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ETHICS IN DUI DEFENSE

Glenn R. Funk
117 Union Street
Nashville, TN 37201
(615) 255-9595

Before getting in to some of the particular scenarios that can present ethical dilemmas in DUI representation, it is important to note that on September 29, 2010, the Supreme Court filed an Order adopting revisions to the Rules of Professional Conduct. The changes will take effect on January 1, 2011. Among the more interesting changes is a new provision dictating that prosecutors who discover credible evidence that someone might have been wrongfully convicted of a crime are required to take steps to further investigate and, in some instances, to work to remedy the conviction. The amended Rules also provide more specific guidelines regarding a lawyer's duty to communicate and consult with the client. Obviously, both of these amendments are of particular interest to those of us representing criminal defendants.

COMMON ETHICAL QUESTIONS IN DUI REPRESENTATION

Outlined below are five hypothetical situations which commonly arise when representing a defendant charged with DUI:

1. What if you know that client has a prior and the D.A. does not?
2. Then, what if the D.A. actually asks whether your client has priors?
3. D.A. knows your client has a prior but warrant does not reflect he was represented even though you know that he was?
4. You know your client has a DUI out of State but it doesn't look like a DUI - can you argue against it even when you know different?

5. Client admits to you he was drunk but then insists on taking stand and testifying he was not - can you allow them to proceed?

Attached to this outline are the relevant portions of Rule 1.6, which governs 'confidentiality'; Rule 3.1, entitled 'meritorious claims and contentions'; and Rule 3.3, dealing with 'candor toward the tribunal'. The pertinent comments are also provided as they are helpful in answering each of the questions outlined above.

What if you know that client has a prior and the D.A. does not?

This dilemma would seem to be resolved pursuant to Rule 1.6 which would seem to demand that you cannot reveal this information to the District Attorney. Indeed, review of the comments section under Rule 1.6 (highlighted) provides that "***The confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source.***" As such, it would appear one could (or should) take this 'whatever the source' portion to mean that, even if you had a copy of the prior conviction, your duty is to your client and not to the State.

What if the D.A. actually asks whether your client has priors?

Even where the State asks about priors, (they probably shouldn't be asking in the first place - and, maybe, that's what you tell them if they do ask), Rule 1.6 would seem to prohibit informing them without your client's consent. In reality, depending on the DA, it may help negotiations to be forthcoming and that's probably a conversation to have with your client. (*See also, discussion under question 3 regarding comment number 8 dealing with authorized disclosure*). It would seem the State can probably find the prior if they look hard enough. But, for ethical purposes, this Rule appears to prohibit telling them anything about your client's record without the client's consent.

What do you do when the attorney for the State knows your client has a prior DUI conviction but the warrant does not reflect he was represented even though you know that he was?

This question seems to contemplate you would be making an assertion you knew was not true *unless* the DA simply offered to disregard the conviction without asking for comment. If that were the case, certainly the same reasoning for the first two questions would apply: not to reveal/ offer secrets of your client. Your duty would be to them and not the State.

On the other hand if this scenario develops into actually arguing the issue, comment number 8 dealing with 'authorized disclosure' is instructive:

> [8] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. ***In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed,*** or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

In the scenario presented where you are aware that the client was actually represented by counsel in his prior DUI conviction, it would not seem you could *properly dispute* that fact in actual litigation without being dishonest. But, this is where Rule 3.1, dealing with advocacy, creates some gray area. Pursuant to Rule 3.1, " *a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established".* Because this scenario is closely related to the 4th hypothetical, let's examine that situation.

You know your client has a DUI out of State but it doesn't look like a DUI - can you argue against it even when you know different?

Clearly, this question contemplates putting forth an argument you know is not supported by the facts. Again, Rule 3.1 seeks to prohibit frivolous arguments or those that are not in good faith. However, as noted above, it makes an allowance for lawyers representing someone whose liberty is at stake to *nevertheless so defend the proceeding as to require that every element of the case be established.* I would suggest it doesn't really matter what you know. The issue would be what can the State prove. Might be a fine line but the duty to your client is making the State prove their case provided you are not making false statements to the court.

Returning to the third hypothetical, this same reasoning and the same Rules would seem to apply if the situation came to actually putting forth an argument. At that point, while you certainly could not argue something you knew to be false , pursuant to Rule 3.1, you can make them prove their case. Finally, as a practical consideration, it is also helpful that Comment 8 to Rule 1.6 allows that disclosure can be made in negotiation (such as disclosing prior record) if it would facilitate a satisfactory conclusion. Determining whether such disclosure would facilitate a good result for the client will, of course, depend on a host of factors, such as knowing the effect it would have on the particular District Attorney.

Your client admits to you he was drunk but then insists on taking stand and testifying he was not - can you allow them to proceed?

Of all the hypothetical scenarios presented here, this is the one for which the Rules provide the clearest answer. In fact, Rule 3.3, entitled 'candor toward the tribunal" states:

(b) A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

(c) A lawyer shall not affirm the validity of, or otherwise use, any evidence the lawyer knows to be false.

