FUNDAMENTAL ETHICAL CONSIDERATIONS IN FEDERAL CRIMINAL DEFENSE

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National Seminar for Federal Defenders
Pittsburgh, Pennsylvania
June 3, 2016

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I. Certain decisions are the defendant's and certain decisions are defense counsel's.[1]

A. Defendant's decisions after full consultation.

1. What plea to enter.

2. Whether to waive a jury trial.

3. Whether to testify in his or her own behalf.

See ABA Standards for Criminal Justice, § 4-5.2(a), at 199-200 (ABA 3d ed. 1993) [hereinafter cited as "ABA Standards"]; Annotated Model Rules of Professional Conduct, Rule 1.2(a) (ABA 6th ed. 2007) [hereinafter cited as "AMRPC"]; Texas Disciplinary Rules of Professional Conduct, Rule 1.02(a) [hereinafter cited as "TDRPC"]; see also Florida v. Nixon, 543 U.S. 175, 187-92 (2004) (reiterating that "[a] defendant . . . has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal,'" but that, when counsel informs the defendant of the strategic choice to admit guilt in the guilt-innocence phase of a capital trial and the client is unresponsive, prejudice is not to be presumed in an analysis for ineffective assistance of counsel); United States v. Chapman, 593 F.3d 365, 368 (4th Cir. 2010) (citing Nixon and reiterating that the decisions that are exclusively a defendant's are whether to plead guilty, waive a jury, testify, and appeal); United States v. Thomas, 417 F.3d 1053, 1056-59 (9th Cir. 2005) (applying Nixon to a non-capital federal prosecution and assuming that it is deficient performance to fail to consult with the defendant prior to conceding guilt, but holding that there was no prejudice under the test for ineffective assistance of counsel); United States v. Mullins, 315 F.3d 449, 454-57 (5th Cir. 2002)

[1]Although this outline cites numerous cases and various rules and codes of professional ethics, the author encourages you to consult and rely on the most recent rules and precedent in your particular jurisdiction.

(holding that the "decision of whether to testify belongs to the defendant and his lawyer cannot waive it over his objection," but that the lawyer's improper deprivation of the right to testify, although deficient performance, was not prejudicial in this particular case); United States v. Holman, 314 F.3d 837, 840-45 (7th Cir. 2002) (holding that performance of attorney who conceded client's guilt without client's consent from the beginning of trial on one of many counts of drug trafficking was constitutionally deficient, but that the defendant suffered no prejudice as a result), cert. denied, 538 U.S. 1058 (2003); Sexton v. French, 163 F.3d 874, 881 (4th Cir. 1998) (noting that every circuit to have addressed the matter has found that the decision of whether to testify is personal and must be waived by the defendant), cert. denied, 528 U.S. 855 (1999); United States v. Ortiz, 82 F.3d 1066 (D.C. Cir. 1996) (holding that a per se rule requiring court to inquire whether defendant knowingly and intelligently was waiving his right to testify would interfere with the attorney-client relationship, but that, if the court is alerted to a problem with the attorney-client relationship, court may have duty to ask defendant whether waiver was voluntary); United States v. Pennycooke, 65 F.3d 9 (3d Cir. 1995) (court ordinarily should not inform defendant of right to testify or ask defendant whether he is waiving the right voluntarily, because this could influence defendant to waive right *not* to testify); Nielsen v. Hopkins, 58 F.3d 1331 (8th Cir. 1995) (counsel's having psychiatrist testify at guilt-innocence phase of murder trial that defendant was intoxicated at the time of the killing did not amount to conceding guilt, because intoxication was a defense to first-degree murder); Nichols v. Butler, 953 F.2d 1550 (11th Cir. 1992) (defendant was denied effective assistance of counsel where attorney, for purely strategic (non-perjury-related) reasons, threatened to withdraw if defendant testified); United States v. Teague, 953 F.2d 1525, 1532 (11th Cir.) (right to testify is personal and fundamental and cannot be waived by counsel or the court), cert. denied, 506 U.S. 842 (1992); Stano v. Dugger, 921 F.2d 1125, 1146 (11th Cir.) (even if counsel is retained, defendant does not relinquish decision on what plea to enter), cert. denied,

502 U.S. 835 (1991); Miller v. Angliker, 848 F.2d 1312 (2d Cir.) (defendant's choice to plead guilty, not guilty, or not guilty by reason of insanity), cert. denied, 488 U.S. 890 (1988); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983) (trial counsel cannot concede guilt at guilt-innocence phase of capital murder trial), cert. denied, 470 U.S. 1059 (1985); Wiley v. Sowders, 647 F.2d 642 (6th Cir.) (counsel cannot concede guilt without obtaining consent to strategy), cert. denied, 454 U.S. 1091 (1981); State v. Humphries, 336 P.3d 1121, 1126 (Wash. 2014) (en banc) (holding that the trial court could not accept defense counsel's stipulation to an element of the offense in the face of defendant's objection); Commonwealth v. Simmons, 394 S.W.3d 903, 911 (Ky. 2013) (holding that the right to a 12-person jury may not be unilaterally waived by counsel, but may only be waived personally by the defendant); see generally Godinez v. Moran, 509 U.S. 389 (1993) (in context of competency standard, court mentions several decisions defendant must be able to make: whether to waive jury trial, whether to testify, what defense to use).

4. Whether to appeal. See ABA Standards § 4-8.2(a), (b), at 237; see also Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (reiterating that it is professionally unreasonable for a lawyer to disregard a client's direction to file a notice of appeal); Hodge v. United States, 554 F.3d 372, 380 (3d Cir. 2009) ("If counsel failed to follow Hodge's instructions [to appeal], his assistance was clearly ineffective under Flores-Ortega. If, on the other hand, counsel was unsure about Hodge's wishes, the consultation and subsequent service he provided was still deficient under Flores-Ortega, as well as in violation of Strickland's reasonableness standard, because any doubt under these circumstances should have been resolved in favor of appeal."); Don v. Nix, 886 F.2d 203 (8th Cir. 1989) (counsel cannot waive defendant's right to appeal).

   a. Indeed, disregarding the client's direction to file a notice of appeal is professionally unreasonable even "in a case where

the defendant signed, as part of his plea agreement, a limited waiver of his right to appeal his sentence." Gomez-Diaz v. United States, 433 F.3d 788, 790, 791-93 (11th Cir. 2005); see also Campbell v. United States, 686 F.3d 353, 358-60 (6th Cir. 2012); United States v. Poindexter, 492 F.3d 263, 271-73 (4th Cir. 2007); United States v. Tapp, 491 F.3d 263, 265-66 (5th Cir. 2007); Campusano v. United States, 442 F.3d 770, 771-72 (2d Cir. 2006); United States v. Garrett, 402 F.3d 1262, 1266-67 (10th Cir. 2005). But see United States v. Nunez, 546 F.3d 450, 453-56 (7th Cir. 2008); United States v. Mabry, 536 F.3d 231, 242 (3d Cir. 2008).

b. This is true "regardless of whether [the defendant] can identify any arguably meritorious grounds for appeal that would fit one of the exceptions contained in his appeal waiver." Gomez-Diaz, 433 F.3d at 793; see also Campusano, 442 F.3d at 773-75; Garrett, 402 F.3d at 1267.

c. Thus, when a defendant who has waived certain appellate rights as part of a plea agreement requests that defense counsel file a notice of appeal, counsel should file the notice of appeal and should subsequently brief the validity of the waiver of appellate rights and file a brief pursuant to Anders v. California, 386 U.S. 738 (1967), when there is no basis to contest the validity of the waiver. See United States v. Gomez-Perez, 215 F.3d 315, 319-20 (2d Cir. 2000); see also Gomez-Diaz, 433 F.3d at 793 (defendant entitled to out-of-time appeal if he requested that defense counsel file notice of appeal, even where he waived certain appellate rights); Garrett, 402 F.3d at 1267 (same); cf. United States v. Story, 439 F.3d 226, 230 (5th Cir. 2006) (holding that appeal waivers do not deprive the appellate court of jurisdiction). But see Nunez v. United States, 546 F.3d 450, 456 (7th Cir. 2008) ("Once a defendant has waived his right to appeal not only in writing but also in open court under Rule 11(b)(1)(N), the sixth amendment does not require counsel to disregard the waiver. The regimen of Strickland applies: the defendant must

show both objectively deficient performance and prejudice. Unless a non-frivolous issue could be raised on appeal, counsel should protect the client's interest in retaining the benefit of the plea bargain. To the extent that other circuits disable counsel from making such a professional judgment, we disagree with them."); Mabry, 536 F.3d 240-44 (same).

d. In these circumstances, not only must defense counsel address in the Anders brief the waiver of appeal provision that is part of the plea agreement, but defense counsel also has an "obligation to ascertain and certify that the Government would rely on the defendant's appellate waiver before moving to withdraw." United States v. Davis, 530 F.3d 318, 321 (5th Cir. 2008) (internal quotation marks and citations omitted).

e. One court has held that counsel's failure to remain reasonably available during the ten-day window for filing a notice of appeal constituted ineffective assistance of counsel. See Corral v. United States, 498 F.3d 470, 473-75 (7th Cir. 2007). But see Otero v. United States, 499 F.3d 1267, 1271 (11th Cir. 2007) (holding that counsel had no constitutional obligation to consult with client about whether to appeal where the client had agreed to a broad waiver of appeal and did not communicate to counsel a desire to appeal); but see also United States v. Parsons, 505 F.3d 797, 799-800 (8th Cir. 2007) (holding that where counsel did not hear defendant's request to appeal "the relevant inquiry is whether counsel's failure to consult about an appeal was ineffective assistance," and finding that it was not).

5. Whether to represent himself or herself. See Faretta v. California, 422 U.S. 806 (1975) (court cannot force defendant to accept appointed attorney); see also McKaskle v. Wiggins, 465 U.S. 168 (1984) (right to self-representation not violated when standby counsel does not interfere with control of defense or appearance of self-representation); United States v. Wilkes, 20 F.3d 651 (5th Cir. 1994) (although pro se pleadings are construed liberally, pro

se litigants must still comply with Federal Rules of Appellate Procedure); In re Hipp, Inc., 5 F.3d 109, 114 (5th Cir. 1993) (request to proceed pro se must be clear and unequivocal); cf. United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006) (holding that the right to select counsel of one's choice "has been regarded as the root meaning of the constitutional guarantee"). But see Indiana v. Edwards, 554 U.S. 164, 178 (2008) (holding that "the Constitution permits the States to insist upon representation by counsel for those competent to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"); Martinez v. Court of Appeals of California, 528 U.S. 152, 163 (2000) (holding that a defendant does not have a Faretta-type constitutional right to represent self on appeal, as opposed to at trial); cf. Martel v. Clair, 132 S. Ct. 1276, 1280 (2012) (holding that, in decided a capital defendant's motion to change counsel, the courts should employ the same "interests of justice" standard that they apply in non-capital cases under 18 U.S.C. § 3006A and that the abuse of discretion in deciding whether the lower court erred in deciding the issue).

6. The objective and general methods of representation. AMRPC, Rule 1.2(a) & Comment; TDRPC, Rule 1.02(a)(1); see, e.g., Nixon, 543 U.S. at 187 (reiterating that counsel is required to consult with the defendant on "'important decisions,' including questions of overarching defense strategy"); United States v. Felix-Rodriguez, 22 F.3d 964 (9th Cir. 1994) (counsel could not waive defendant's right to be present when taped conversations were replayed to jury during deliberations); Carter v. Sowders, 5 F.3d 975 (6th Cir. 1993) (counsel could not waive defendant's confrontation rights without defendant's consent; granting habeas due to admission at trial of videotaped deposition of informant that defendant did not attend and that counsel left midway through), cert. denied, 511 U.S. 1097 (1994); Larson v. Tansy, 911 F.2d 392 (10th Cir. 1990) (counsel could not waive defendant's right to be present during trial; defendant's silence when counsel made request did not constitute waiver).

B. Strategic decisions to be made by lawyer after full consultation.

1. Which witnesses to call.

2. Whether and how to conduct cross-examination.

3. Which jurors to accept or strike. See, e.g., United States v. Boyd, 86 F.3d 719 (7th Cir. 1996) (defendant did not have right to determine how to use peremptory challenges).

4. What trial motions to make.

5. All other strategic or tactical decisions. See ABA Standards, § 4-5.2(b), at 200; AMRPC, Rule 1.2(a) & Comment; TDRPC, Rule 1.02, Comment 1 (a lawyer has very broad discretion to determine technical and legal tactics, subject to certain wishes of the client regarding expenses and concern for third parties who might be adversely affected); see also Gonzalez v. United States, 553 U.S. 242, 250 (2008) (holding that "acceptance of a magistrate judge at the jury selection phase is a tactical decision" and, therefore, that "express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial, pursuant to the authorization in [28 U.S.C.] § 636(b)(3)"); Nixon, 543 U.S. at 187-92 (holding that, although counsel has a duty to consult with the defendant on questions of overarching defense strategy, when the client is unresponsive during consultation, counsel may proceed without obtaining explicit consent of the client); Darden v. Wainwright, 477 U.S. 168 (1986) (not ineffective assistance of counsel to introduce no mitigating evidence at penalty phase because government's rebuttal evidence would have been damaging); United States v. Gates, 709 F.3d 58, 65 (1st Cir.), cert. denied, 134 S. Ct. 264 (2013) (holding that a defendant's lawyer may seek a continuance and the concomitant exclusion of time for Speedy Trial Act purposes without first securing the defendant's personal consent); Chapman, 593 F.3d at 369-70 (holding that whether to request a mistrial or accept one when it is offered is a tactical decision and thus for the attorney to decide,

even when the client disagrees); United States v. Holman, 314 F.3d 837, 840-44 (7th Cir. 2002) (holding that, "[t]hough an unusual defense strategy, we have held that conceding guilt to one count of a multi-count indictment to bolster the case for innocent on the remaining counts is a valid trial strategy which, by itself, does not rise to the level of deficient performance," but requiring counsel to obtain the client's consent); Haynes v. Cain, 298 F.3d 375 (5th Cir.) (en banc) (holding that defense counsel's concession that defendant was guilty of second-degree murder was a strategic attempt to avoid the death penalty rather than a failure to subject the prosecution's case to meaningful adversarial testing, that it thus did not raise presumption of prejudice, and that the failure to obtain the defendant's consent before making this concession did not prejudice defendant under Strickland v. Washington, 466 U.S. 668 (1984)), cert. denied, 537 U.S. 1072 (2002); Sexton, 163 F.3d at 885 (stating that some decisions are personal and cannot be made without the client's consent, but that other decisions, such what evidence to introduce, what objections to make, and what pretrial motions to file, including a motion to suppress evidence, are tactical and can be made without the client's consent); Government of Virgin Islands v. Weatherwax, 77 F.3d 1425 (3d Cir. 1996) (counsel did not have to follow client's request to bring it to court's attention that juror had been seen with newspaper account of trial); Brecheen v. Reynolds, 41 F.3d 1343, 1368-69 (10th Cir. 1994) (counsel must discuss mitigation strategy with capital murder defendant, but decision whether to present mitigating evidence is counsel's), cert. denied, 515 U.S. 1135 (1995); United States v. McGill, 11 F.3d 223 (1st Cir. 1993) (whether to make futile objection to admission of prejudicial film clip, or try to dilute its impact by having entire film shown, was counsel's decision); Drew v. Collins, 964 F.2d 411, 423 (5th Cir. 1992) (decision not to object to closing argument in capital murder prosecution was a matter of trial strategy and was not proof of ineffective assistance of counsel), cert. denied, 509 U.S. 925 (1993); Poole v. United States, 832 F.2d 561 (11th Cir. 1987) (stipulation to easily provable matters does not require defendant's consent), cert. denied, 488 U.S. 817

(1988); Graham v. Mabry, 645 F.2d 603 (8th Cir. 1981) (voir dire and challenges are well within function of trial counsel); United States v. Stephens, 609 F.2d 230 (5th Cir. 1980) (stipulation to evidence and waiver of right of confrontation acceptable if client does not dissent and decision is legitimate trial tactic or prudent trial strategy); Puglisi v. State, 112 So. 3d 1196, 1206 (Fla. 2013) (holding that the decision to present witnesses is not a fundamental decision resting exclusively with a criminal defendant and that defense counsel has the ultimate authority to decide which witnesses to present); Commonwealth v. Lavoie, 981 N.E.2d (Mass. 2013) (holding that, even without defendant's consent, defense counsel may waive the right to a public trial during jury selection as a tactical decision within counsel's purview to manage the conduct of the trial); People v. Colville, 979 N.E.2d 1125, 1130-32 (N.Y. 2012) (holding that whether to ask for a lesser-included jury instruction is a matter of strategy that rests with defense counsel, and citing other courts that so hold); cf. Missouri v. Frye, 132 S. Ct. 1399, 1405-11 (2012) (holding that it was ineffective assistance of counsel to fail to communicate plea offer to defendant before it expired); Lafler v. Cooper, 132 S. Ct. 1376, 1385-88 (2012) (holding that counsel rendered ineffective assistance by advising defendant to reject plea offer and go to trial on the theory that the state could not establish intent to murder since the victim was shot below the waist and where defendant received a sentence that was three and one-half times longer than the sentence he would have received); Rompilla v. Beard, 545 U.S. 374, 380-93 (2005) (holding that petitioner received ineffective assistance of counsel at his capital sentencing due to counsel's failure to investigate mitigating evidence regarding traumatic childhood and mental health problems when, if counsel only had reviewed the court file on petitioner's prior conviction, counsel would have found leads on mitigation); Darden v. United States, 708 F.3d 1225, 1230-33 (11th Cir.) (holding that it a presumption of prejudice under United States v. Cronic, 466 U.S. 648 (1984), was not triggered by counsel's concession of guilt on one robbery charge to better strategically contest the other robbery charge or by counsel's

failure to consult with the defendant about this concession strategy), cert. denied, 133 S. Ct. 2871 (2013); Lowery v. Collins, 996 F.2d 770 (5th Cir. 1993) (distinguishing defense counsel's failure to call a witness from the waiver in Stephens).

