Sixteen Ethical Scenarios Related to the Representation of Federal Criminal Defendants in North Carolina: An Interactive Presentation by Eric Brignac

This proposed CLE presentation addresses ethical issues that may arise in the representation of federal criminal defendants in North Carolina. The answers come directly from Formal Ethics Opinions and the Rules of Professional Responsibility. The presentation creates hypothetical scenarios and asks the participants to anonymously vote (via Mentimeter or some other app) before showing and explaining the answer. This format will keep people engaged while allowing them to learn the answers directly from the Formal Ethics Opinions.

Scenario 1: Attorney Alice represents Defendant who pleaded guilty to a federal offense. Alice is aware based on conversations with her client and her own research that he has one prior conviction that should score 3 criminal history points, making the client a Criminal History Category II. However, when the draft PSR comes out, it states that the client has no prior convictions and classifies him as CHC I. Does Alice's duty of candor to the tribunal obligate her to bring the prior conviction to the Court's attention"

Answer 1: NO.Formal Ethics Opinion 98-5."A defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward. The duty of confidentiality to the client is paramount provided the defense lawyer does not affirmatively misrepresent the facts to the court. . . . Although Rule 3.3(a)(2) prohibits a lawyer from failing to disclose a material fact to a tribunal 'when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,' this rule [is] not violated because Client's [criminal history] record was inaccurate through no fault of Client and Client did not criminally or fraudulently conceal the prior conviction from the prosecutor or the court."

Note for those practicing in state court–because NC prior record level sheets are prepared by the prosecution, a defense lawyer does NOT need to correct a prosecutor's mistake on one. But the defense lawyer and prosecutor CANNOT AGREE to knowingly file a false prior record level with the court as part of informal plea negotiations. That action crosses the line into misrepresentations to the tribunal. Formal Ethics Opinion 2003-5.

Scenario 2: Alice realizes that the criminal history mistake should make her client eligible for a 2 level reduction as a Zero-Point Offender (USSG 4C1.1), which, among other things, requires that "the defendant did not receive any criminal history points from Chapter Four, Part A." The PSR does not apply this reduction. May Alice object to the PSR on these grounds and advocate at sentencing for the Zero-Point Offender reduction?

Answer 2: NO. Formal Ethics Opinion 98-5: "No. Unlike the prior inquiry, in this situation the burden of showing eligibility for a [reduction] is on the defendant. By petitioning the court for the [reduction], the defendant is making ***an implicit representation*** to the court that he has no prior convictions and is eligible for the [reduction.] [Alice] is aware that this is a false representation of a material fact and he may not participate in its presentation to a tribunal by filing the petition. Rule 3.3(a)(1)." (emphasis added).

Scenario 3: Bob represents a 16-year old whose case was transferred to adult court and is being tried as an adult. The defendant's parents (who are his legal guardians) want Bob to tell them everything about the case. The defendant tells Bob that he does not want Bob to tell his parents anything. May Bob disclose otherwise confidential case information to the parents/legal guardians of his minor client?

Answer 3: NO. Formal Ethics Opinion 98-18. The key here is that the client is being tried as an adult. "A lawyer representing a minor may disclose confidential information to the minor's legal guardian, over the minor's objection, if the disclosure is necessary for the guardian to make a legally binding decision about the subject matter of the representation. See Rule 1.14, cmt. [3]." But here, "Minor is being tried as an adult and the consent of Minor's parents is not necessary for Minor to make a legally binding decision about the plea agreement. Therefore, [Bob] must honor Minor's request and not disclose the information to Minor's parents."

Scenario 4: Attorney Charlie represents a Defendant who is planning to sign a plea agreement. The plea agreement is good for Charlie's client, but he notices that the prosecutor has expanded the standard appeal waiver language to also waive the

Defendant's right to bring claims of ineffective assistance of counsel or prosecutorial misconduct. May Charlie advise his client to sign this plea?

Answer 4: NO. RPC 129. Both Charlie and the prosecutor have a conflict of interest in having a defendant sign a plea that limits their exposure to future adverse litigation.

Scenario 5: Attorney Eric represents a non-detained client who has an upcoming hearing to determine whether his probation should be revoked. He meets with the client to discuss the upcoming hearing. The night before the hearing, he calls the client and confirms that the client knows when and where the hearing is and intends to show up. The client does not show up. The client does not answer his phone when Eric tries to contact him before court. When the case is called, the judge asks Eric where his client is. Eric tells the judge that he told the client about the hearing and confirmed with him yesterday that the hearing was happening and he does not know where his client is. Did Eric do anything wrong?

