



PUERTO RICO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

DILEMAS ÉTICOS DE LOS ABOGADOS CRIMINALISTAS

-November 2008-

BIBLIOGRAPHY

Among the authorities relied upon at the Ethics tertulia are the following. Many of these are not included in the materials distributed at the tertulia.

In Puerto Rico, the Cánones de Ética provide substantive law. Their violation, even in federal court, can result in sanctions against any attorney admitted to practice in Puerto Rico. The federal court also adopts the ABA Model Rules (not the Code) of Professional Conduct. To the extent the Code sheds light on the Rules, it may be helpful, but it is not authoritative.

PROBLEM AREA: Client False Name, Client Perjury

Ethics Advisory Opinion, NACDL Formal Opinion 92-2

("What is the proper course for a criminal defense attorney to follow if the defendant proposes to commit perjury?")

Ethics Advisory Committee, NACDL, Formal Opinion 90-2

"Must an attorney disclose to a state court that client is charged under false name where clients requests non-disclosure of fact that true name is different and that s/he is in fact a resident alien, not illegal alien?"

Florida Professional Ethics Advisory Opinion 90-6 (Reconsideration) 1/18/08
(Under Rules of Professional Conduct)

This body had previously (Former Ethics Opinion 90-6)held that lawyer who learns that client is proceeding under false name "may not inform the court of this fact." On reconsideration, that opinion is withdrawn and Committee decides that:

- A. If lawyer learns false name before accepting representation, must condition representation on agreement to disclose true name.
- B. If lawyer learns this after accepting representation, but before entering appearance, lawyer should attempt to persuade client to reveal true name. If client refuses, lawyer must disclose the fact "if disclosure is necessary to prevent client from committing a crime."
- C. If the lawyer learns only after appearing under the false name, must inform client cannot assist in misleading the court & try to persuade client to disclose. If unsuccessful, lawyer must disclose, may have to withdraw.

OJO: These scenarios do not apply to "John Doe" defendants because everyone knows your client is not John Doe.

Note to this Opinion: "Whether the client's constitutional rights to counsel and against self-incrimination supersede the lawyer's ethical responsibilities under the Rules Regulating the Florida Bar is outside the scope of this committee's authority to opine." But you know what Justice Stevens would say!

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

Supreme Court unanimously decided that not permitting client to testify falsely is not ineffective assistance of counsel. In self-defense case, defendant wanted to say he saw a gun when previously indicated merely thought he saw a gun. Please read Justice Stevens' concurrence warning attorneys that those who adopt the role of judge or jury to determine the facts . . . pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment."

PROBLEM AREA: Client's Incriminating Physical Evidence

Formal Ethics Opinion, Colorado State Bar Ethics Committee
Ethics Opinion 60 7/24/82

("Lawyer has duty to surrender incriminating physical evidence in his or her possession, without revealing identity and confidential communications of client. When the evidence is observed (but not possessed, altered or disturbed) as a result of confidential communications, s/he must not disclose the observations to authorities." (Under Code of Professional Responsibilities, not Model Rules)

*Formal Opinion No. 2005-105
(Oregon)*

"A lawyer may not accept evidence of a crime, such as a murder weapon, unless the lawyer makes it available to the prosecutor. . . . A lawyer may, however, deliver the weapon to the prosecutor anonymously or through an intermediary to avoid implicating the lawyer's client."

*Opinion #60 Issued 9/04/85
Professional Ethics Commission of the Board of Overseers of the Bar of Maine*

"The lawyer is under no ethical obligation to act as custodian of evidence for a client. Should a lawyer elect to take possession of the evidence, the lawyer will be confronted with complex and conflicting ethical and legal obligations."

Cites:

- The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from his Client, 38 U.Chi.L.Rev. 211, 212-213 (1970)
- *In re Ryder*, 263 F.Supp. 360 (E.D. Va. 1967)(frequently cited)
- Comment, Ethics, Law and Loyalty: The Attorney's Duty to Turn Over Incriminating Evidence, 32 Stanford L. Rev. 977 (1980)
- **Freedman, Where the Bodies are Buried: The Adversary System and the Obligation of Confidentiality, 10 Crim. Law. Bul. 979.

This Opinion concludes:

“Having set forth the countervailing interpretations, one of which is a simple argument arising from the plain language of the rule and the criminal code and the other of which is considerably more complex and less obvious from the law, we are unable to provide an answer as to what the ethical obligations of an attorney are when in possession of incriminating evidence. We do think it clear that . . . lawyers are well advised not to take possession of evidence of a crime.”

PROBLEM: FISHY SMELLING FEES

In re Moffit, Zwerling & Kemmler, 846 F.Supp. 463 (E.D. Va. 1994)(Fee of over \$100,000)

paid in \$100. bills pulled out of cracker box). Oft-cited case. Shepardize for First Circuit cases. "There is a clear principle that an attorney is not permitted to be willfully ignorant of how his/her representation is funded." Duty to inquire: Lawyer must ask, "what kind of fish is that?" and accept only answers that an ordinary lawyer would believe.

See generally, excellent article by Barry Tarlow in RICO REPORT, THE CHAMPION Sept/Oct/ 1983, and possibly later.

And don't forget J. Pérez Giménez' opinion in [*US v. González-Mendez*](#), 352 F.Supp.2d 173, 66 Fed. R. Evid. Serv. 301 (D.Puerto Rico January 14, 2005) on US Attorney's inquiry into attorney fees.

GENERALLY, FOR PROBLEMS 1 & 2, *see* "Crime/Fraud exception" to duty of confidentiality. *See, e.g., In re Grand Jury, Violette*, 183 F.3d 71 (1st Cir. 1999).