6. Counsel on appeal has no constitutional duty to raise every nonfrivolous issue requested by defendant. See Jones v. Barnes, 463 U.S. 745 (1983); see also Evitts v. Lucey, 469 U.S. 387, 394 (1985) (holding that, when state provides for direct appeal, counsel must be appointed for the indigent appellant in the first appeal so that the appeal is more than a meaningless ritual, but that appointed counsel need not advance every argument, regardless of merit, urged by the appellant); Moss v. Collins, 963 F.2d 44 (5th Cir. 1992) (after filing an Anders brief, counsel need not send defendant record and inform him of opportunity to file a pro se brief, when there are no nonfrivolous issues), cert. denied, 506 U.S. 1055 (1993); Don v. Nix, 886 F.2d 203 (8th Cir. 1989) (which issues to raise on appeal is counsel's decision); Mayo v. Lynaugh, 882 F.2d 134 (5th Cir. 1989) (reasonable for appellate counsel to winnow out weaker arguments and focus on key issues); cf. United States v. Turner, 677 F.3d 570, 579 (3d Cir. 2012) (holding that, "except in cases governed by Anders, parties represented by counsel may not file pro se briefs"); United States v. Ogbanna, 184 F.3d 447, 449 & n.2 (5th Cir.) (refusing to consider the defendant's pro se brief, and threatening to sanction counsel for aiding the defendant in filing a frivolous pro se brief), cert. denied, 528 U.S. 1055 (1999); United States v. Wagner, 158 F.3d 901 (5th Cir. 1998) (after counsel files Anders brief, court will consider Anders brief and defendant's arguments, but defendant cannot proceed pro se); United States v. Dierling, 131 F.3d 722, 734-35 n.7 (8th Cir. 1997) (stating that it is not the practice of the court to consider pro se briefs filed by parties who are represented by counsel, and implicitly rejecting the defendant's request for copies of the transcripts), cert. denied, 523 U.S. 1066 (1998). But see Smith v. Robbins, 528 U.S. 259, 288 (2000) (noting that, despite Barnes, it is still possible for a client to bring an ineffectiveness claim for failing to raise an issue on

appeal, but it is difficult to demonstrate that counsel was incompetent).

7. Nor does appellate counsel have a duty to file a petition for rehearing. See United States v. Coney, 120 F.3d 26, 27 (3d Cir. 1997) (holding that criminal defense counsel is under no obligation to file a petition for rehearing or a petition for rehearing en banc); cf. United States v. Hawkins, 505 F.3d 613, 614-15 (7th Cir. 2007) (Ripple, J., in chambers) (acknowledging that defense counsel generally has no obligation to file a petition for rehearing, but noting that the court could not accept that position at the present time given the claim raised on appeal and the conclusory nature of appointed counsel's submission).

8. Appellate counsel also is not required to provide the defendant with his own personal copies of the transcripts. Kimsey v. Gora, 772 F.2d 907, 1985 WL 13651, at *2 (6th Cir. Aug. 1, 1985) (unpublished) (holding that a defendant represented by counsel on appeal is not entitled to his own personal copies of the transcripts in his case); United States v. Ward, 610 F.2d 294, 295 (5th Cir. 1980) (same); Hooks v. Roberts, 480 F.2d 1196, 1198 (5th Cir. 1973) (same), cert. denied, 414 U.S. 1163 (1974); Shelton v. Beto, 460 F.2d 1234, 1235 (5th Cir. 1972) (appellate counsel was the best judge of whether he needed a separate copy of the transcript); Perry v. Texas, 456 F.2d 879 (5th Cir.) (defendant has no right to copies of transcripts for his own personal use), cert. denied, 409 U.S. 916 (1972); cf. Wells v. United States, 530 F.2d 971, 1975 U.S. App. LEXIS 11778, at *2-*3 (4th Cir. 1975) (unpublished) (holding that there is no constitutional or statutory requirement that appellate counsel confer with his client).

II. Defense counsel cannot keep the fruits and instrumentalities of a crime.

A. "It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime." In re Ryder, 381 F.2d 713, 714 (4th Cir. 1967); see also United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982) (disqualifying

defense attorney who had allegedly fabricated and destroyed evidence); Glass v. Heyd, 457 F.2d 562, 566 (5th Cir. 1972) (adopting reasoning of In re Ryder).

1. Taking possession of the fruits and instrumentalities makes the lawyer a participant in the criminal act. In re Ryder, 381 F.2d at 714; see generally TDRPC, Rule 8.04; 48A Tex. Prac., Tex. Lawyer & Jud. Ethics § 8:4 (2012 ed.).

2. The lawyer's acts are not protected by the attorney-client privilege. Id.; see also Cal. Standing Comm. on Prof'l Responsibility, Formal Op. No. 1986-89, 1986 WL 69069, at *1-*2 (1986) (holding that, when client requests attorney to take possession of stolen property, attorney's taking possession of such property would alter the state of its possession and location, and attorney must deliver stolen property to authorities if he takes possession of it and must inform the client that he will deliver the stolen property to authorities – and may become a witness – if he takes possession).

B. An attorney cannot refuse to comply with a grand jury subpoena ordering him to turn over money received from clients suspected of a bank robbery. In re January 1976 Grand Jury, 534 F.2d 719 (7th Cir. 1976).

C. A lawyer shall not assist or counsel client to engage in conduct that the lawyer knows is criminal or fraudulent. AMRPC, Rule 1.2(d); TDRPC, Rule 1.02(c). See, e.g., In re Mross, 657 N.W.2d 342 (Wis. 2003) (approving ninety-day suspension from the practice of law of state public defender who smuggled cigarettes to his incarcerated client).

1. Lawyer is required to give honest opinion about such conduct, but cannot participate. AMRPC, Rule 1.2, Comment; see also TDRPC, Rule 1.02(c).

2. If client's conduct persists, withdrawal may be required. AMRPC, Rule 1.2, Comment.; see also TDRPC, Rule 1.02,

Comment 8; id. Rule 1.15.

3. Lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily injury. AMRPC, Rule 1.6(b)(2) & Comment. Some jurisdictions, such as Texas, ***require*** the lawyer to reveal confidential information clearly establishing client is likely to commit a criminal or fraudulent act likely to result in death or serious bodily harm to a person, to the extent it reasonably appears necessary to prevent client from committing the act, ***and*** even ***permit*** the lawyer to reveal confidential information if substantial injury to financial interests or property is likely. See, e.g., AMRPC, Rule 1.6(b)(3) & Comment; TDRPC, Rule 1.05(e) & Comments 18 and 19.

4. In other words, the attorney-client privilege does not apply when legal representation was obtained to promote continuing or intended criminal activity. United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994), cert. denied, 513 U.S. 1179 (1995); United States v. Soudan, 812 F.2d 920, 927 (5th Cir. 1986), cert. denied, 481 U.S. 1052 (1987); United States v. Harrelson, 754 F.2d 1153, 1167 (5th Cir.), cert. denied, 474 U.S. 1034 (1985); United States v. Dyer, 722 F.2d 174, 177 (5th Cir. 1983).

D. The attorney-client privilege, therefore, does not bar testimony about the original condition and location of evidence when the evidence has been removed or altered.

1. If the attorney leaves evidence in its original location, testimony is barred by the attorney-client privilege. Cluthette v. Rushen, 770 F.2d 1469, 1472-73 (9th Cir. 1985), cert. denied, 475 U.S. 1088 (1986).

2. Because removal of evidence by attorney or his client suggests an attempt to frustrate prosecution and creates an obligation to turn it over to the state, attorney-client privilege does not bar

testimony on the evidence. Id.; cf. Lawyer Disciplinary Bd. v. Smoot, 716 S.E.2d 491, 498-507 (W. Va. 2010) (suspending lawyer for one year for unlawfully altering a document that had potential evidentiary value be removing narrative portion of physician's report before he produced the report in a federal black lung benefits case).

E. If you end up with the fruits or instrumentalities of the crime, ***immediately*** take remedial measures to produce them to the prosecution while maintaining the attorney-client privilege and work product doctrine with regard to other information that you might have gathered.

1. See, e.g., United States v. Scruggs, 549 F.2d 1097, 1103-04 (6th Cir.) (affirming obstruction and possession of stolen money convictions of father and son attorneys who took bank robbery money as a fee, denied doing so, and destroyed the money), cert. denied, 434 U.S. 824 (1977);

2. Commonwealth v. Stenhach, 514 A.2d 114, 116-27 (Pa. Super. Ct. 1986) (rejecting public defenders' contention that their conduct was proper and that they had no duty to deliver rifle stock of weapon to the prosecution until they were ordered to do so, but finding statutes of conviction overbroad), appeal denied, 534 A.2d 769 (Pa. 1987).

3. Nev. State Bar Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 51 (Aug. 18, 2014) (holding, among other things, that, when a lawyer representing two codefendant's in a drug case has $29,000 anonymously dropped off at his office, the lawyer must: (1) report the funds to the IRS and may need to inquire into the source of the funds to do so; (2) secure the informed consent of the defendants to ensure there is no conflict of interest; (3) consult with the clients to obtain an agreement on the division of fees; and (4) promptly deposit the funds into a trust account). Moreover, the lawyer should not have contact with the person/defendant who gave the funds, but should leave it up to that person's lawyer to consult with him about the nature

of the funds.

F. The meaning of "fruit," "instrumentality," and "contraband" are:

1. An "instrumentality" of a crime is something that was used or was intended to be used to commit the crime, such as a gun, computer software, or burglar's tools.

2. "Contraband" is something that is illegal in itself to possess, such as drugs, child pornography, and counterfeit money.

3. A "fruit" of the crime is something that was obtained as a result of the crime, such as the victim's Rolex.

4. See Stephen Gillers, Guns, Fruits, Drugs, and Documents: A Criminal Lawyer's Responsibility for Real Evidence, 63 Stan. L. Rev. 813, 822 (2011); Evan A. Jenness, Possessing Evidence of a Client's Crime, The Champion 16, 17 (Dec. 2010).

G. An attorney has no duty to turn over to prosecution ordinary materials with evidentiary significance, such as bank records, e-mails, and phone records. See Jenness, supra at 18.

H. More problematic are "not entirely ordinary items with evidentiary significance," such as a "client's bloody glove and Nixon's Watergate tapes." Id.

1. According to Jenness, they are treated "much the same as contraband, fruits and instrumentalities."

2. But courts "split the baby by requiring lawyers to surrender the evidence, but precluding prosecutors offering evidence that defense was the source" if the defense stipulates to authenticity. Id.; see generally Restatement (Third) of the Law Governing Lawyers § 119; ABA Standards for Criminal Justice – Defense Function, Standard 4.4.6.

I. An interesting case in this area is In re Olson, 222 P.3d 632 (Mont. 2009).

1. The Chief County Public Defender Olsen represented a client charged with sexual abuse of children, went to the clients' apartment to get helpful items after police had searched it, found pictures that were not, but could be argued to be, child pornography, and removed, tagged, bagged, and sealed items as evidence.

2. On advice of the Federal Public Defender, Olsen got a protective order from county court.

3. When Olsen changed jobs, a different public defender began handling the case and – without reviewing the file – sent the evidence to the prosecutor.

4. Office of Disciplinary Counsel filed complaint against Olsen alleging ethical violations, including obstructing a party's access to evidence, tampering with evidence, and engaging in deceitful conduct.

5. The Montana Supreme Court found that there was insufficient evidence to support these allegations because: (1) Olson did everything to preserve the evidence; and (2) the evidence did not show that Olsen was dishonest or deceitful. Id. at 638-39.

III. The attorney-client privilege does not protect conversations about on-going illegal activity.

A. When the client seeks and obtains his attorney's advice in furtherance of illegal activities, the crime-fraud exception to the attorney-client privilege permits the introduction into evidence of those conversations. See United States v. Aucoin, 964 F.2d 1492 (5th Cir.) (intercepted conversations concerning on-going, illegal gambling activity held admissible), cert. denied, 506 U.S. 1023 (1992); see also TDRPC, Rule 1.05(c)(8) & Comments 9-12; In re Grand Jury Proceedings, G.S., F.S.,

609 F.3d 909, 912 (8th Cir. 2010); United States v. Doe, 429 F.3d 450, 453-54 (3d Cir. 2005) (holding that the crime-fraud exception only applies "when a client knowingly seeks legal counsel to further a continuing or future crime" and does not apply when the client merely "proposes a course of conduct which he is advised by counsel is illegal").

B. "Once the party seeking disclosure makes a prima facie case that the attorney-client relationship was used to promote an intended criminal activity, the confidences within the relationship are no longer shielded." United States v. Ballard, 779 F.2d 287, 292 (5th Cir.), cert. denied, 475 U.S. 1109 (1986); see also In re: Grand Jury Investigation, 445 F.3d 266, 274 (3d Cir.) ("Therefore, the privilege can be overridden if the client used the lawyer's services to further a continuing or future crime or fraud."), cert. denied, 549 U.S. 997 (2006).

C. A party "invoking the crime-fraud exception must make a prima facie showing that (1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme, and (2) the documents containing the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud." In re Grand Jury Proceedings # 5, 401 F.3d 247, 251 (4th Cir. 2005).

1. "Prong one of this test is satisfied by a prima facie showing of evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed." Id.

