansive)

"shall not reveal information relating to the representation of a client unless . . . ."

- Attorney-Client Privilege (evidence rule & generally narrower)



Some Rule 1.6 exceptions are not exceptions to A-C Privilege, *e.g*, no exception for defending oneself (need court supervision/order)

Basics of Attorney-Client Privilege

Restatement § 86

1. a communication

2. made between privileged persons

3. in confidence

4. for the purpose of obtaining or providing legal assistance for the client

Waiver of A-C Privilege

- Only the client can waive A-C privilege
- Court may find that by asserting IAC, the client has waived A-C privilege, but that requires the court's determination and supervision
- If court issues order finding IAC claim waives A-C privilege, limit response to only what is "reasonably necessary to establish a defense" – the court order is not a blanket waiver

Facing an IAC Claim?

- When government contacts you

- You have a duty to protect A-C privilege & confidentiality

- Comment 15 to IL Rule 1.6 & Comment 11 to MO Rule 4-1.6: "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that . . . the information sought is protected against disclosure by attorney-client privilege or other applicable law."

- Do not reveal A-C privilege communications or confidential information without a court order or court supervision

Office of Chief Disciplinary Counsel, MO Ethics Op. 2017-04

Rules 4-1.4; 4-1.6; 4-3.4

Q: May Attorney comply with a court Order directing Attorney to provide to law enforcement information related to the representation of Client, where Client declines to give informed consent for Attorney to provide the confidential information?

A: Rule 4-1.6(b)(4) allows Attorney to reveal confidential information to the extent reasonably necessary to comply with other law or a court order. Rule 4-3.4(c) forbids a lawyer from knowingly disobeying an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no obligation exists. Before complying with the Order, and absent informed consent from Client to do otherwise, attorney should assert on Client's behalf all non-frivolous claims that the Order is not authorized by other law or that the information is protected by the attorney-client privilege or other applicable law. See Rule 4-1.6, Comment [11]. If Attorney's challenge is denied, Attorney must consult with Client about the possibility of appeal, to the extent required by Rule 4-1.4. See Rule 4-1.6, Comment [11]. If review is not sought, or if Client is no longer Attorney's current client at the time of the adverse ruling, Attorney is free to comply with the Order. Rule 4-1.6(b)(4). If Attorney lacks a good faith basis for an original or further challenge to the Order, Attorney is free to comply with the Order and may be required to do so pursuant to Rule 4-3.4(c).

Responding to Online Criticism – Think Twice

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 496 **January 13, 2021**

Responding to Online Criticism

Lawyers are regularly targets of online criticism and negative reviews. Model Rule of Professional Conduct 1.6(a) prohibits lawyers from disclosing information relating to any client's representation or information that could reasonably lead to the discovery of confidential information by another. A negative online review, alone, does not meet the requirements of permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response that discloses information relating to a client's representation or that would lead to discovery of confidential information would exceed any disclosure permitted under the Rule. As a best practice, lawyers should consider not responding to a negative post or review, because doing so may draw more attention to it and invite further response from an already unhappy critic. Lawyers may request that the website or search engine host remove the information. Lawyers who choose to respond online must not disclose information that relates to a client matter, or that could reasonably lead to the discovery of confidential information by another, in the response. Lawyers may post an invitation to contact the lawyer privately to resolve the matter. Another permissible online response would be to indicate that professional considerations preclude a response.[1]

Questions?

Client or Lawyer, Who's in Charge?

Rule 1.2: Client-Lawyer Relationship

(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**.

Jones v. Barnes, 463 U.S. 745, 751 (1983), Sixth Amendment gives the accused the right to 1) plea to enter, 2) waive jury trial, 3) testify, and 4) appeal.

Faretta v. California, 422 U.S. 806 (1977), under some circumstances the Sixth Amendment also gives the accused the right to proceed pro se.

Faretta, 422 U.S. at 819-20

- The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." . . . The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant.

Client "Objectives" of Representation

- Plea to enter
- Whether to waive jury trial
- Whether to testify
- Whether to appeal (in brief, lawyer must argue anything that may arguably support the appeal, even if it appears to raise frivolous issue)
- Proceed pro se
- Make the government prove its case. Rule 3.1: "A lawyer for the defendant in a criminal proceeding . . . may . . . defend the proceeding as to require that every element of the case be established."

Comment [3]. "The lawyer's obligations under this Rule [3.1] are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule."

Clearly “Means” Decisions

- Which jurors to challenge or accept
- Which witnesses to call (other than client)
- Whether and how to conduct cross-examination
- What evidence to introduce
- What pretrial and trial motions to make
- Usually other strategic decisions

Debatable “Means” Decisions

- Some courts rely on *Faretta* that it is the client’s Sixth Amendment right “to make his defense”
- The theory of the defense?
- Whether mitigation evidence should be introduced?
- *State v. Hedges*, 8 P.3d 1259, 1273-74 (Kan. 2000), Defendant competent to stand trial has the right to decide whether to assert insanity defense.

Disagreements Over Means?
Comment 2 to Rule 1.2

[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).

Rule 1.2(a) “lawyer may take such action on behalf of a client as is **impliedly authorized to carry out the representation**.

- Case scheduling
- Whether to file a suppression motion or other pretrial motions
- Whether to stipulate to an easily provable fact

Client's Acquiescing to Counsel's Decisions

- *Frey v. Schuetzle*, 151 F3d 893 (8th Cir. 1998), accused did not object when his attorney stated he would not testify- - acquiescence was equated with knowingly and voluntarily waiving right to testify

- *Florida v. Nixon,* 543 U.S. 175 (2004) versus *McCoy v. Louisiana,* 138 S.Ct. 1500 (2018)

Questions?

Ethics of Standby Counsel

- 66% of pro se defendants go to trial
- Authority to appoint
- Role, available to assist
- Pro se defendant has the right to control the defense
- Substantial and frequent unsolicited participation may deprive pro se defendant of Sixth Amendment right to present client's own defense, *Faretta*
- Legal advisor not legal assistant – do not have perform research errands for the defendant unless ordered by the court

Duties Owed to Pro Se Defendant

- No client-attorney relationship unless asked to represent
- Only duty is to be available, unless the court specifies more
- Pro se who does not ask for standby counsel, like a prospective client
- If the court orders or the pro se requests partial assistance, then limited scope representation
- If pro se requests representation, then full client-attorney relationship

Judge's Role in Appointing Standby Counsel

- Judge's duty to ensure standby counsel does not participate unless requested by the pro se defendant or ordered by the court

Best Practices of Judge and Standby Counsel

- Court order specifying what is expected of standby counsel and role
- Judge should explain role of standby counsel to the accused
- Standby counsel should treat pro se defendant as client for conflict purposes
- Standby counsel should treat pro se defendant as prospective client for confidentiality purposes
- Standby counsel must be sufficiently prepared to provide competent advice and assistance, including taking over defense if requested by the court or ordered by the court
- Standby counsel must attend all stages of the proceedings

Questions?