Rule 3.3 continues by providing a step by step procedure for dealing with this situation:

1. If you know your client intends to lie on the stand, you must first advise him not to do so - Rule 3.3(e);
2. If, after advising him to refrain from perjury, you know he still intends to do so, you must seek to withdraw from representation. Importantly, you must tell the court the request is pursuant to the Rules of Professional *without further disclosure of information protected by Rule 1.6*.
3. If not allowed to withdraw from representation you must allow your client to testify in the narrative, meaning he offers his testimony without examination on your part.

Again, these steps are detailed in Rule 3.3, which, along with the relevant portions of 1.6 and 3.1, are attached to this outline. It is important to consider the lengths to which the Rules go to protect the rights and interests of the defendant in a criminal proceeding. These protections are perhaps most evident in Rule 3.3's procedures for handling a client who intends to defraud the court in that, the attorney who is seeking to withdraw cannot inform the court as to the specifics of his request and, if the motion to withdraw is not granted, he must allow the client to still testify. Clearly, the Rules of Professional conduct put a premium on zealous representation of criminal defendants.

As for hypotheticals 1-4, it seems there is always gray area but that the number one duty is to the client and maintaing the client's secrets. As noted, the rules make special allowances for zealous representation in criminal cases provided you, as the lawyer, do not knowingly perpetrate a fraud on the court. As such, the best answer to any ethical dilemma in criminal representation is probably remember who you represent, make the State prove their case and don't lie.

Rule 1.6
CONFIDENTIALITY

(a) Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation. [Amended by order filed April 29, 2003.]

COMMENTS

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client, but it also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of lawyer-client confidentiality is given effect by related bodies of law, including the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. ***The confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source.*** A lawyer may not disclose such information except as

authorized or as required by the Rules of Professional Conduct or other law. See also Scope Comment [7].

[7] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of hypotheticals to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[8] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. ***In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed,*** or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Disclosure Adverse to Client

[10] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. For example, paragraph (b)(1) enables the lawyer to reveal information to the extent necessary to prevent the client from committing a crime. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although Paragraph (b)(1) does not require that the lawyer reveal the client's misconduct, the lawyer may not in any way counsel the client to engage, or assist the client, in conduct that the lawyer knows is criminal or fraudulent. See RPC 1.2(d); see also RPC 1.16 (respecting the lawyer's obligation or right to withdraw from the representation of the client in such circumstances). ***RPC 3.3, rather than paragraph (b)(1) of this Rule governs disclosure of a client's intention to commit perjury or other crimes in connection with an adjudicative proceeding.***

CHAPTER 3
ADVOCATE

Rule 3.1
MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend or continue with the prosecution or defense of a proceeding, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENTS

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. Both procedural and substantive law establish limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client 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. What is required of lawyers, however, is that they act reasonably to inform themselves about the facts of their client's case and the law applicable to the case and then act reasonably in determining that they can make non-frivolous arguments in support of their client's position. Such an action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a non-frivolous argument on the merits of the action taken or to support the action taken by a non-frivolous argument for an extension, modification, or reversal of existing law.

[3] Although this Rule does not preclude a lawyer for a defendant in a criminal matter from defending the proceeding so as to require that every element of the case be established, the defense lawyer must not file frivolous motions and must give notice to the prosecution if the lawyer decides to abandon an affirmative defense that the lawyer had previously indicated would be presented in the case.

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

(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) in an *ex parte* proceeding, fail to 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.

(b) A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

(c) A lawyer shall not affirm the validity of, or otherwise use, any evidence the lawyer knows to be false.

(d) A lawyer may refuse to offer or use evidence, other than the testimony of a client who is a defendant in a criminal matter, that the lawyer reasonably believes is false, misleading, fraudulent or illegally obtained.

(e) If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client

to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall consult with the client about the consequences of the client's failure to do so.

(f) If a lawyer, after consultation with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by RPC 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.

(g) A lawyer who, prior to conclusion of the proceeding, comes to know that the lawyer has offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by RPC 1.6.

(h) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has perpetrated a fraud upon the tribunal or otherwise committed an offense against the administration of justice in connection with the proceeding, and in which the lawyer's client was not implicated, shall promptly report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.

(i) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.

(j) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's report of a perjury, fraud, or offense against the administration of justice by a person other than the lawyer's client, a tribunal requests additional information that the lawyer can only provide by disclosing information protected by RPC 1.6 or 1.9(c), the lawyer shall comply with the request, but only if finally ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected by the attorney-client privilege.

COMMENTS

[1] This Rule governs the conduct of a lawyer who is representing a client in connection with the proceedings of a tribunal, such as a court or an administrative agency acting in an adjudicative capacity. It applies not only when the lawyer appears before the tribunal, but also when the lawyer participates in activities conducted pursuant to the tribunal's authority, such as pre-trial discovery in a civil matter.

[2] The 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 to refrain from assisting a client to perpetrate a fraud upon the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare RPC 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in RPC 1.2(d) not to counsel a client to commit, or assist the client in committing a fraud, applies in litigation. Regarding compliance with RPC 1.2(d), see the Comment to that Rule and also Comments [1] and [7] to RPC 8.4.