2. "Prong two may be satisfied with a showing of a close relationship between the attorney-client communications and the possible criminal or fraudulent activity." Id.; see also In re Green Grand Jury Subpoena, 492 F.3d 976, 983 (8th Cir. 2007) (rejecting the contention that the showing must be by clear and convincing evidence); In re: Grand Jury Investigation, 445 F.3d at 274 (holding that, in a criminal case, the government "must make a prima facie showing that (1) the client was committing or

intending to commit a prima facie showing that a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime of fraud"); In re Grand Jury Subpoena, 419 F.3d 329, 336 (5th Cir. 2005) (noting that allegations in the pleadings alone are insufficient to make out a prima facie case).

D. Whether the lawyer is unaware of or an unwitting tool in a continuing or planned wrongful act is irrelevant to the crime-fraud exception to ***the attorney-client privilege***. In re Grand Jury Proceedings # 5, 401 F.3d at 251; see Doe, 429 F.3d at 454 (stating that "the client's intention controls" and that the attorney-client "privilege may be denied even if the lawyer is altogether innocent") (internal quotations omitted); In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996) (focus is on client's state of mind, not attorney's; attorney may have been unaware of crime and taken no affirmative step to further it; crime need not be successfully completed); United States v. Neal, 27 F.3d 1035 (5th Cir. 1994) (crime-fraud exception applied even though attorney refused to participate in or assist with illegal scheme), cert. denied, 513 U.S. 1179 (1995); see also TDRPC, Rule 1.05(c)(8) & Comments 9-12.

E. The district court may perform an in camera inspection of privileged information if the government makes a prima facie showing that the crime-fraud exception applies. See United States v. Zolin, 491 U.S. 554, 572 (1989) (district court may perform in camera review of attorney-client material upon showing of factual basis for good faith belief that attorney was assisting client in crime or fraud); United States v. de la Jara, 973 F.2d 746 (9th Cir. 1992) (for court to perform in camera review of privileged materials, government must first make prima facie showing that crime-fraud exception applies, based on nonprivileged evidence).

F. The circuits appear to be divided over whether a district court holding an in camera hearing must review allegedly privileged documents before deciding whether the crime-fraud exception applies. See In re Grand Jury Proceedings # 5, 401 F.3d at 253 & n.5 (holding that the district court could review summaries of the privilege holder's documents, but noting that In re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 645 (8th

Cir. 2001), and In re Antitrust Grand Jury, 805 F.2d 155, 168 (6th Cir. 1986), require a district court to review allegedly privileged documents in camera). But see Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assur. Soc'y of U.S., 406 F.3d 867, 880 (7th Cir.2005) (holding that magistrate judge should have reviewed "every document contested").

G. However, a district court abuses its discretion when it is presented with no evidence of the contents of allegedly privileged documents, but nevertheless holds that the documents bear a close relationship to an existing or future scheme to commit a crime or fraud. In re Grand Jury Proceedings # 5, 401 F.3d at 255.

H. Note that an ***innocent attorney*** may invoke the ***work product privilege*** "even if a prima facie case of fraud or criminal activity has been made as to the client." In re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994); see also In re Grand Jury Proceedings, G.S., F.S., 609 F.3d at 912-13.

I. In fact, the Fourth Circuit, in a thorough analysis, has opined that the work product privilege may be asserted by the client or the attorney and that "those seeking to overcome ***the opinion work product privilege*** [as opposed to the fact work product privilege] must make a prima facie showing that the attorney in question was aware of or a knowing participant in the criminal conduct. If the attorney was not aware of the criminal conduct, a court must redact any portions of subpoenaed materials." In re Grand Jury Proceedings # 5, 401 F.3d at 252 (emphasis added; internal quotation marks omitted); see also In re Grand Jury Proceedings, G.S., F.S., 609 F.3d at 913; In re Green Grand Jury Subpoena, 492 F.3d 976, 980-82 (8th Cir. 2007) (discussing the distinction between "ordinary work product" and "opinion work product" and the greater protection afforded the latter).

J. Even if the government makes a prima facie showing that the crime-fraud exception applies, "the proper reach of the crime-fraud exception when applicable does not extend to all communications made in the course of the attorney-client relationship, but rather is limited to those

communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct." In re Grand Jury Subpoena, 419 F.3d at 343 (holding that the district court's "application of the crime-fraud exception was overly broad because it lacked the requisite specificity to reach only communications and documents no longer protected by the attorney-client and work product privileges").

IV. The attorney-client privilege protects conversations between an attorney and prospective clients who are jointly interviewed.

A. One of many jointly interviewed prospective clients cannot waive the attorney-client privilege as to all participants. In re Auclair, 961 F.2d 65 (5th Cir. 1992).

B. One of the jointly interviewed prospective clients is entitled to protection of the privilege even when joint representation proves impossible and other clients waive the privilege. Id.; see also In re Sealed Case, 29 F.3d 715, 718-19 (D.C. Cir. 1994) (remanding for a determination on the applicability of the "common interest privilege"); see generally AMRPC, Rule 1.6 & Comment; TDRPC, Rule 1.05.

C. Note that a joint defense agreement between defendants represented by their own attorneys may present unique ethical problems and considerations different from those presented by joint representation by a single attorney. See, e.g., United States v. Almeida, 341 F.3d 1318, 1326 (11th Cir. 2003) (holding that "when each party to a joint defense agreement is represented by his own attorney, and when communications by one co-defendant are made to the attorneys of other co-defendants, such communications do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence"); United States v. Stepney, 246 F. Supp. 2d 1069 (N.D. Cal. 2002) (discussing power of district court to inquire into and review joint defense agreements for potential ethical problems).

V. Defense counsel should not advise the client what his defense "should be" before asking the client to discuss his involvement in the offense.

A. The lawyer should seek to determine all relevant facts known to the client.

1. The lawyer should probe for all legally relevant information.

2. Without seeking to influence the direction of the client's responses. ABA Standards, § 4-3.2(a), at 152.

B. "Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing such facts." Id. § 4-3.2(b), at 152; see also AMRPC, Rule 1.2(d) (a lawyer shall not assist or counsel a client to engage in fraudulent conduct); TDRPC, Rule 3.04(b) (a lawyer shall not assist a witness in testifying falsely).

VI. Neither a prosecutor nor defense counsel may discourage or obstruct communications between a witness and opposing counsel.

A. "[A]s a general rule, witnesses to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them." United States v. Girod, 646 F.3d 304, 311 (5th Cir. 2011) (brackets added and internal quotation marks and brackets omitted).

B. It is unprofessional conduct for a prosecutor or defense counsel to advise or cause any person (other than defense counsel's own client) to be advised to decline to give the opposing party information which such person has the right to give. See ABA Standards, § 3-3.1(d), at 47; id. § 4-4.3(d), at 185; see also Epperly v. Booker, 997 F.2d 1, 10 (4th Cir.) (noting that prosecutor's instructions to police officer witnesses not to speak with defense counsel was the kind of interference with witnesses that circuit courts have recognized to be a violation of the constitutional right to a fair trial), cert. denied, 510 U.S. 1015 (1993); United States v.

McGhee, 495 F. Supp. 2d 1024, 1026 (D. S.D. 2007) ("In criminal proceedings, the prosecution and the defense generally have an equal right to interview witnesses before trial.").

C. A lawyer shall not obstruct another party's access to evidence or request a person other than a client to refrain from voluntarily giving relevant information to the other party. See AMRPC, Rule 3.4(a), (f); TDRPC, 3.04(a), (b) & (e); see also Lambert v. Blackwell, 387 F.3d 210, 260 (3d Cir. 2004) ("Intimidation or threats from the government that dissuade a potential witness from testifying may infringe a defendant's Fourteenth Amendment right to due process and Sixth Amendment right to compulsory process), cert. denied, 544 U.S. 1063 (2005); Workman v. Bell, 178 F.3d 759, 772 (6th Cir. 1998) (holding that remarks police made to witness instructing witness that "there was no need to talk further about this . . . [u]nless it was with someone from the department" likely interfered with the defense's ability to interview the witness, but did no rise to the level of a constitutional violation) (brackets and ellipses in original), cert. denied, 528 U.S. 913 (1999); United States v. Gonzales, 164 F.3d 1285, 1292 (10th Cir. 1999) (holding that district court did not abuse its discretion in choosing to sanction the government for interference with a witness's freedom of choice about whether to talk to the defense); United States v. Arrington, 867 F.2d 122 (2d Cir. 1989) (mistrial required where there were allegations that defense attorney had attempted to keep witnesses from testifying, because rebutting allegations would require attorney to act as witness and because situation created conflict of interest); United States v. Walton, 602 F.2d 1176, 1179-80 (4th Cir. 1979); United States v. Murray, 492 F.2d 178, 194 (9th Cir. 1973), cert. denied, 419 U.S. 942 (1974); United States v. Matlock, 491 F.2d 504, 506 (6th Cir.), cert. denied, 419 U.S. 864 (1974).

D. Prosecution can justify interference with defense counsel's right to interview potential witness only by showing the clearest and most compelling considerations. Kines v. Butterworth, 669 F.2d 6, 9 (1st Cir. 1981), cert. denied, 456 U.S. 980 (1982); see also United States v. Vega-Figueroa, 234 F.3d 744, 752 (1st Cir. 2000) (citing Kines while refusing to reverse, but stating that "[w]e take a dim view of government agents

gratuitously confronting a defense witness out of court before the witness testifies"); Cacoperdo v. Demosthenes, 37 F.3d 504 (9th Cir. 1994) (even if prosecution improperly interferes with defense access to witness, there is no due process violation unless defendant can show this prevented him from eliciting favorable evidence), cert. denied, 514 U.S. 1026 (1995); United States v. Medina, 992 F.2d 573 (6th Cir. 1993) (it was not improper to wait until after witness's direct testimony to make him available to defense for interview, in context of security concerns), cert. denied, 510 U.S. 1109 (1994).

E. When a government agent merely advises a witness of his right to decline to speak with defense counsel and the witness voluntarily declines to do so, the defendant's right of access to witnesses is not violated. United States v. Bittner, 728 F.2d 1038, 1041-42 (8th Cir. 1984); see also United States v. Davis, 154 F.3d 772, 785 (8th Cir. 1998) (no error where government merely advised the witnesses that they did not have to answer questions), cert. denied, 525 U.S. 1161 (1999); United States v. Tejeda, 974 F.2d 210, 217 (1st Cir. 1992) (witness cannot be compelled to submit to a pretrial interview).

F. "Thus, substantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant. Whether a defendant has made a showing of substantial interference is a fact question, and [a court of appeals] therefore review[s] a claim of prosecutorial intimidation for clear error. Any violation is subject to harmless-error analysis, and [a court of appeals] will not reverse unless the prosecutor's conduct was sufficiently egregious in nature and degree so as to deprive the defendant of a fair trial." Girod, 646 F.3d at 311 (internal quotation marks, citations, and brackets omitted).

G. The trial court's denial of a motion for permission to speak to a government witness during trial does not necessarily require reversal. See, e.g., United States v. Scott, 518 F.2d 261, 268 (6th Cir. 1975) (declining to reverse where: (1) trial court indicated it would grant a recess after direct testimony but the defendants never requested one; (2) defendants showed no more than the mere inaccessibility of the witness prior to trial; and (3) prosecutor related the substance of the witness's

testimony to defense counsel and promised to turn over Jencks material at trial); see also United States v. Walton, 602 F.2d 1176, 1179-80 (4th Cir. 4th Cir. 1979) (expressing concern that a government witness was placed in protective custody and that defendant was not allowed access to the witness, but declining to reverse on the ground that the error was harmless since the record showed that defense counsel had reviewed a report containing the substance of the witness's testimony, was prepared to cross-examine the witness, and did a thorough job in doing so).

VII. Criminal defense counsel is not required to advise a prospective witness concerning the possibility of self-incrimination and the witness's need for an attorney.

A. It is not necessary for the lawyer or the lawyer's investigator, in interviewing a prospective witness, to caution the prospective witness about self-incrimination and the need for counsel. ABA Standards, § 4-4.3(c), at 185.

B. However, whenever a prosecutor knows or has reason to believe that the conduct of a witness to be interviewed may be the subject of a criminal prosecution, it is proper for the prosecutor to advise the witness concerning possible self-incrimination and the possible need for counsel. ABA Standards, § 3-3.2(b), at 53; see AMRPC, Rule 3.8(c) (prosecutor shall not seek to obtain from unrepresented accused a waiver of rights); id., Rule 3.8(b) (requiring prosecutor to assure accused has been advised of his right to counsel); TDRPC, Rule 3.09(b) & (c) (prosecutor should refrain from custodial interrogation of accused unless accused has been warned of right to counsel and given reasonable opportunity to obtain counsel, and prosecutor should refrain from obtaining from unrepresented accused a waiver of important rights); United States v. Jackson, 935 F.2d 832 (7th Cir. 1991) (it is proper for prosecutor to warn unrepresented defense witness about risk of self-incrimination, in manner calculated to lead to uncoerced decision by witness); see also United States v. Johnson, 437 F.3d 665, 677 (7th Cir. 2006) (quoting Jackson and noting that, if a prosecutor cautions a defense witness about testifying in a manner that is a threat and is beyond that which is necessary, the inference that the prosecutor sought

to coerce a witness into silence is strong).

VIII. An attorney may not misrepresent himself to be an impartial party or burden or harass a prospective witness, but jurisdictions are divided on whether an attorney may conduct undercover investigations using deceit.

A. The ABA Model Rules and state rules impose upon all attorneys dealing with unrepresented third parties the obligation:

1. to make clear that they are not disinterested; and

2. not to "use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such . . . person[s]."AMRPC, Rules 4.4(a); see also id., Rule 4.1(a) (requiring that, in the course of representing a client, a lawyer shall not "knowingly make a false statement of material fact or law to a third person"); id. Rule 4.3 (requiring that, in dealing with a person who is not represented by counsel, "a lawyer shall not state or imply that the lawyer is disinterested"); TDRPC, Rules 4.03 & 4.04 (a lawyer representing a client shall not state or imply to a third party that he is disinterested and shall not engage in behavior solely to embarrass, delay, or burden a third person).

B. A number of jurisdictions, therefore, have held that engaging in deceitful subterfuge while examining a witness or conducting an investigation on a client's behalf violates the rules of professional ethics.

1. Compare Philadelphia Bar Association Professional Guidance Committee, Opinion No. 2009-02, 2009 WL 934623, at *1-*5 (March 2009) (holding that lawyer could not have a third person befriend a witness who was unfavorable to his client in order to gain permission to access and find impeaching information on the witness's restricted Myspace and Facebook pages).

2. Cincinnati Bar Ass'n v. Statzer, 800 N.E.2d 1117 (Ohio 2003)

(finding that lawyer had engaged in a subterfuge that was a deceitful tactic that intimidated the witness during the deposition of her former legal assistant by (1) conspicuously placing nine audiotapes that were suggestively labeled (but in fact contained irrelevant information) in front of the legal assistant, (2) implying that she had recorded conversations with the legal assistant that could impeach and personally embarrass her, and (3) cautioning the legal assistant to answer truthfully or risk perjuring herself);

3. In re Paulter, 47 P.3d 1175 (Colo. 2002) (en banc) (finding that the prosecutor violated the rules of professional conduct by lying to an accused murderer on the run by representing himself to be a criminal defense lawyer in order to get the accused murderer to turn himself in);

4. In re Gatti, 8 P.3d 966 (Or. 2000) (en banc) (holding that attorney, who was representing chiropractors charged with racketeering and fraud concerning workers' compensation claims, had violated the rules of professional conduct by representing himself to be a chiropractor in order to investigate the processing of medical insurance claims by third parties, and also concluding that there were no exceptions that allowed even government lawyers conducting investigations to make false statements of fact to third persons).

5. In re Crossen, 880 N.E.2d 352 (Mass. 2008) (ordering disbarment of attorney who, in an ongoing matter in which the attorney represented some of the litigants, participated in an intricate plan to discredit and recuse the presiding judge by posing with his own investigators as corporate executives, setting up and secretly making a tape recording of a sham job interview for the judge's former law clerk, during which the law clerk repeatedly was questioned about the judge's personal and professional character and her decision-making process in the ongoing matter involving the attorney's clients, and using a tape recording of the interview to coax and then threaten the law clerk into providing sworn statements damaging to the judge, which the law clerk otherwise

would not have made).