Answer 5: YES. Eric violated both his duty of confidentiality to his client (Rule 1.6) and his duty to zealously advocate for his client (Rule 1.3). He should have answered truthfully "I don't know" when asked where his client was and said no more. If asked by the judge whether the client knew of the hearing, Eric must say that he cannot answer that question without violating attorney-client confidence. Eric cannot lie to cover for the client (Rule 3.3–candor toward the tribunal), but he cannot volunteer *any* information that would hurt the client in the eyes of the court.

Scenario 6: Doug and Fred and childhood friends who grew up and became lawyers. They each practiced separately in small firms. Fred, sadly, ran into financial and substance abuse problems that affected his practice, and he was ultimately disbarred. Happily, he went into recovery and has been solvent and sober for several years. Doug would like to help out his old friend and would like to hire him as a law clerk in his firm, making clear that Fred is not practicing law. May Doug hire Fred, a disbarred lawyer, as a clerk?

Answer 6: YES. Rule 5.5(g)-(h) and Comments 15-16. A firm may hire a disbarred lawyer to work as a legal clerk as long as it is made clear that the former attorney is not practicing law (and, of course, that he does not actually practice law). If they work in a small town where Fred was known as a lawyer, Doug's firm may have to even make an affirmative representation to clients that Fred is not working as an attorney but as a clerk. Fred should also be paid a salary or hourly rate and not a percentage of firm profits.

Scenario 7: One of Fred's old clients (who he represented during the period leading to his disbarment) hears that he is now working with Doug's firm and would like to hire Doug's firm to perform legal work. May Doug's firm take on the former client?

Answer 7: NO. The risk of client confusion and the appearance of impropriety is too great.

Scenario 8: May Fred's prior firm hire him in the same non-lawyer capacity as Doug can?

Answer 8: NO. Again, the risk of confusion and appearance of impropriety is too great. And it would be impossible for Fred to work in the same place that he worked as an attorney as a non-attorney.

Scenario 9: Debbie is being accused of ineffective assistance of counsel by a former client. The prosecutor contacts her and asks for specific limited information about her representation of the client in order to respond to the accusations. Debbie believes that the requested information is reasonably necessary to respond to the accusations. May Debbie disclose this information, or must she wait for a court to order her to disclose it?

Answer 9: She CAN disclose the information without a court order. Formal Ethics Opinion 2011-16 and Rule 1.6(b). Note that North Carolina **expressly *rejects*** ABA

Formal Op. 10-456, which prohibits such disclosure outside of a "court-supervised" setting.

Scenario 10: If instead of asking for limited information, the prosecutor asks Debbie for "the client's file." Can she turn that over?

Answer 10: NO. "Simply put, the pursuit of an ineffective assistance of counsel claim by a former client does not give the lawyer carte blanche to disclose all information contained in a former client's file." Debbie determines in her discretion what is "reasonably necessary" to defend the accusation and can disclose that information but no more.

Scenario 11: Attorney William has to write a brief for a client. He finds a brief online written by attorney Susan with whom he has no affiliation. Susan's brief involves his precise legal issue. William copies her brief verbatim, changing only party names. William does not mention or acknowledge that he copied the brief. Did he violate any Rule of Professional Responsibility?

Answer 11: NO. Formal Ethics Opinion 2008-14. As long as William reviews the work to make sure that it meets the standards of competent representation (Rule 1.1), he has no ethical obligation to attribute the work to the author. The opinion notes that "[n]o opinion is expressed, however, on the legal question of whether a lawyer has intellectual property rights in the lawyer's written works including briefs, pleadings, discovery, and other legal documents."

Scenario 12: Attorney Jimmy represents Defendant in a criminal case. The government has provided Jimmy with discovery as PDF files. The state has also given Lawyer DVDs containing copies of the video recordings of interrogations of Defendant and a codefendant; surveillance videotapes; and audio recordings of calls made by Defendant and the codefendant from the jail.

Jimmy reviewed the discovery and provided Defendant with a summary of the evidence. Defendant demands that he be provided a copy of the entire 1,200 pages of discovery and be allowed to view/listen to the 17 hours of video and audio recordings.

Does Jimmy have an ethical duty to comply with the client's demand?

Answer 12: YES (with exceptions). Formal Ethics Opinion 2013-2.