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal

argument is a discussion seeking to determine the legal premises properly applicable to the case.

Ex Parte Proceedings

[5] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an *ex parte* proceeding, such as an application for a temporary restraining order or one conducted pursuant to RPC 1.7(c), there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. As provided in paragraph (a)(3), the lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Refusing to Offer or Use False Evidence

[6] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. The lawyer must similarly refuse to offer a client's testimony that the lawyer knows to be false, except that paragraph (b) permits the lawyer to allow a criminal defendant to testify by way of narrative if the lawyer's request to withdraw, as required by paragraph (f), is denied. Paragraph (c) precludes a lawyer from affirming the validity of, or otherwise using, any evidence the lawyer knows to be false, including the narrative testimony of a criminal defendant.

[7] As provided in paragraph (d), a lawyer has authority to refuse to offer or use testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer or use the testimony of such a client because the lawyer reasonably believes the testimony to be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Wrongdoing in Adjudicative Proceedings by Clients and Others

[8] A lawyer who is representing a client in an adjudicative proceeding and comes to know prior to the completion of the proceeding that the client has perpetrated a fraud or committed perjury or another offense against the administration of justice, or intends to do so before the end of the proceeding, is in a difficult position in which the lawyer must strike a professionally responsible balance between the lawyer's duties of loyalty and confidentiality owed to the client and the equally important duty of the lawyer to avoid assisting the client with the consummation of the fraud or perjury. In all such cases, paragraph (e) requires the lawyer to advise the client to desist from or to rectify the crime or fraud and inform the client of the consequences of a failure to do so. The hard questions come in those rare cases in which the client refuses to reveal the misconduct and prohibits the lawyer from doing so.

[9] Paragraph (f) sets forth the lawyer's responsibilities in situations in which the lawyer's client is implicated in the misconduct. In these situations, the Rules do not permit the lawyer to report the client's offense. Confidentiality under RPC 1.6 prevails over the lawyer's duty of candor to the tribunal. Only if the client is implicated in misconduct by or toward a juror or a member of the jury pool does the lawyer's duty of candor to the tribunal prevail over confidentiality. See paragraph (i).

[10] Although the lawyer may not reveal the client's misconduct, the lawyer must not voluntarily continue to represent the client, for to do so without disclosure of the misconduct would assist the client to consummate the offense. The Rule, therefore, requires the lawyer to seek permission of the tribunal to withdraw from the representation of the client. To increase the likelihood that the tribunal will permit the lawyer to withdraw, the lawyer is also required to inform the tribunal that the request for permission to withdraw is required by the Rules of Professional Conduct. This statement also serves to advise the tribunal that something is amiss without providing the tribunal with any of the information related to the representation that is protected by RPC 1.6. These Rules, therefore, are intended to preserve confidentiality while requiring the lawyer to act so as not to assist the client with the consummation of the fraud. This reflects a judgment that the legal system will be best served by rules that encourage clients to confide in their lawyers who in turn will advise

them to rectify the fraud. Many, if not most, clients will abide by their lawyer's advice, particularly if the lawyer spells out the consequences of failing to do so. At the same time, our legal system and profession cannot permit lawyers to assist clients who refuse to follow their advice and insist on consummating an ongoing fraud.

[11] Once the lawyer has made a request for permission to withdraw, the tribunal may grant or deny the request to withdraw without further inquiry or may seek more information from the lawyers about the reasons for the lawyer's request. If the judge seeks more information, the lawyer must resist disclosure of information protected by RPC 1.6, but only to the extent that the lawyer may do so in compliance with RPC 3.1. If the lawyer cannot make a non-frivolous argument that the information sought by the tribunal is protected by the attorney-client privilege, the lawyer must respond truthfully to the inquiry. If, however, there is a non-frivolous argument that the information sought is privileged, paragraph (h) requires the lawyer to invoke the privilege. Whether to seek an interlocutory appeal from an adverse decision with respect to the claim of privilege is governed by RPC 1.2 and 3.1.

[12] If a lawyer is required to seek permission from a tribunal to withdraw from the representation of a client in either a civil or criminal proceeding because the client has refused to rectify a perjury or fraud, it is ultimately the responsibility of the tribunal to determine whether the lawyer will be permitted to withdraw from the representation. In a criminal proceeding, however, a decision to permit the lawyer's withdrawal may implicate the constitutional rights of the accused and may even have the effect of precluding further prosecution of the client. Notwithstanding this possibility, the lawyer must seek permission to withdraw, leaving it to the prosecutor to object to the request and to the tribunal to ultimately determine whether withdrawal is permitted. If permission to withdraw is not granted, the lawyer must continue to represent the client, but cannot assist the client in consummating the fraud or perjury by directly or indirectly using the perjured testimony or false evidence during the current or any subsequent stage of the proceeding. A defense lawyer who complies with these rules acts professionally without regard to the effect of the lawyer's compliance on the outcome of the proceeding.

Constitutional Requirements

[17] These Rules apply to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these Rules is subordinate to any such constitutional requirement.