6. Attorney Grievance Comm'n of Maryland v. Smith, 950 A.2d 101, 104-06, 130 (Md. 2008) (suspending defense counsel from the practice of law for six months because he had misrepresented himself to be a police officer in a phone call to a person he believed to be a prosecution witness to get that person to call the police, learn of criminal charges, and take the Fifth Amendment on the witness stand in defense counsel's client's trial).

7. Schalk v. State, No. 53A01-1005-CR-210, 2011 WL 682342 (Ind. Ct. App. Feb. 28, 2011) (affirming misdemeanor conviction for possession of marijuana and rejecting the argument that the defendant, who was a criminal defense attorney, was immune from prosecution because he was authorized to set up a drug deal with a witness against his client in order to discredit the witness as part of the guarantees under the Sixth Amendment).

8. In re Ositis, 40 P.3d 500, 502-05 (Ore. 2002) (affirming suspension of an attorney who directed a private investigator to pose as a journalist in order to interview a party to a potential legal dispute, because the conduct involved misrepresentation of a material fact).

9. New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 2010-2 (Sept. 2010) (available at http://www.abcny.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf) (last visited Sept. 6, 2010) (ruling that neither an attorney nor her agent may directly or indirectly use deceptive behavior or trickery in sending a "friend request" to gain information from a potential witness, but may use the attorney's real name and profile to send a "friend request" to obtain information from any unrepresented person's social networking website without also disclosing the reasons for making the request).

10. San Diego County Bar Legal Ethics Comm., Legal Ethics Op.

2011-2 (May 24, 2011) (available at http://www.sdcba.org/index.cfm?pg=LEC2011-2) (last visited Sept. 6, 2011) (ruling that an attorney representing a former employee of a company who sends a "friend request" to a dissatisfied high-ranking company employee that gives only the attorney's name in an attempt to see any disparaging remarks about the company that the high-ranking employee may have posted on his social media page violates the attorney's ethical duty not to deceive by not disclosing the purpose of making the "friend request").

11. For additional ethics opinions on an attorney's use of social media, see ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (Apr. 24, 2014) (discussing reviewing jurors' internet presence and postings); ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 13-462 (Feb. 21, 2013) (discussing judges' use of social media and social networking with attorneys and whether disclosure is required); Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 2014-5 (discussing friending and accessing the personal web site of an unrepresented adversary); New Hampshire Bar Ass'n Ethics Comm., Advisory Op. 2012-13/5 (June 20, 2013) (discussing investigating a non-party witness through the witness's social media accounts); Oregon State Bar Legal Ethics Comm., Op. 2013-189 (Feb. 2013) (discussing investigating an opposing party's public and non-public information on the person's social media web site). See generally NY. State Bar Ass'n, Social Media Ethics Guidelines, https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html.

C. However, at least some jurisdictions have held that engaging in deceitful subterfuge while conducting an investigation on a client's behalf does not violate the rules of professional ethics.

1. See, e.g., Office of Lawyer Regulation v. Stephen P. Hurley, No. 2007AP478-D (Wisc. Sup. Ct. Feb 11, 2009) (available as an order in letter format via internet search by case name); see also

Office of Lawyer Regulation v. Stephen P. Hurley, Case No. 07 AP 478-D (Wisc. Sup. Ct. Feb.5, 2008) (Referee's Report) (at http://www.thedailypage.com/media/2008/02/06/WI%20OLR%20Hurley%20report%20020508.pdf) (last visited February 1, 2011) (holding that an attorney, who was representing a client charged with sexual assault of a child, exhibiting harmful materials to a child, and possession of child pornography, had not violated the rules of professional conduct by having his investigator conduct an undercover investigation that tricked the child and his mother into giving up the child's computer so that the attorney could examine the computer's hard drive);

2. Virginia State Bar Standing Committee on Legal Ethics Opinion 1845 (June 16, 2009) (concluding that it was not unethical for the state bar's staff counsel to direct a lay investigator to engage in a covert investigation into the unauthorized practice of law because, among other things, the unauthorized practice of law is a crime, staff counsel was charged by law with a duty to investigate conduct that is unlawful or criminal, and it is very well accepted that law enforcement authorities are authorized to conduct or supervise undercover operations using deception to gather information about criminal conduct).

3. New York County Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. No. 737, at *4 (May 23, 2007) (holding that, while dissemblance by attorneys is generally impermissible, "[n]on-government attorneys may therefore in our view ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where: (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; and (iii) the lawyer's conduct and the investigators' conduct that the lawyer is supervising do not otherwise violate the Code (including, but not limited to, DR 7-104, the "no-contact"

rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties").

E. At least two states now recognize that a lawyer may conduct or supervise covert investigative activities. See Oregon Rules of Professional Conduct, Rule 8.4(b); Wisconsin Rules of Professional Conduct, Rule 4.1(b) (20 Wisc. S. Ct. R. 4.1(b)).

IX. It is neither unethical nor frivolous for criminal defense counsel to put the prosecution to its burden of proof.

A. The Model Rules of Professional Conduct state that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." AMRPC, Rule 3.1 & Comment; see also TDRPC, Rule 3.01.

B. The Model Rules, however, make the explicit exception that "[a] lawyer for the defendant in a criminal proceeding, or for 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." AMRPC, Rule 3.1; TDRPC, Rule 3.01, Comment 3; see also State v. Smith, 247 P.3d 676, 679-80 (Kan. 2011) (reversing and remanding for a new trial and appointment of new counsel where defense counsel believed he could not introduce even truthful facts showing that the client lacked the motive and ability to commit the robbery because defense counsel was convinced that the client was guilty).

C. Legal scholars have pointed out that this "exception for criminal proceedings reflects the constitutional principle that the state must prove every element of the crime charged and may not, by procedural rule or otherwise, shift its burden to the defendant." Robert P. Schuwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A HOUS. L. REV. 1, 236 (1990).

D. The American Bar Association has explained that defense counsel's zealous protection of the rights of the client comports with, rather than contradicts, the administration of justice:

"Defense counsel, in protecting the rights of the defendant, may resist the wishes of the judge on some matters, and though such resistance should never lead to disrespectful behavior, defense counsel may appear unyielding and uncooperative at times. In doing so, defense counsel is not contradicting his or her duty to the administration of justice but is fulfilling a necessary and important function within the adversary system. The adversary system requires defense counsel's presence and zealous advocacy just as it requires the presence and zealous advocacy of the prosecutor and the neutrality of the judge. Defense counsel should not be viewed as impeding the administration of justice simply because he or she challenges the prosecution, but as an indispensable part of its fulfillment." ABA Standards, § 4-1.2, Commentary, at 122.

E. The right to counsel hinges on "'[t]he very premise of our adversary system of criminal justice . . . that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" United States v. Cronic, 466 U.S. 648, 655 (1984) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)); see also United States v. Jiménez-Bencevi, 788 F.3d 7, (1st Cir. 2015) (holding that it was permissible for defense counsel to have an expert witness call into doubt that it was the defendant who appeared in the video tape as the perpetrator even though the defendant had admitted to the crime during plea bargaining proffer session because the lawyer did not "know" the expert opinion was false since the defendant had initially denied guilt and the prosecution's witnesses had changed their stories and were not the most credible).

F. Under the Texas rules of professional ethics, for example, criminal defense counsel has no duty to correct the mistakes or mistaken impressions of the court when neither defense counsel nor the client have made any misrepresentations to the court. See TX Eth. Op. 504, 1995 WL 908214 (Tex. Prof. Eth. Comm. 1995) (concluding that, if neither criminal defense counsel nor his client have made any false

statements to the court, criminal defense counsel may remain silent when the prosecutor erroneously tells the court that the client has no prior criminal convictions); Florida Ethics Op. 86-3, 1986 WL 84407 (Dec. 15, 1986) (same); cf. Utah State Bar Ethics Advisory Comm., Op. No. 05-02, 2005 WL 5302773 (Apr. 28, 2005) (concluding that defense counsel may not answer the court's questions about the client's prior criminal record without the client's informed consent). But see In re Seelig, 850 A.2d 477 (N.J. 2004) (holding that attorney failed to inform court of material fact and violated the rules of ethics where he told prosecutor his presence was not needed at guilty plea proceeding and merely said "you can do fines" in response to court's inquiry when client entered guilty plea to traffic tickets when more serious charges were pending and when the guilty plea resulted in a double jeopardy bar against further prosecution on the more serious pending charges); Current Development 2005-2006, Is New Jersey's Heightened Duty of Candor Too Much of a Good Thing?, 19 Geo. J. Legal Ethics 951 (2006) (concluding that New Jersey's ethical rule on candor constitutes a direct attack on the adversary system); but see also State v. Kane, No. A-5773-13T1, 2015 WL 657667, at *8 (N.J. Super. Ct. App. Div. Feb. 17, 2015) (unpublished) (distinguishing Seelig on the ground that, in Seelig, the "defense attorney affirmatively misled a municipal judge about the facts in a vehicular case," and holding that it was not a fraud on the curt but instead was ineffective for defendant's second counsel to have her withdraw her earlier plea to a lesser motor vehicle offense that provided double jeopardy protection to a greater motor vehicle offense).

G. Note, however, that, if disclosure of confidential information to a tribunal is necessary to avoid a criminal or fraudulent act, then the lawyer must reveal such information. See TDRPC, Rule 1.05(f) & 3.03(a)(2); see also TX Eth. Op. 473, 1992 WL 792966 (Tex. Prof. Eth. Comm. 1992) (holding that an attorney must disclose information learned from the client showing that the client either does not now, or did not at the time of appointment, qualify financially for previously appointed criminal defense counsel); United States v. Williams, 698 F.3d 371, 381-84 (7th Cir. 2012) (approving attorney's passing along to the court that the client gave him a letter that asked his relative to make

up a false alibi defense for the client and the attorney's testimony at trial to that effect, but also holding that any error in admitting attorney's testimony was harmless); see generally AMRPC, Rule 3.3, Comment (stating that there are circumstances where failure to make disclosure is the equivalent of an affirmative misrepresentation).

X. There is no universal answer on whether criminal defense counsel must or should disclose the whereabouts of the bail jumping client.

A. "No universal answers currently exist as to whether an attorney should disclose his or her fugitive client's whereabouts. Case law and ethical opinions appear to conflict." Shelly K. Hillyer, The Attorney-Client Privilege, Ethical Rules of Confidentiality, and Other Arguments Bearing on Disclosure of Fugitive Client's Whereabouts, 68 TEMP. L. REV. 307, 356 (1995) ; see also Carolyn Crotty Guttilla, Note, Caught Between a Rock and a Hard Place: When Can or Should an Attorney Disclose a Client's Confidence, 32 SUFFOLK U. L. REV. 707, 721-22 (1999).

B. Answering the issue of whether an attorney is required to disclose the whereabouts of the bail jumping client is complicated by the fact that the American Bar Association ("ABA") has changed its position on the issue over the years.

1. In 1936, the ABA took the position that an attorney was required to disclose the whereabouts of his fugitive client and could be disciplined for failing to do so. See ABA Formal Op. 155 (1936).

2. In 1980, the ABA took the position that an attorney did not have a duty to report to authorities that his client remained free on bond long after sentencing when the client and the attorney were not under a court order concerning surrender and when the attorney had advised the client to surrender to the proper authority. ABA Formal Op. 1453 (1980).

3. In 1984, however, the ABA withdrew Formal Opinion 155 (1936) because it was "inconsistent with both the Model Rules of

Professional Conduct and the former Model Code of Professional Responsibility." ABA Formal Op. 84-349 (1984).

C. Some states followed the ABA's chameleon-like position, and some states did not do so.

1. For example, the Florida State Bar at first unanimously followed the position that an attorney was required to disclose that his client had left the state with the intention of jumping bail, Florida Ethics Op. 72-34, 1973 WL 20132 (Jan. 12, 1973), but it later withdrew that opinion for reconsideration. See United States v. Del Carpio-Cotrina, 733 F. Supp. 95, 98 n.8 (S.D. Fla. 1990).

2. Ultimately, the Florida State Bar decided that a criminal defense lawyer who learns that his client has left the state for the purpose of avoiding a court appearance may not, under most circumstances, divulge such information until required to do so by the court at the time of the scheduled appearance. Florida Ethics Op. 90-1, 1990 WL 446957 (July 15, 1990), amended (Feb. 29, 1996). The opinion notes that counsel would be ethically obliged to step forward and advise the court of the situation when, prior to the date of the court appearance, counsel knows to a reasonable certainty that the client's avoidance of the court's authority is a willful and an irreversible fact or when the client has violated some other specific condition of bond such as a condition that he not leave the state. Id.

3. The New York State Bar, however, has opined that information respecting a client's whereabouts gained in the professional relationship that the client has requested be held inviolate squarely falls within the general ethical obligation of preserving the confidentiality of client secrets and that a lawyer may postpone testifying to such information pending further review. New York Ethics Op. 528, 1981 WL 27589 (Feb 17, 1981); see also New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal O. No. 99-02 (1999) (concluding that attorney may sell property of fugitive client and pay client's

creditors as long as the attorney does not know that the sale of the property or the disposition of the proceeds is unlawful).

4. Other states take a position similar to the position of the New York State Bar. See, e.g., Utah State Bar Ethics Advisory Op. Comm., Op. No. 97-02, 1997 WL 45141 (Jan. 24, 1997) (concluding that an attorney may not reveal the phone number of a fugitive client to authorities who have an arrest warrant for the client and that refusing to do so does not constitute assisting the client in conduct that is illegal or fraudulent); Illinois State Bar Advisory Op. 89-13, 1990 WL 657247 (Apr. 9, 1990) (stating that an attorney at a docket call who has a client who has disappeared or has cut off all contact cannot disclose such information if it is a secret or in confidence unless ordered to do so, in which event the attorney may disclose such information, or appeal the order, or test the law, or seek permission to withdraw from representation); Nebraska State Bar Advisory Op. 90-2 (stating that an attorney may not reveal the whereabouts of a former client to the United States Marshal where such information was received during the course of the professional relationship, but also stating that the attorney may ethically do so when the attorney determines that the client intends to commit a crime in the future, when the client has consented, or when the attorney is required to do so by law or court order).[2]

D. Courts addressing the issue of whether an attorney must disclose the bail jumping client's whereabouts similarly are divided on the issue.

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[2] Note that the Texas Disciplinary Rules of Professional Conduct state that a "lawyer may reveal confidential information . . . [w]hen the lawyer has reason to believe it is necessary to do so to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law. . . [or] [w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act." TDRPC, Rule 1.05(c)(4) & (7). Nebraska State Bar Op. 90-2 cites State Bar of Texas Informal Opinion 101 (1979) for the proposition that an attorney must comply with a court order to disclose information even when the attorney has been instructed to invoke the attorney-client privilege, but the author of this paper has not been able to confirm the existence of that Texas informal opinion.

1. Some courts have held that the lawyer has a duty to disclose the whereabouts of the bail jumping client. In United States v. Del Carpio-Cotrina, 733 F. Supp. 95 (S.D. Fla. 1990), for example, the district court held that a lawyer has a duty to advise the court that the client has jumped bond and will not appear for trial when the lawyer has a firm factual basis (equating to proof beyond a reasonable doubt and actual knowledge) for believing such to be true. Id. at 99-100. The court did not sanction counsel for failing to inform the court and moving for a continuance because the court determined that the law on this issue had been unclear up to that point in time. Id. at 100.