Rule 1.4 requires a lawyer to "keep a client reasonably informed about the status of a matter" and "promptly comply with reasonable requests for information."

But what does *that* mean?

"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."

"(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Without any specific request by the client,a lawyer **meets these obligations** by providing a defendant a reasonable summary of the discovery and consulting with him about it.

But if the lawyer has provided the client with a summary/explanation of the discovery materials and the client, nonetheless, requests copies of or asks to review any of the file materials, the duty to comply with reasonable requests for information **requires the lawyer to afford the client the opportunity to meaningfully review relevant discovery material unless one or more of the following conditions exist:**

1. the lawyer believes it is in the best interest of the client's legal defense to deny the request;
2. a protective order or court rule limiting the discovery materials that may be shown to the defendant or taken to a jail or prison is in effect;
3. such review is prohibited by the specific terms of a discovery agreement between the prosecution and the defense lawyer (note that such agreements may raise other ethical issues);

4. because of circumstances beyond the defense counsel's control, such review is not feasible in light of the volume of discovery materials and the time remaining before trial or before a decision must be made by the client on a plea offer; or
5. disclosure of the discovery materials will endanger the safety or welfare of the client or others.

Note Well: Comment [7] to Rule 1.4 states that **a lawyer "may NOT withhold information to serve the lawyer's own interest or convenience or the interest or convenience of another person." Therefore, the lawyer may not deny the request due to issues of expense or inconvenience**.

Regardless of whether the lawyer determines that the client should have an opportunity to review some or all of the discovery materials, the lawyer is **not required** to provide the client with a physical copy of the discovery materials during the course of the representation.

Scenario 13:

If Jimmy provides Defendant with a copy of, or access to, discovery materials, may he redact or otherwise remove private information of a third person, such as the address of a witness or pictures of an alleged victim?

Answer 13:

YES. Jimmy may redact or otherwise remove information that he determines, in his professional judgment, should not be disclosed to the client, including information that would endanger the safety and welfare of the client or is subject to a protective order, court rule, or agreement prohibiting disclosure. *See* Rule 1.4, cmt. [7].

Scenario 14: Attorney Gallant hates AI. He has made a point of learning nothing about it. He has sworn to never ever use it in his personal life or in his practice. Several vendors have approached him offering to demonstrate legal-specific AI products that would expedite certain research tasks while maintaining client confidentiality. Gallant just shows them the door.

Is Gallant complying with his ethical obligations to his clients?

Answer 14: NO. Formal Ethics Opinion 2024-1.The problem is not that Gallant is not using AI. The problem is that Gallant is refusing to even learn about it. "Comment 8 to Rule 1.1 recognizes the reality of advancements in technology impacting a lawyer's practice, and states that part of a lawyer's duty of competency is to 'keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice[.]' I am sure that at some point in the past there were lawyers who refused to use computers. And, at some point, that became an ethical issue.

Scenario 15: Attorney Susan bills by the hour. Normally, a motion to suppress takes her three hours to draft and file. With AI, it takes her only one hour to produce the same level of work. May she bill the client for three hours of work?

Answer 15: NO. Formal Ethics Opinion 2024-1 Susan "may not bill a client for three hours of work when only one hour of work was actually experienced. A lawyer's billing practices must be accurate, honest, and not clearly excessive. . . . Rather than billing on an hourly basis, [Susan] may consider billing clients a flat fee for the drafting of documents—even when using AI to assist in drafting—provided the flat fee charged is not clearly excessive and the client consents to the billing structure."

Scenario 16: Mary uses AI to help represent her client. Does she need to tell the client that she is using Ai?

Answer 16: IT DEPENDS. Formal Ethics Opinion 2024-1. "The answer to this question depends on the type of technology used, the intended product from the technology, and the level of reliance placed upon the technology/technology's product. . . . Generally, a lawyer **need not** inform her client that she is using an AI tool to complete ordinary tasks, such as conducting legal research or generic case/practice management. However, if a lawyer delegates substantive tasks in furtherance of the representation to an AI tool, the lawyer's use of the tool is akin to outsourcing legal work to a nonlawyer or other third-party resource or service, **for which the client's advanced informed consent is required**. See 2007 Formal Ethics Opinion 12. Additionally, if the decision to use or not use an AI tool in the case requires the client's input with regard to fees, the lawyer must inform and seek input from the client. **As stated before, it is ultimately a lawyer's professional responsibility to exercise independent judgment when deciding to use or rely upon the work product of any outsourced, third-party service."**