2. See also Commonwealth v. Maguigan, 511 A.2d 1327, 1337 (Pa. Sup. Ct. 1986) (holding that, when a client is under conditions of bail and defies a lawful court order to appear, "his 'whereabouts' are not unqualifiedly protected by the attorney-client privilege, and the attorney may be compelled to disclose information of the client's whereabouts"); In re Doe, 420 N.Y.S.2d 996, 998-99 (N.Y. Sup. Ct. 1979) (holding that attorney must disclose the whereabouts of the client who breached her plea agreement by leaving state psychiatric hospital, but relying on the later withdrawn ABA Formal Opinion 155 (1936)).

3. Other courts have held that the client's whereabouts are protected by the attorney-client privilege. In In re Nackson, 555 A.2d 1101 (N.J. Sup. Ct. 1989), for example, the New Jersey Supreme Court held that the bail jumping client's whereabouts were privileged and not covered by the crime-fraud exception when the client had phoned the attorney from out of state in order to have him negotiate a plea agreement before he would return to New Jersey and when the authorities had used no other means to find the client than subpoenaing his lawyer to testify before the grand jury. Id. at 1103-07.

4. See also In re Grand Jury Subpoenas Served Upon Field, 408 F. Supp. 1169 (S.D.N.Y. 1976) (holding that, when grand jury subpoenas were served on the client's lawyers and the client had

consulted with his lawyers concerning which jurisdiction he should relocate to from Milan, Italy, the client's address was privileged because it was communicated to the lawyers for the purpose of receiving legal advice); In re Stolar, 397 F. Supp. 520 (S.D.N.Y. 1975) (holding that client's address and telephone number were protected by the attorney-client privilege when the client had disclosed this information to get legal advice concerning the FBI's desire to question him and when the grand jury and the FBI sought the information to question the client about the whereabouts of a third person suspected of having violated federal law); cf. In re Grand Jury Subpoena to Nancy Bergeson, 425 F.3d 1221, 1224-27 (9th Cir. 2005) (affirming district court's exercise of discretion in quashing grand jury subpoena as oppressive and unreasonable where it required defense counsel to testify about what she had told her client with regard to the trial setting so as to satisfy the knowledge element of bail jumping).

5. The San Diego County Bar Association has issued an ethics opinion in which it held, based on the duty of confidentiality, that an attorney may not answer the court's question, "Do you have any idea why your client isn't here?," when the client's mother had called the attorney the night before and told her not to expect to see the client in court the next morning because "he just left the house high as a kite." See San Diego County Bar Ass'n Legal Ethics Opinion 2011-1, available at http://www.sdcba.org/index.cfm?pg=LegalEthicsOpinion-2011-1 (last visited on April 1, 2011)).

XI. Criminal defense counsel may attempt to impeach or discredit a witness by cross-examination even when counsel knows that the witness is telling the truth.

A. A lawyer's belief or knowledge that the witness is telling the truth does not preclude cross-examination. ABA Standards, § 4-7.6(b), at 223.

B. The rule above substantially applies to a prosecutor, but a "prosecutor

should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully." ABA Standards, § 3-5.7(b), at 103; see also AMRPC, Rule 3.8, Comment (prosecutor has responsibility of a minister of justice and not simply that of an advocate).

C. "If [defense counsel] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure, or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth." United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part).

D. "Vigorous advocacy by defense counsel may properly entail impeaching or confusing a witness, even if counsel thinks the witness is truthful, and refraining from presenting evidence even if he knows the truth." United States v. Thoreen, 653 F.2d 1332, 1338-39 (9th Cir. 1981), cert. denied, 455 U.S. 938 (1982). Nevertheless, an attorney was held in criminal contempt for obtaining an acquittal by having a person other than his client sit at the defense table and having a key government witness identify that person as the offender. Id. at 1340-43. According to the Ninth Circuit, defense counsel first should have notified the opposing party and the court of the substitution of the person at the defense table. Id.

XII. An attorney should not call a witness to testify if the attorney knows that the witness will claim a valid privilege not to testify.

A. Neither the prosecutor nor defense counsel should call such a witness to testify for the purpose of impressing upon the jury the fact of the claim of the privilege, and in some instances, doing so will constitute unprofessional conduct. ABA Standards, § 3-5.7(c), at 103; id. § 4-7.6(c) at 223; cf. AMRPC, Rule 4.4 (lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person and should not use methods of obtaining evidence that violate the legal rights of such a person); TDRPC, Rule 4.04(a) (same);

see also United States v. Ornelas-Rodriguez, 12 F.3d 1339 (5th Cir.) (stating that a witness's invocation of the Fifth Amendment may require a mistrial if (1) the government is flagrantly trying to build its case on inferences from the use of the privilege or (2) the witness's refusal to answer lends considerable weight to the government's case), cert. denied, 513 U.S. 830 (1994); United States v. Crawford, 707 F.2d 447 (10th Cir. 1983) (neither government nor defense may call witness knowing the witness will claim the Fifth Amendment privilege); United States v. Bowman, 636 F.2d 1003 (5th Cir. Unit A 1981) (upholding district court's refusal to allow defense to call witnesses who would take the Fifth Amendment, giving rise to questionable inferences).

B. The trial court should carefully scrutinize the practice of calling a witness who will claim the privilege not to testify because of the potential for unfair prejudice. United States v. Maffei, 450 F.2d 928 (6th Cir. 1971), cert. denied. 406 U.S. 938 (1972); see also United States v. Vandetti, 623 F.2d 1144 (6th Cir. 1980) (suggesting use of balancing under Fed. R. Evid. 403); United States v. Kilpatrick, 477 F.2d 357 (6th Cir. 1973) (permitting prosecutor to call such a witness when government's case otherwise would be seriously prejudiced).

C. To warrant reversal of a conviction, the prosecutor must have made a conscious and flagrant effort to construct his case on the inferences arising from the assertion of the privilege. See United States v. Brown, 12 F.3d 52, 54 (5th Cir. 1994) (vacating convictions and sentences); but see United States v. Victor, 973 F.2d 975, 979-80 (1st Cir. 1992) (refusing to reverse due to lack of prejudice); United States v. Newton, 891 F.2d 944 (1st Cir. 1989) (prosecutor did not make conscious and flagrant effort and testimony did not add critical weight to prosecutor's case); see also Namet v. United States, 373 U.S. 179 (1963) (no reversible error where witness made only a few claims of privilege to support inference already well established by other evidence).

XIII. Defense counsel must not assist his client in testifying falsely when his client informs him that he intends to commit perjury.

A. A defendant's constitutional right to testify does not extend to the right

to testify falsely. Nix v. Whiteside, 475 U.S. 157, 173 (1986); see also United States v. Dunnigan, 507 U.S. 87 (1993) (sentence enhancement for obstruction of justice for defendant's perjury at trial did not violate defendant's right to testify).

B. Whether a lawyer persuades or compels the client to desist from perjury, the client does not have a valid claim of ineffective assistance of counsel. Nix, 457 U.S. at 175; see also Jackson v. United States, 928 F.2d 245 (8th Cir.) (it was not ineffective assistance for attorney to tell court, outside presence of jury, that defendant wanted to testify and that attorney might have to withdraw as a result; defendant's decision not to testify after court explained attorney's duties regarding perjury was voluntary), cert. denied, 502 U.S. 828 (1991).

C. The lawyer should not inform the court in the presence of the jury that the defendant is testifying against advice of counsel, but doing so is not necessarily reversible error. United States v. Campbell, 616 F.2d 1151, 1152 (9th Cir.), cert. denied, 447 U.S. 910 (1980).

D. Courts have disagreed on whether informing the court during a bench trial or hearing that the client is testifying against the advice of counsel and will testify in narrative form, which leads the court to infer that the client will perjure himself, is ineffective assistance of counsel or the denial of the right to a fair trial. Compare Lowrey v. Cardwell, 575 F.2d 727, 730-31 (9th Cir. 1978) (holding that defense counsel at defendant's bench trial violated the defendant's right to a fair trial when counsel, who was surprised by the client's perjury, obtained a recess, unsuccessfully moved to withdraw, ended the defendant's testimony, and then did not refer to the defendant's testimony in closing argument, because counsel's actions gave the trial court the impression that the defendant had testified falsely), with People v. Andrades, 828 N.E.2d 599, 603-04 & n.3 (N.Y. 2005) (expressly rejecting the Ninth Circuit's approach in Lowery, and holding that defendant was not denied his right to a fair hearing and that counsel was not ineffective, and properly balanced his duties to the client and to the court, when counsel unsuccessfully moved to withdraw prior to defendant's suppression hearing and at the suppression hearing told the court that the defendant

intended to testify, that he had advised the defendant not to testify, that he was having an ethical problem, and that he intended to just call the defendant's attention to the time, date, and location, "and let him run with the ball").

E. Courts also have disagreed about whether counsel's refusal to put the perjurious client on the witness stand violates the client's constitutional rights. Compare United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984) (holding that counsel's refusal to put client on the witness stand when the client would have testified perjuriously did not violate the client's constitutional rights), cert. denied, 475 U.S. 1064 (1986), with People v. Johnson, 72 Cal. Rptr. 2d 805, 815-22 (Cal. Ct. App.) (rejecting the approach taken in Curtis, and adopting the narrative approach for an attorney faced with the prospect that his client will commit perjury if he testifies). cert. denied, 525 U.S. (1998).

F. The Tenth Circuit has held that defense counsel's mid-trial, ex parte discussion with the judge concerning defense counsel's fear that his client would commit perjury did not violate counsel's ethical duty to the client or constitute ineffective assistance of counsel. United States v. Litchfield, 959 F.2d 1514 (10th Cir. 1992).

G. Counsel should strongly discourage the defendant from taking the witness stand to testify perjuriously and must not assist the client in committing perjury. See ABA Standards, § 4-7.5, at 221 (Commentary) & n.1 (noting lack of consensus on what defense counsel should do); see also AMRPC, Rule 1.2(d) & Comment; id., Rule 3.3, Comment; TDRPC, Rule 3.03(a)(5) & Comment 5 (a lawyer must not use evidence he knows to be false and should urge the client not to testify falsely).

H. If persuasion does not work, counsel may seek to withdraw if necessary, but should not inform the court of the reasons for doing so. See ABA Standards, § 4-7.5 (Commentary); see also AMRPC, Rule 1.2, Comment; id., Rule 1.6, Comment; TDRPC, Rule 3.03, Comments 5&6; see also United States v. Henkel, 799 F.2d 369, 370 (7th Cir. 1986), cert. denied 479 U.S. 1101 (1987) (holding that the perjurious defendant was not denied due process or his right to counsel when the lawyer called the

defendant as a witness to testify, informed the court that the defendant was testifying against advice of counsel, and moved to withdraw because he could not professionally proceed, and when the court denied the motion to withdraw and offered the defendant an opportunity to testify, but the defendant declined the court's offer).

I. The ABA Standards and the Model Rules appear to approve, as a last resort, disclosing the perjury to the court. See ABA Standards, § 4-7.5 (Commentary) (if withdrawal is impossible or will not remedy the situation, the advocate should make disclosure to the court); AMRPC, Rule 3.3 (Comment) (same).

J. Some states require that, when the client commits perjury, the lawyer must take reasonable remedial measures which may include revealing the client's perjury. See, e.g., TDRPC, Rule 3.03, Comment 12; see also id., Rule 3.03(b) (if the lawyer cannot persuade the client to correct false evidence, the lawyer shall take reasonable remedial measures which may include disclosure of the true facts); cf. New York City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-2 (holding that, when counsel learns that material evidence offered by the lawyer, the lawyer's client or a witness called by a lawyer during a now-concluded civil or criminal proceeding was false, the lawyer is obligated to take reasonable remedial measures, which includes disclosing the false evidence to the tribunal).

K. Both the Model Rules of Professional Conduct and the rules of various jurisdictions recognize the lawyer's authority to refuse to offer testimony or other evidence that the lawyer believes is false. See AMRPC, Rule 3.3, Comment; see, e.g., TDRPC, Rule 3.03, Comment 15. As pointed out by the Texas Disciplinary Rules, for example, there is a distinction between the situation in which the lawyer knows that the client's testimony is false and the situation in which the lawyer **believes** the client's testimony is false. In the latter situation, the choice to use or not to use the testimony is within the lawyer's discretion. "A lawyer may refuse to offer evidence that the lawyer reasonably **believes** is untrustworthy. That discretion should be exercised cautiously, however, in order not to impair the legitimate interests of the client. Where a client wishes to have such suspect evidence introduced, generally the

lawyer should do so and allow the finder of fact to assess its probative value." TDRPC, Rule 3.03, Comment. 15. A lawyer's duties under the Texas Rules to remedy the prior use of false evidence "are not triggered by the introduction of testimony or other evidence that is believed by the lawyer to be false, but not known to be so." Id.; see also United States v. Jiménez-Bencevi, 788 F.3d 7, (1st Cir. 2015) (holding that it was permissible for defense counsel to have an expert witness call into doubt that it was the defendant who appeared in the video tape as the perpetrator even though the defendant had admitted to the crime during plea bargaining proffer session because the lawyer did not "know" the expert opinion was false since the defendant had initially denied guilt and the prosecution's witnesses had changed their stories and were not the most credible).

L. There is no universally agreed upon proper course found in the literature concerning the steps that defense counsel should take when the defendant insists on committing perjury. See United States v. Scott, 909 F.2d 488, 494 n.10 (11th Cir. 1990) (discussing various views of scholars); see also TDRPC, Rule 3.03, Comments 11& 12 (discussing three proposed solutions to dilemma of client's perjury).

M. A number of cases seem to approve defense counsel's disclosure to the court of the fact that the client is about to commit perjury. See United States v. Omene, 143 F.3d 1167, 1170-72 (9th Cir. 1998) (holding that defendant was not denied effective assistance of counsel when he was put to the choice of not testifying at all or testifying only in narrative form after his trial counsel informed the court that he had an "overwhelming belief" that his client would give perjurious testimony, but could say nothing else); United States v. Hamilton, 128 F.3d 996, 1000 (6th Cir. 1997) (holding that former defense counsel did not violate the attorney-client privilege by filing a sealed pleading with the court indicating that certain receipts were false and that the client would commit perjury if he testified at trial); see also Shockley v. Kearney, Civ. A. No. 95-207-SLR, 1996 WL 431093 (D. Del. July 25, 1996) (holding that defense counsel did not render ineffective assistance when he had a mid-trial in-chambers conference with the court in which he revealed that the defendant would "testify to a version of events which

I know not to be true" and when the court allowed the defendant to testify in narrative form).

N. "Not unexpectedly, courts have adopted differing standards to determine what an attorney must 'know' before concluding that his client's testimony will be perjurious." Commonwealth v. Mitchell, 781 N.E.2d 1237, 1246, 1250-51 (Mass.) (discussing the "good cause," "compelling support," "knowledge beyond a reasonable doubt," and "actual knowledge" or "firm factual basis" standards adopted by various courts and adopting the "firm basis in objective fact" standard), cert. denied, 539 U.S. 907 (2003); see also State v. Chambers, 994 A.2d 1248, 1259 & n.13 (Conn. 2010) (agreeing that the standard is actual awareness and not reasonable belief that the client will commit perjury, and discussing the various standards employed by courts and commentators); Brown v. Commonwealth, 226 S.W.3d 74, 81-85 (Ky. 2007) (adopting the approach of Mitchell).

O. Based on the "extremely high standard for evaluating prospective perjury," the Wisconsin Supreme Court has made it clear that "an attorney may not substitute narrative questioning for the traditional question and answer format unless counsel knows that the client intends to testify falsely. Absent the most extraordinary circumstances, such knowledge must be based on the client's expressed admission of intent to testify untruthfully. While we recognize that the defendant's admission need not be phrased in 'magic words,' it must be unambiguous and directly made to the attorney." State v. McDowell, 681 N.W.2d 500, 514 (Wis. 2004) (holding that defense counsel was ineffective by switching to narrative questioning during trial despite the fact that he believed his client intended to testify truthfully, but finding that the client had not established prejudice); see also People v. Darrett, 769 N.Y.S.2d 14, 18-22 (N.Y. App. Div. 2003) (remanding for a new suppression hearing on the ground that defense counsel prematurely revealed, during a suppression hearing, that the client would falsely claim either self defense or alibi). But see People v. Calhoun, 351 Ill. App. 3d 1072, 1084-85 (Ill. App. Ct. 2004) (criticizing McDowell on the ground that the actual-knowledge standard "is too high," and approving the firm-factual-basis standard of Mitchell).

XIV. Defense counsel should not comment to the jury on the possible inference of guilt from a codefendant's refusal to testify.

A. The defendant has a constitutional right to silence, free from prejudicial comments. United States v. Kane, 887 F.2d 568, 575 (5th Cir. 1989), cert. denied, 493 U.S. 1090 (1990); see also United States v. DeLuna, 308 F.2d 140, 141 (5th Cir. 1962) (reversing defendant's conviction).

B. If counsel for codefendant comments on another defendant's decision to invoke his right to silence and such comments are not harmless, reversal is merited. United States v. Jones, 839 F.2d 1041, 1055 (5th Cir.), cert. denied, 486 U.S. 1024 (1988); see also United States v. Coleman, 7 F.3d 1500 (10th Cir. 1993); Kane, 887 F.2d at 575.

C. The test for analyzing whether counsel's comments constituted prejudicial error is:

1. Were the comments constitutionally impermissible as a violation of the integrity of the defendant's right to remain silent?

2. Were the comments harmless beyond a reasonable doubt? Kane, 887 F.2d at 575; see also United States v. Collins, 972 F.2d 1385, 1408 n.47 (5th Cir. 1992).

D. A lawyer's adverse comment on the codefendant's silence is improper, but a lawyer's favorable comment on his own client's willingness to testify is permissible. United States v. LaChance, 817 F.2d 1491, 1495-96 (11th Cir.), cert. denied, 484 U.S. 928 (1987); United States v. Diecidue, 603 F.2d 535, 553 (5th Cir. 1979).

XV. Defense counsel normally should not represent two defendants charged in the same indictment or even in two separate indictments if some facts are common to each case.

A. Defense counsel should not undertake to defend more that one defendant in a criminal case if the duty to one of the defendants may conflict with the other. ABA Standards, § 4-3.5(c).

B. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants, except in unusual situations when it is clear that no conflict will develop at any stage of the proceedings. Id.; see also AMRPC, Rule 1.7, Comment; TDRPC, Rule 1.06, Comment 2; see generally United States v. Infante, 404 F.3d 376, 389-393 (5th Cir. 2005) (holding that lower court erred in finding that there was no conflict of interest where trial counsel who represented the defendant also represented two of the witnesses who testified against the defendant and stated to the trial court that he would advocate for a reduction in the sentences of the witnesses based on their testimony; remanding for determination of whether the conflict adversely affected trial counsel's performance); McFarland v. Yukins, 356 F.3d 688 (6th Cir. 2004) (affirming grant of writ of habeas corpus because trial counsel labored under a conflict of interest when he jointly represented the defendant and her daughter in a drug prosecution and made an actual choice to forego an obvious and strong defense to avoid inculpating the daughter); Dawan v. Lockhart, 31 F.3d 718 (8th Cir. 1994) (granting habeas where defendant's attorney previously had represented codefendant who implicated defendant); Cates v. Superintendent, Indiana Youth Center, 981 F.2d 949 (7th Cir. 1992) (although joint representation of codefendants does not per se violate Sixth Amendment, counsel must advise court of conflict); United States v. Moscony, 927 F.2d 742 (3d Cir.) (attorney disqualified where attorney had interviewed client's employees, who were under investigation but became witnesses for government, and employees at time of interview believed the attorney was representing them), cert. denied, 501 U.S. 1211 (1991); cf. United States v. Oberoi, 331 F.3d 44, 47-52 (2d Cir. 2003) (holding that public defender was entitled to withdraw as counsel due to a conflict of interest raised by the need to cross-examine a witness who was also a client of public defender's office, notwithstanding the client's consent); United States v. Daugerdas, 735 F. Supp. 2d 113, 114-18 (S.D.N.Y. 2010) (granting government's motion to disqualify law firm from representing defendant in tax prosecution where the law firm also represented a cooperating witness); State ex rel. Horn v. Ray, 325 S.W.3d 500 (Mo. Ct. App. 2010) (holding that, even with the client's consent, criminal defense counsel could not represent both the defendant and the victim);

Kiker v. State, 55 So.3d 1060, 1065-68 (Miss. 2011) (reversing conviction where defense counsel represented a witness against the defendant). But see United States v. Kindle, 925 F.2d 272 (8th Cir. 1991) (attorney's participation in uniform defense strategy with codefendants' attorneys does not amount to constructive joint representation or conflict of interest).

C. The duty not to reveal information relating to representation of a client continues after the lawyer-client relationship has terminated:

1. Defense counsel, therefore, must not put himself or herself into a position where that confidentiality is threatened, ABA Standards, § 4-3.5(c) (Commentary); see also AMRPC, Rule 1.9 (discussing prohibition against representation that conflicts with the interests of a former client); TDRPC, Rule 1.09 (same).

2. Nor may defense counsel allow confidential information to be used or revealed to the disadvantage of the former client. ABA Standards, § 4-3.5(c) (Commentary); AMRPC 1.9(c)(1) & (2); TDRPC, Rule 1.05(b)(3); see also Thomas v. Municipal Court, 878 F.2d 285 (9th Cir. 1989) (attorney could not represent husband in prosecution for assaulting wife, where attorney had formerly represented wife in action to set aside her first marriage, and husband's defense was that wife falsely accused him of assault in retaliation for his allegation that she was a bigamist); cf. Mickens v. Taylor, 535 U.S. 162 (2002) (holding that, to demonstrate a Sixth Amendment violation where the trial court failed to inquire into the potential conflict of interest arising from defense counsel's prior representation of the murder victim at the time of death and where the trial court knew of or reasonably should have known of the potential conflict, the defendant had to establish that this conflict of interest adversely affected counsel's performance); United States v. Regale, No. Crim. 01-321-KI, 2006 WL 696312, at * (D. Or. Mar. 14, 2006) (unpublished) (holding that criminal defense attorney whose client had died could not continue to serve as a resource counsel for the other defendants' attorneys with whom there was a joint defense

agreement in the case due to the continued duty of defense counsel to his deceased client and the conflicts of interest that could be created by it); see generally Swidler & Berlin v. United States, 524 U.S. 399, 405-06 (1998) (discussing that the attorney-client privilege continues after the death of the client).

D. If a lawyer would be prohibited due to a conflict of interest from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct. AMRPC, Rule 1.10; TDRPC, Rule 1.06(f); see In re Prince, 40 F.3d 356 (11th Cir. 1994) (rule applies to firms of any size).

E. Although two defendants may consent to joint representation in a criminal case, the trial court may refuse to allow it. Wheat v. United States, 486 U.S. 153 (1988) (trial court may refuse to allow multiple representation when actual conflict or serious potential for conflict exists); see United States v. Sanchez Guerrero, 546 F.3d 328, 333-35 (5th Cir. 2008) (affirming disqualification of attorney due to conflict of interest where attorney represented two brothers and a witness against one of the brothers in exchange for a reduction of his sentence); United States v. Vasquez, 995 F.2d 40 (5th Cir. 1993) (despite defendant's waiver of conflict, disqualification of counsel who represented a government witness was proper); United States v. Holley, 826 F.2d 331, 333 (5th Cir. 1987) (trial court's failure to comply with Fed. R. Crim. P. 44(c) requires reversal only if an actual conflict is demonstrated), cert. denied, 485 U.S. 960 (1988); United States v. Benavides, 664 F.2d 1255 (5th Cir.), cert. denied, 457 U.S. 1121 (1982) (same); see also Fed. R. Crim. P. 44(c); see generally United States v. Rico, 51 F.3d 495 (5th Cir.) (upholding waiver of conflict by wife who accepted joint representation with husband, but who later asserted this had prevented her from presenting duress defense), cert. denied, 516 U.S. 883 (1995); United States v. Reeves, 892 F.2d 1223 (5th Cir. 1990) (it was not a violation of Sixth Amendment for court to remove, over defendant's objection, counsel who was under investigation in connection with defendant's offense).

F. Conflicts of interest also may arise when a third party pays an attorney's

fee for the defendant.

1. In Quintero v. United States, 33 F.3d 1133 (9th Cir. 1994):

   a. The Ninth Circuit held that a conflict of interest exists and there has been ineffective assistance of counsel if a third party involved in the drug offense pays the attorney's fees for an indigent defendant and the defendant rejects a favorable plea agreement at his attorney's urging; and

   b. It published the opinion "to alert trial judges, particularly in drug cases, to determine whether or not third parties are paying the fees of retained counsel when the defendant is indigent and, if so, whether the defendant understands the potential conflict of interest that may exist in such an arrangement and voluntarily waives that conflict." Id. at 1134.

2. The ABA Standards for Criminal Justice also warn about the conflict of interest that may arise when a lawyer accepts a fee from an third party.

   a. "In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:
   (i) the accused consents after disclosure;
   (ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and
   (iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality. ABA Standards for Criminal Justice – Defense Function, Standard 4-3.5(e)(i)-(iii).

3. Texas and ABA ethics rules and their comments similarly warn about conflicts of interest and compromising the duty of loyalty

when a fee is accepted from a third party.

a. TDRPC, Rule 1.06(b)(2) provides that "a lawyer shall not represent a person if the representation of that person . . . reasonably appears to be or become adversely affected by the lawyer's . . . responsibilities to another client or a third person."

b. TDRPC, Rule 1.06, Comment 12, provides that "a lawyer may be paid from a source other than a client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client."

c. AMRPC, Rule 1.7, Comment 13, provides that, "[i]f acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee . . ., then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation."

XVI. The attorney-client privilege does not prohibit defense counsel from revealing conversations with the client when the client accuses the attorney of wrongdoing, but counsel should disclose such information in a judicial setting with appropriate safeguards.

A. The attorney-client privilege is waived by the client when the client alleges a breach of a duty to him. See United States v. Pinson, 584 F.3d 972, 977-78 (10th Cir. 2009), cert. denied, 559 U.S. 955 (2010); Bittaker v. Woodford, 331 F.3d 715, 716, 718 (9th Cir.), cert. denied, 540 U.S. 1013 (2003); Johnson v. Alabama, 256 F.3d 1156, 1178 (11th Cir. 2001), cert. denied, 535 U.S. 926 (2002); Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967); see also Indus. Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Elec. Co., 953 F.2d 1004, 1007 (5th

Cir. 1992) (noting that attack on attorney waives attorney-client privilege); Doe v. A. Corp., 709 F.2d 1043, 1048-49 (5th Cir. 1983) (noting that it would be an injustice to allow client's confidence to deprive counsel of the means of defending his own rights); Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974), cert. denied, 419 U.S. 1125 (1975); see generally AMRPC, Rule 1.6(b)(5) (lawyer may reveal confidential information to the extent reasonably necessary to establish a claim or defense in a controversy with the client or to respond to allegations in any proceeding concerning the lawyer's representation of the client); TDRPC, Rule 1.05(c)(5)-(6) & (d)(2) (same).

B. When the client calls into question the competence of his attorney, the privilege is waived. Tasby, 504 F.2d at 336; see also In re Lott, 424 F.3d 446, 453 (6th Cir. 2005), cert. denied, 547 U.S. 1092 (2006); Johnson, 256 F.3d at 1178; Laughner, 373 F.2d at 327.

C. The scope of the waiver applies to all communications relevant to the issue of competence or breach of the duty. See Bittaker, 331 F.3d at 716; Laughner, 373 F.2d at 327; see also Indus. Clearinghouse, Inc., 953 F.2d at 1007 (discussing scope of waiver); cf. Naglak v. Pennsylvania State University, 133 F.R.D. 18, 23 (M.D. Pa. 1990) (waiver is limited, and blanket disclosure is not permitted); United States v. Zolp, 659 F. Supp. 692, 723-24 (D.N.J. 1987) (even a witness for the government waives the attorney-client privilege only to the extent that he discusses such confidential communications with the government); see generally Bittaker 331 F.3d at 718-729 (applying the implied waiver doctrine to restrict the scope of a habeas petitioner's waiver of the attorney-client privilege and affirming the federal district court's protective order, which precluded the state from using the habeas petitioner's privileged materials that were produced during the federal habeas proceeding for any other purpose than litigating the federal habeas petition and barred the Attorney General from turning them over to any other law enforcement or prosecutorial agencies).

D. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to respond to allegations concerning the lawyer's competency. AMRPC, Rule 1.6(b)(5); TDRPC, Rule

1.05(c)(5) & (6), (d)(2); see also Bittaker, 331 F.3d at 718-29; Neb. Ethics Advisory Op. for Lawyers, No. 12-11 (holding that a lawyer who is sued civilly along with two client codefendants by a federal agency for fraud and regulatory violations allegedly committed by the lawyer and the two clients may release confidential information to the agency only to the extent the lawyer reasonably believes necessary to establish his or her defense and that the lawyer should make every practicable effort to limit access to the information through protective orders or other arrangements).

E. The lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to the representation of the client, to limit the disclosure to those having a need to know it, and to obtain protective orders or make other arrangements to minimize the risk of disclosure. AMRPC, Rule 1.6(b)(5) Comment.; Mo. RPC, Rule 4-1.6, Comment (disclosure should be no greater than the lawyer reasonably believes necessary to vindicate innocence and should be made in a manner that limits access to information by others, such as by use of protective orders or other arrangements); see also TDRPC, 1.05, Comment 14 (disclosure should be no greater than the lawyer believes necessary to the purpose).

F. In camera review of the proposed disclosure may be an appropriate method for resolving whether the disclosure should be made. See Zola, 659 F. Supp. at 724-25; First Federal Savings and Loan v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 568 (S.D.N.Y. 1986).

G. In the its ethics opinion on this issue, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (July 14, 2010), the ABA reached the following conclusion, which cautions counsel to provide confidential information only in a judicial setting when responding to a client's claim contained in, for example, a habeas corpus petition:

"Against this background, 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. It will be rare to confront circumstances where trial counsel can reasonably believe that

such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information. If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since Strickland, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting." Id. at 5.

H. The District of Columbia Bar Legal Ethics Committee released an opinion disagreeing with ABA Formal Op. 10-456 because D.C. Rule of Professional Conduct 1.6 differs from Model Rule of Professional Conduct 1.6: "D.C. Rule 1.6(e)(3) permits a defense lawyer whose conduct has been placed in issue by a former client's ineffective assistance of counsel claim to make, without judicial approval or supervision, such disclosures of information protected by Rule 1.6 as are reasonably necessary to respond to the client's specific allegations about the lawyer's performance. . . The rule allows a lawyer to disclose protected information only to the extent 'reasonably necessary' to respond to 'specific allegations' by the former client." D.C. Legal Ethics Comm. Op. 364 (Jan. 2013); see also In re Disciplinary

Proceedings Against Thompson, 847 N.W.2d 793, 796-803 (Wisc. 2014) (disagreeing with ABA Formal Op. 10-456 and holding that, when a client claims that the attorney was ineffective, the attorney-client privileged is waived, the lawyer may respond, and the response need not be confined to a "court-supervised" setting); Tenn. Formal Ethics Op. 2013-F-156 (June 14, 2013) (holding that the Tennessee Rules of Professional Conduct permit but do not require former defense counsel accused of ineffective assistance to voluntarily provide limited information to the prosecutor outside of a court proceeding and discussing North Carolina Formal Ethics Op. 16 to the same effect).

I. Note that defense counsel should not attempt to argue his own ineffectiveness, but instead should seek appointment of new counsel. See United States v. Del Muro, 87 F.3d 1078 (9th Cir. 1996) (when defendant filed Rule 33 motion for new trial alleging ineffective assistance of counsel, district court erred by refusing to appoint new counsel; having trial counsel argue own ineffectiveness created conflict and was presumed prejudicial); see also Manning v. Foster, 224 F.3d 1129, 1134 (9th Cir. 2000) (discussing Del Muro).

XVII. Counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, must not request or accept payment from anyone other than the court.

A. The Criminal Justice Act states that, except as authorized by the court, no person appointed as counsel by the court "may request or accept any payment or promise of payment for representing a defendant." 18 U.S.C. § 3006(f).

B. The Seventh Circuit has cogently summarized the purpose of this provision:

> The plain meaning of this sentence is that attorneys or other persons "representing" a defendant under the CJA are prohibited from seeking payment for their services from sources other than the government without approval of the district court. This provision prevents the augmentation of their CJA remuneration in any way, including the

> formation of side agreements with the defendant or with others. . . .
> . . . This requirement ensures the protection of the government from the unnecessary expenditure of funds when other sources are available to the defendant. It also protects that defendant from demands to augment the compensation of those who have agreed to render services within the framework of the CJA. Even when, as here, the side agreement is between third parties, the possibility of eventual pressure on the defendant or on other on his behalf to reimburse that attorney for the expenditure is a substantial danger that Congress obviously intended to curb. United States v. Silva, 140 F.3d 1098, 1102-03 (7th Cir. 1998).

C. If a third party can pay an acceptable fee, counsel should inform the court that he or she is being retained to represent the client and should move the court to vacate the appointment order.

D. Note that, if counsel is appointed to represent a client in a large and complex federal criminal case, appointed counsel can apply to the district court for authorization to receive interim compensation while the case is pending. See, e.g., United States v. Gonzales, 150 F.3d 1246, 1251-52 (1998) (citing pertinent rules and noting that the district court had approved interim compensation because of the complexity and length of the proceedings).

E. Note also that, under the Criminal Justice Act, appointed counsel cannot be paid for work done after counsel has formally withdrawn from representation of the defendant, even if the work is to aid in the transition of the case to new counsel. See United States v. Romero-Gallardo, 245 F.3d 1159, 1159-61 (10th Cir. 2001).

XVIII. The client normally is entitled to the case file held by the attorney.

A. In a majority of jurisdictions, the client is entitled to the entire case file held by the attorney, including the attorney's work product. See Iowa

Supreme Court Attorney Disciplinary Board v. Gottshalk, 729 N.W.2d 812, 819-22 (Iowa 2007) (discussing jurisdictions in the majority and the minority and adopting the majority approach that the attorney must turn over the entire file to the client); In re Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 666 N.Y.S.2d 985, 987-89 (N.Y. 1997) (same); see, e.g., In re McCann, 422 S.W.2d 701, 705-11 (Tex. Crim. App. 2013) (holding that the client owns the file and that a client's attorney could not be compelled to turn over a death-sentenced client's file to client's post-conviction counsel in the face of the client's objection); Hiatt v. Clark, 194 S.W.3d 324 (Ky. 2006). (holding that client was entitled to entire case file, despite attorney's claim that work product did not have to be disclosed to the client, as the client needed the file to pursue post-conviction relief); Means v. State, 103 P.3d 25, 30 (Nev. 2004) (holding that "the work product doctrine is not an exception to the inspection rights conferred in [the applicable Nevada ethics rule] and does not shield an attorney from having to disclose his notes to his former client"); see generally Restatement (Third) of the Law Governing Lawyers § 46(2) (2000) ("On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse,").

B. Indeed, a number of states' ethical rules and opinions specifically state that an attorney should surrender the file to the client at the end of representation or make copies of it for the client. See, e.g., TDRPC, Rule 1.15(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled" and "may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation."); AMRPC, Rule 1.16(d) (same); Pa. Bar Ass'n Comm. on Legal and Prof'l Responsibility, Formal Op. No. 2007-100, 2007 WL 1170779 (2007) (discussing client's right to access, copy, and possess attorney's file, and stating that "[i]t is generally accepted that client files are maintained by a lawyer for the benefit of his or her principal, the client").

C. Courts also have recognized that the client is entitled to the case file. See, e.g., Maxwell v. Florida, 479 U.S. 972, 976-77 & n.2 (1986) (Marshall, J., dissenting from denial of certiorari) (stating that "[t]here is no more accurate or reliable evidence of trial counsel's actual perspective and extent of preparation than the contents of the client's case file"); Spivey v. Zant, 683 F.2d 881, 885 (5th Cir. Unit B 1982) (holding that "work product doctrine . . . does not apply to the situation in which a client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation"); In Re George, 28 S.W.3d 511, 516 (Tex. 2000) ("The attorney is the agent of the client, and the work product created by the attorney during his representation is the property of the client."); In re Bernstein, 707 A.2d 371, 376 (D.C. Ct. App. 1998) ("This rule unambiguously requires an attorney to surrender a client's file upon termination of representation.").

D. However, a minority of jurisdictions hold that an attorney's work product belongs to the attorney and not to the client. See Ill. State Bar Assoc., Advisory Op. No. 94-13, 1995 WL 874715, at *6 (1995) (concluding that an attorney's work product does not belong to and need not be turned over to the client and citing in support of its position Federal Land Bank of Jackson v. Federal Intermediate Credit Bank, 127 F.R.D. 473 (S.D. Miss. 1989), affirmed, 128 F.R.D. 182 (S.D. Miss. 1989); Estate of Johnson, 538 N.Y.S. 2d 173 (1989); State Bar Association of North Dakota Opinion 93-15 (November 17, 1993); Bar Association of Nassau County, New York, Opinion No. 91-31 (November 18, 1991); Mississippi State Bar Opinion No. 144 (March 11, 1988); State Bar of Arizona Opinion No. 81-32 (November 2, 1981); and ABA Informal Opinion No. 1376 (February 18, 1977)). But see Gottshalk, 729 N.W.2d 812, 819-22 (Iowa 2007) (adopting the majority "entire file" position because, among other reasons, attorneys are in a fiduciary relationship with the client and owe the client candor, honest, and good faith); In re Sage Realty Corp, 666 N.Y.S.2d 985, 987-89 (N.Y. 1997) (concluding that the majority position on the issue is the better position for various reasons).

E. State ethics opinions have specifically addressed the form in which the

client's case file may be kept and produced to the client. See, e.g., D.C. Bar Legal Ethics Comm., Op. 357 (Dec. 2010) (ruling that, absent a prior agreement, a lawyer must comply with a reasonable request to convert electronic records to paper form, that a former client normally should bear the cost of the conversion) (available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion357.cfm (last visited September 6, 2011); Mo. S. Ct. Advisory Comm., Formal Op. 127, 2009 WL 6827282 (May 19, 2009) (ruling that an attorney may destroy most, but not necessarily all, of the paper file, if the file is stored electronically, that items of intrinsic value or that may have legal significance, such as originals, may not be destroyed, that firms should offer the paper file to the client prior to destruction, and that an attorney must have the necessary software and hardware available to access the electronic file and must for a ten-year period, upon request, provide it to the client in a manner in which the client will be able to access it using commonly used, relatively inexpensive, software and hardware without charge, except for shipping or delivery charges); but see Sacksteder v. Senney, No. 25892, 2014 WL 2832727, at *2-*3 (Ohio Ct. App. 2d Dist. June 20, 2014) (holding that, although a client has the right to the return of any original paper given to the lawyer, a client has no right to other original documents, as opposed to photocopies of other documents, in the case file).

XIX. Under certain circumstances, defense counsel may be authorized to withhold information from the client.

A. A lawyer is required to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." TDRPC, Rule 1.03(a); see also AMRPC, Rule 1.4(a).

1. A lawyer is required to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." TDRPC, Rule 1.03(b); AMRPC, Rule 1.4(b).

2. "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the

representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." TDRPC, Rule 1.03, Comment 1.

3. "In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others." TDRPC, Rule 1.03, Comment 2.

B. "On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail." TDRPC, 1.03, Comment. 2; AMRPC, Rule 1.4, Comment 5.

1. "The guiding principle is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Id.

2. "Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult." TDRPC, 1.03, Comment. 3; AMRPC, Rule 1.4, Comment 6.

3. "In some circumstances, a lawyer may be justified in *delaying transmission* of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication." TDRPC, 1.03, Comment. 4; AMRPC, Rule 1.4 Comment 7.

C. "Similarly, rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client." TDRPC, 1.03, Comment. 4; AMRPC, Rule 1.4 Comment 7.

D. "A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client." Restatement (Third) of the Law Governing Lawyers § 46(1).

E. "On request, a lawyer must allow a client or former client to inspect and

copy any document possessed by the lawyer relating to the representation, *unless substantial grounds exist to refuse*." Id. § 46(2) (emphasis added).

F. "Unless a client or former client consents to nondelivery *or substantial grounds exist for refusing to make delivery*, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs." Id. § 46(3) (emphasis added).

G. Judicial and state ethics opinions make clear that an attorney is authorized in some situations to withhold information from the client.

1. Pennsylvania Bar Association Formal Opinion No. 2007-100, 2007 WL 1170779 (2007), for example, sets out the materials that a client is entitled and not entitled to have.

   a. The opinion states that a client should not typically be given, in response for a general request for the file, "items that the lawyer is restricted from sharing with the client due to other legal obligations (such as 'restricted confidential' documents of a litigation adversary that are limited to counsel's eyes only)." Id.

   b. The opinion also states that, when the client makes a specific request for these restricted materials, "the client is entitled to such items unless there are substantial grounds to decline the request." Id.

   c. It additionally makes clear that a lawyer and a client may enter into a reasonable agreement on the types of documents to be placed in the file and on the lawyer's and client's rights to them. Id.

2. Utah Ethics Opinion No. 06-04, 2006 WL 3694076 (Dec. 8, 2006).

a. The Utah State Bar noted that the Utah Rules of Criminal Procedure allow limits to be imposed on the use of information provided through discovery.

b. The opinion ruled that "[d]iscovery that has been provided with restrictions on dissemination to a client in a criminal law case" by rule or by court order "may not be released to the client by the client's lawyer, notwithstanding a specific request by the client or former client." Id.

3. Tex. Comm. on Prof'l Ethics, Op. 570, 2006 WL 2038682 (May 2006).

a. The opinion holds that a lawyer normally should give his notes in the file to the client upon request.

b. But, it recognizes exceptions justifying withholding of notes when: (i) required to do so by court; (ii) not doing so would violate lawyer's duty to another person; and (iii) not doing so would risk causing serious harm to client. Id.; but cf. Tex, Comm. on Prof'l Ethics, Op. 646, 2014 WL 7010000 (Nov. 2014) (holding that, because prosecutors are required to make the disclosures in the Texas discovery statute, they "may not, as a condition for providing information in their files they are obligated to disclose, require that criminal defense lawyers agree not to show or provide copies of the information to their clients").

4. In re Bragg, 2012 WL 566958 (W.D. Va. Feb. 21, 2012) (unpublished).

a. The opinion reprimanded CJA counsel for violating a discovery order by giving copies of grand jury transcripts and other investigative materials to his client who was in jail because the discovery order prohibited defense counsel from removing discovery from his office unless it was kept in counsel's personal possession.

b. The court noted that the discovery order benefitted the defendants with access to discovery, but prevented witness intimidation.

5. Other federal courts have granted the government protective orders requiring counsel to return or destroy all copies of witness statements and prohibiting defendants in jail from possessing them.

a. These courts have reasoned that (i) a defendant has no right to Jencks material before trial, and (ii) dissemination of Jencks material in jails leads to witness intimidation.

b. See United States v. Garcia, 406 F. Supp.2d 304 (S.D.N.Y. 2005); see also United States v. Scott, 2008 WL 4372814 (M.D. Pa. 2008) (unpublished); United States v. Basciano, 2006 WL 2270432 (E.D.N.Y. 2006) (unpublished).

XX. The rules of professional ethics give no definitive answer for when counsel should make a decision for the mentally incompetent client, but they do provide some guidance.

A. The rules of professional ethics do not specifically tell a lawyer when or how to make a decision for a mentally incompetent client.

1. "Perhaps no area of the criminal defense lawyer's role is more fraught with confusion and lack of certainty than the question of how to deal with the client who is so mentally impaired that he cannot make rational, or completely rational, decisions on his own."

2. "The defense lawyer is truly 'at sea.'"

3. "Many lawyers are simply lost dealing with the issue, and justifiably so because their state ethics rules fail to adequately deal with the criminal defense lawyer's duties to the mentally ill or impaired client and general rules are often difficult to state or

apply from case to case." Id. at 457. John Wesley Hall, Jr., Professional Responsibility in Criminal Defense Practice 455, 457 (West 2005) (footnote omitted) (discussing this issue at length and related rules and standards).

4. The ABA Standards for defense counsel make only one mention of the mentally disabled client.

   a. "Defense counsel should consider all procedural steps which in good faith may be taken, including, for example . . . obtaining psychiatric examination of the accused when the need appears . . . ."

   b. ABA Standards for Criminal Justice – Defense Function, Standard 4.3-6; see also Hall, supra, at 461.

5. Only three Texas ethics rules mention a "client under a disability."

   a. Rule 1.02 instructs that a lawyer should: (i) seek a guardian when the lawyer reasonably believes that the client is legally incompetent and that such action should be taken to protect the client; and (ii) should take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. TDRPC, Rule 1.02(g) & Comment 13.

   b. Rule 1.03 instructs that: (i) a lawyer may withhold a psychiatric diagnosis from a client when a psychiatrist indicates that disclosure would harm the client; (ii) a lawyer should seek to maintain reasonable communication with a client under a disability insofar as possible, although it may not be possible to maintain the attorney-client relationship; and (iii) a client may have the ability to understand, deliberate, and reach conclusions on some matters affecting the client's well being. TDRPC, Rule 1.03, Comments 4 & 5.

   c. Rule 1.05 instructs that a lawyer: (i) may reveal confidential

information when the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law; and (ii) with or without the client's consent, may reveal confidential information reasonably necessary to secure an appointment or order of a guardian as authorized under TDRPC, Rule 1.02(g). TDRPC, Rule 1.05(c)(4) & Comment 17.

B. Other ethics rules and standards provide some guidance but no concrete answers.

1. AMRPC, Rule 1.14 and its comments provides the following guidance, which seems to take a somewhat restrictive view on the liberty to make decisions.

a. As far as possible, a lawyer should maintain a normal lawyer-client relationship.

b. A lawyer may take reasonably necessary protective action, including consulting with other individuals and seeking a guardian.

c. When protective action is impliedly authorized, a lawyer may reveal confidential information, but only to the extent reasonably necessary to protect client's interests.

d. A lawyer may take protective action, such as seeking professional services.

e. In taking protective action, a lawyer should be guided by: (i) the wishes and values of the client to the extent known; (ii) the client's best interests; and (iii) the goals of intruding into client's decision making autonomy to the least extent feasible, maximizing client capabilities, and respecting the client's family and social connections.

f. However, a criminal defense lawyer with a good-faith doubt about client's competency must raise it with the court. AMRPC, Rule 1.14(a)-(c) & Comments 1, 2, 5-8.

2. ABA Formal Opinion 96-404 appears to take the same restrictive view as the ABA's Model Rules and states the following.

   a. A lawyer cannot to take protective action merely because the lawyer believes client is not acting in the client's best interest, but may take such action only when the client cannot adequately act in the client's own interest.

   b. The authority to take protective action should be exercised with caution in a limited manner.

   c. The protective action should be that which is reasonably viewed as the least restrictive action under the circumstances.

   d. And, withdrawal from representation is disfavored. ABA Formal Op. 96-404 (1996).

3. The ABA Mental Health Standards provide guidance on some matters but not on whether or how to make decisions for the incompetent client.

   a. Standard 7-4.2(c) provides: (i) defense counsel should move for evaluation of defendant's competence to stand trial whenever counsel has a good faith doubt as to it; (ii) counsel may move for evaluation over client's objection; and (iii) counsel should make known to the court and the prosecutor those facts that give rise to the good faith doubt as to competence.

   b. Standard 7-4.10(d) provides: (i) a person determined to be incompetent and detained for treatment should have no right to refuse ordinary and reasonable treatment designed to effect competence; and (ii) a defendant should have the right to

refuse any treatment that may impair defendant's ability to prepare a defense to the charge, that is experimental, or that has an unreasonable risk of serious, hazardous, or irreversible side effects.

4. The Restatement (Third) of the Law Governing Lawyers § 24 and its Comments appear to provide a bit more guidance and leeway to an attorney, and they provide as follows.

   a. A lawyer should be careful not to construe as proof of disability a client's insistence on a view the lawyer considers unwise or contrary to the lawyer's views.

   b. A lawyer should take reasonable steps to elicit the client's views on decisions necessary to representation.

   c. A client is entitled to make decisions to the extent the client is able to do so.

   d. A lawyer should act only on a reasonable belief, based on appropriate investigation, that the client is unable to make adequately considered decision.

   e. If the client, when able to decide, had expressed views, the lawyer should follow them unless the lawyer has a reason to believe changed circumstances would have changed those views.

   f. If there is a conflict of interest between the lawyer and the client, a decision by another lawyer may be appropriate.

   g. The lawyer should give appropriate weight to the client's presently expressed views.

   h. A lawyer may raise the incompetency or insanity of a client.

C. Note that there is a special standard, apart from competency to stand

trial, to determine a defendant's competency to waive appeal, a habeas corpus challenge, and the like.

1. Rees v. Peyton, 384 U.S. 312 (1966).

   a. The Supreme Court had granted certiorari, the petitioner then told counsel to withdraw petition, and the petitioner and the state disagreed on the petitioner's competence.

   b. The Court held that it could not determine how to dispose of the petition until after a remand for the district court to hold a hearing.

   c. The test to be used was the following: "whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." Id. at 314.

2. Appellate courts have followed Rees and have remanded to the district court for a hearing on whether the defendant is competent to withdraw his appeal or his habeas challenge.

   a. The Fifth Circuit, for example, interprets Rees as encompassing a three-part test: "(1) Is the person suffering from a mental disease or defect? (2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him? (3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options." Rumbaugh v. Procunier, 758 F.2d 395, 398 (5th Cir. 1985) (original paragraph structure omitted).

b. See also Awkal v. Mitchell, 174 Fed. Appx. 248, 249-50 (6th Cir. 2006) (unpublished); Comer v. Stewart, 215 F.3d 910, 914-18 (9th Cir. 2000); Mata v. Johnson, 210 F.3d 324, 327-28 (5th Cir. 2000).

D. Some other sources to consider.

1. Kelly Hilgers and Paula Ramer, Forced Medication of Defendants to Achieve Competency: An Update on the Law After Sell, 17 Geo. J. Legal Ethics 813 (2004) (discussing, among other things, why forced medication may not be in the client's best interest).

2. Alaska Ethics Op. No. 2006-2 (Apr. 6, 2006) (concluding that defense counsel would not act unethically if, after discussing the issue with the client, he chose not to raise a mental health issue in seeking post-conviction relief).

3. John D. King, Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant, 58 Am. U. L. Rev. 207 (2008) (proposing factors for counsel to make the surrogate decision for the incompetent client and more specifically with regard to raising a competency issue).

4. Christopher Slobogin and Amy Mashburn, The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability, 68 Fordham L. Rev. 1581 (2000) (contending that defense counsel as a fiduciary of the client should make the ultimate decisions in the case, including whether to plea guilty, to go to trial, or to raise incompetency or insanity).

5. Rodney J. Uphoff, The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court, 1988 Wis. L. Rev. 65 (1988) (contending defense counsel should be permitted to make a case-by-case determination whether to raise competency, and proposing factors for making that determination).

XXI. The types, limits, and duties of standby counsel.

A. Volume 7, Chapter 2, of the Guide to Judiciary Policies and Procedures recognizes two types of standby counsel.

1. § 220.55.20 Standby Counsel Services Accepted by a Pro Se Defendant.

a. "The CJA provides that '[u]nless the (financially eligible) person waives representation by counsel . . . the court shall appoint counsel to represent him.'"

b. "While the court has inherent authority to appoint standby counsel, such appointments may not be made and counsel may not be compensated under the CJA unless the defendant qualifies for appointed counsel and representation is actually rendered by counsel."

c. "Similarly, if at any time during the course of the proceedings the services of standby counsel are accepted by a financially eligible pro se defendant, a nunc pro tunc CJA appointment order should be effected and counsel may be compensated under the CJA."

2. § 220.55.30 Standby Counsel Appointed Under the Court's Inherent Authority.

a. "In circumstances in which standby counsel is appointed under the court's inherent authority, and counsel serves exclusively on behalf of the court to protect the integrity and continuity of the proceedings, and does not represent the defendant, any compensation to be paid counsel shall be in the capacity of an 'expert or consultant.'"

b. "Accordingly, an appointment under this section may be made regardless of whether the defendant is financially able to obtain adequate representation. . . ."

c. ". . . If, during the course of the proceedings, a pro se defendant who is financially able to retain counsel elects to do so, the court's appointment of an attorney . . . shall be terminated."

B. ABA Standards for Criminal Justice – Defense Function, Standard 4-3.9 also recognizes two types of standby counsel.

1. "Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case."

2. "Defense counsel whose duty it is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court."

C. In McKaskle v. Wiggins, 465 U.S. 168, 183-84 (1984), the Supreme Court discussed the limits of standby counsel's activities as follows.

1. "Faretta rights are also not infringed when standby counsel assists the pro se defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task . . . . Nor are they infringed when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure. . . . A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. "

2. "Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course. . . . The right of self-representation is not . . . a license not to comply with relevant rules of procedural and substantive law."

3. "Accordingly, . . . [a] defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles . . . ."

4. See also United States v. Simpson, 645 F.3d 300, 309 (5th Cir. 2011) (holding that appointment of a liaison counsel to inquire into and facilitate mentally troubled defendant's communication with his two other appointed attorneys did not deprive the defendant of his Sixth Amendment right to counsel).

C. In State v. Silva, 27 P.3d 663, 677-78 (Wash. App. 2001), the Washington Court of Appeals noted that the role contemplated for standby counsel is not in any respect that of an errand runner.

1. The court noted that a court may take into consideration such issues as security concerns or avoidance of abuse by opportunistic or vacillating defendants.

2. It also held that a trial court may order standby counsel to: (a) act as liaison between the accused and the court or prosecutor; (b) provide forms; (c) assist in securing an investigator, if necessary; and (d) any other duties that would satisfy the accused's right of access to tools necessary to prepare an adequate pro se defense. Id.

3. See also United States v. Byrd, 208 F.3d 592, 594 (7th Cir. 2000) (leaving to trial judge's discretion how best to shape the contours of standby counsel's obligations).

D. In State v. Powers, 563 S.E.2d 781, 787-88 (W. Va. 2001), the West Virginia Supreme Court pointed out that the ambiguity over the role of standby counsel arises, at least in part, from the variety of ways courts have defined the role.

1. Moreover, it noted that there appear to be three different terms

that are frequently used in the description of such counsel – "standby," "advisory," and "hybrid" and that it is not completely clear whether these terms have similar, or distinctly different, meanings.

2. The court concluded that, "when a circuit court appoints standby counsel to assist a criminal defendant who has been permitted to proceed pro se, the circuit court must, on the record at the time of the appointment, advise both counsel and the defendant of the specific duties standby counsel should be prepared to perform."

E. According to ABA Formal Op. 07-448 (Oct. 20, 2007), standby counsel whose client "never has accepted the client-lawyer relationship . . . has no such relationship, and the unwilling client has no representation, at least as that term is used in the Rules. Any legal obligation owed by the lawyer to the defendant . . . arises from the authority of the appointing tribunal and includes whatever obligations the tribunal may identify. The lawyer's ethical duties are limited to complying with the Rules defining a lawyer's obligations to persons other than a client." (footnote omitted); see also United States v. Oliver, 630 F.3d 397, 414 (5th Cir. 2011) (reiterating that, because the defendant has "no constitutional right to standby counsel and because [the defendant] acted as his own counsel while he was proceeding pro se, he cannot prevail on a claim that standby counsel was ineffective."); United States v. Morrison, 153 F.3d 34, 55 (2d Cir. 1998) holding that, "without a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel").

XXII. Selected legal principles and rules of professional conduct pertinent to appointment of counsel under 18 U.S.C. § 3006A.

A. Under the Criminal Justice Act ("the CJA"), 18 U.S.C. § 3006A, the district court is required to provide representation for any person financially eligible who is charged with a felony or Class A misdemeanor, as well as other persons who are incarcerated or who face incarceration. See 18 U.S.C. § 3006A(a)(1).

B. A person for whom counsel is appointed shall be represented at every stage of the proceedings through appeal. See 18 U.S.C. § 3006A(c).

1. If at any point the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment, as the interests of justice may dictate. See 18 U.S.C. § 3006A(c).

2. If at any stage of the proceedings, the court finds that the person is financially unable to pay retained counsel, it may appoint counsel. See 18 U.S.C. § 3006A(c).

C. "A person is 'financially unable to obtain counsel' . . . if the person's net financial resources and income are insufficient to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to:

(1) the cost of providing the person and his dependents with the necessities of life, and

(2) the cost of the defendant's bail bond if financial conditions are imposed, or the amount of the case deposit defendant is required to make to secure release on bond." Admin. Office of U.S. Courts, GUIDE TO JUDICIARY POLICY, Vol. 7, Ch. 2, Appointment and Payment of Counsel § 210.40.30(a)(1) & (2) [hereinafter cited as "GUIDE TO JUDICIARY"].

3. "Any doubts as to the person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time." Id. § 210.40.30(b).

4. "The initial determination of eligibility should be made without regard to the financial ability of the person's family unless the family indicates willingness and financial ability to retain counsel promptly." Id. § 210.40.50.

4. The court may find a defendant to be "eligible for the appointment of counsel" and have him pay available funds to the Clerk "at the time of such appointment or from time to time thereafter." Id. § 210.40.40.

D. The district court must make an adequate inquiry into the overall personal circumstances of the defendant to make a finding concerning the necessity of appointment of counsel. United States v. Moore, 671 F.2d 139, 141 (5th Cir. 1982).

1. Even if the defendant refuses to fill out a CJA Form 23 financial affidavit because of his fear that it will be used in his prosecution, it is an abuse of the district court's discretion "not to pursue further the matter of financial need for the appointment of counsel." Id.

2. "CJA Form 23 is not a required statutory form. It is an administrative tool to assist the court in appointing counsel." Id.

E. However, the burden of showing by a preponderance of the evidence that counsel should be appointed rests upon the defendant, and a district court is not required to rely on a terse affidavit by the defendant when the government has come forward with evidence placing in doubt the defendant's eligibility for appointment of counsel. United States v. Harris, 707 F.2d 653, 661 (2d Cir.), cert. denied, 464 U.S. 997 (1983); see also United States v. O'Neil, 118 F.3d 65, 74 (2d Cir. 1997) (stating that the defendant bears the burden of proving that he is unable to afford representation), cert. denied, 522 U.S. 1064 (1998); United States v. Davis, 958 F.2d 47, 48 (4th Cir.) (same), cert. denied, 506 U.S. 878 (1992).

F. In United States v. Gravatt, 868 F.2d 585 (3d Cir. 1989), the Third Circuit explained that, when a defendant refuses to fill out a CJA 23 financial affidavit for fear that it will be used against him, the district court can resolve the problem by one of two approaches:

1. the district court may afford the defendant the opportunity to

disclose the required financial information for the court to review in camera, after which the financial information should be sealed and not made available for purposes of the prosecution; or

2. if the district court deems an adversary hearing on defendant's request for appointment of counsel to be appropriate, the court may grant use immunity to the defendant's testimony at that hearing. Id. at 590.

3. See also United States v. Aguirre, 605 F.3d 351, 358 (6th Cir 2010) ("hold[ing] that, if the defendant has disclosed truthful information to demonstrate financial inability and obtain counsel under the Sixth Amendment, that information may not thereafter be admitted against him at trial on the issue of guilt," but declining to reverse conviction on plain-error review); United States v. Beverly, 993 F.2d 1531, 1993 WL 165348, at *1 (1st Cir. 1993) (unpublished) (citing and discussing other courts that have adopted an approach similar to Gravatt); United States v. Davis, 958 F.2d 47, 49 n.4 (4th Cir.) (noting that district court avoided Fifth Amendment problem by examining defendant about his financial situation ex parte and sealing answers), cert. denied, 506 U.S. 878 (1992); United States v. Anderson, 567 F.2d 839, 840-41 (8th Cir. 1977) (holding that district court should have reviewed financial information in camera); cf. United States v. Ellsworth, 547 F.2d 1096, 1098 (9th Cir. 1976) (affirming denial of counsel where defendant invoked his Fifth Amendment right to silence even though the district court assured him that his financial information would not be used against him), cert. denied, 431 U.S. 931 (1977).

G. Note that "[b]y blocking legitimate inquiry into his financial condition, a defendant implicitly waives his right to counsel." Davis, 958 F.2d at 49; see also United States v. Owen, 407 F.3d 222, 226 (4th Cir. 2005) (holding that defendant waived right to counsel by failing to show that he was entitled to appointed counsel and quoting Davis).

H. Note also that a defendant's "false statements in an application for

counsel under the [Criminal Justice] Act are subject to the penalties of perjury." Harris, 707 F.2d at 658.

I. In addition, although a lawyer normally should not knowingly reveal confidential information of a client, state professional ethics rules, such as Rule 1.05(c) of the Texas Disciplinary Rules of Professional Conduct, list exceptions to this rule and allows a lawyer to reveal confidential information: (1) to comply with a court order, a rule of professional conduct, or other law; (2) when it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act; and (3) to the extent necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used. See, e.g., TDRPC, Rule 1.05(c)(4), (7) & (8); see also TDRPC, Rule 1.05(e) & Comment 19; cf. GUIDE TO JUDICIARY, supra, § 210.10.30 (stating that the CJA plan for each district should provide that, if counsel obtains information that the client is financially able to make payment for legal services, and the source of the information is not a privileged communication, counsel shall advise the court). In addition, a lawyer shall not knowingly make a false statement of material fact or law to a tribunal, or fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act. TDRPC Rule 3.03(a)(1) & (2).

J. Under Texas law, for example, when a client represents to a court that he is unable to afford counsel and defense counsel later discovers from the client that the client's statements to the court were false, TDRPC Rules 1.05 and 3.03 require counsel to disclose the facts to the court to avoid assisting the client in a criminal or fraudulent act. Tex. Comm. on Prof'l Ethics, Op. No. 473, 1992 WL 792966 (May 1992).

K. Similarly, if the client truthfully represents to the court that he is unable to afford counsel at the beginning of the criminal case but his appointed counsel later learns during the pendency of the case that the client's financial status has changed and that he now can afford to retain counsel, TDRPC, Rules 1.05 and 3.03 require counsel to disclose the facts to the court to avoid assisting the client in a criminal or fraudulent act. Tex. Comm. on Prof'l Ethics, Op. No. 473, 1992 WL 792966 (May

1992).

L. When appointed counsel learns that the client has obtained appointed counsel by a criminal or fraudulent act, counsel should remember that some state rules of professional ethics dictate that "[a] lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure." TDRPC, Rule 3.08(b).