

# **STATE OF CONNECTICUT**



**Goodwin College**



**Division of Criminal Justice**

## **Ethical Issues in 2015**

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July 2015*

- ✓ **Ethical Issues for Defense Attorneys**
- ✓ **Ethical Issues for Prosecutors**
- ✓ **Ethical Issues for Judges**

## **Ethical Issues for Defense Attorneys**

### **Role of the Defense Attorney**

Protect the due-process rights of the defendant.

Due-process rights:

- ▶ notice of the charges,
- ▶ neutral fact finders,
- ▶ fair presentation of the state's evidence and witnesses,
- ▶ cross-examination, and
- ▶ opportunity to present defense evidence and witnesses
- ▶ right to appeal

## Conflicts of Interest

Generally, attorneys are specifically prohibited from engaging in representations that would compromise their loyalty to their clients.

- ▶ plea bargain for multiple clients?
- ▶ there may be media issues (will it make a good movie?)

## Role of the Defense Attorney

Your first client:



A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

## Role of the Defense Attorney

What about the guilty client?



The defense attorney:

- ▶ defends the rights of the client
- ▶ ensures the police and prosecutor follow proper procedure
- ▶ makes sure the system treats the client fairly

## Guilt: Factual versus Legal

Factual: actually did it

Legal: can be proven beyond a reasonable doubt

Facts:

A shot is heard coming from inside a hotel room. The door is opened almost immediately and your client is found in the room, holding a gun and standing over a person who subsequently dies from a gun shot. Ballistics show the fatal shot was fired from the same gun. No one else was seen entering or leaving the room after the shot was fired.

How do you defend your client?

## **Guilt: Factual versus Legal**

- ✓ Is it possible for someone else to have been in the room and got out after the shot was fired and before the door was opened?
- ✓ Is the person that opened the door credible?
- ✓ Does the client have gunshot residue on their hands or clothes?
- ✓ Does the deceased?
- ✓ Is the shot that was heard the cause of death?
- ✓ What is the time of death?
- ✓ Could this have been a suicide?
- ✓ Is it possible that the client entered the room after the death, picked up the gun and it went off?
- ✓ Any indications that more than one shot was fired?
- ✓ Is there a self-defense claim?
- ✓ Are there competency / mental health issues?

## **Role of the Defense Attorney**

How far can the defense lawyer go?

The lawyer may not:

- ▶ engage in motions or actions to intentionally and maliciously harm others,
- ▶ knowingly advance unwarranted claims or defenses,
- ▶ conceal or fail to disclose that which they are required by law to reveal,
- ▶ knowingly use perjured testimony or false evidence,
- ▶ knowingly make a false statement of law or fact,
- ▶ participate in the creation or preservation of evidence when they know or it is obvious that the evidence is false,
- ▶ counsel the client in conduct that is illegal, or
- ▶ engage in other illegal conduct.

**Is a “not guilty” plea a false statement?**

**“My client will be exonerated after the trial.”**

A lawyer must decline or withdraw from a case if the client demands that the lawyer do something that violates the law or the Rules of Professional Conduct.

## Role of the Defense Attorney

Professional conduct for all attorneys requires that they:

- ✓ Not make frivolous claims or arguments
- ✓ Not delay litigation
- ✓ Always display honesty toward the court
- ✓ Show fairness to opposing party and counsel
- ✓ Maintain impartiality and decorum

## Confidentiality

The *attorney–client privilege* means an attorney cannot be compelled (through subpoena or threat of contempt) to disclose confidential information regarding the client.

RPC §1.6 sets forth only a few situations where a lawyer can ethically reveal confidences of a client:

- ▶ with consent of the client
- ▶ impliedly authorized to carry out representation
- ▶ information is reasonably necessary to prevent the client from committing a criminal or fraudulent act likely to result in:
  - ▶ death or substantial bodily harm; or
  - ▶ substantial injury to the financial interest or property of another;
  - ▶ to prevent or mitigate financial loss due to lawyer's involvement).
- ▶ comply with law or court order

## **Scenario**

A client informed their attorney about criminal drug activity in the client's home. The client informed the attorney that evidence of the drug activity was in the client's home and had been there continuously for approximately one year. Upon hearing this information, the attorney immediately instructed the client to "get rid of" all evidence in the home related to the drug activity and to "clean out" any evidence of drug activity, including the drugs, from an automobile used by the client's spouse, based on the attorney's understanding that there may have been drug-related evidence in the vehicle.

Rule 1.2 (d) of the RPC states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or applications of the law."

## **Ethical Issues for Prosecutors**

## **Role of the Prosecutor**

The prosecutor must seek justice, not merely a conviction.

Toward this end, prosecutors must share evidence, exercise restraint in the use of their power, represent the public interest, and give the accused the benefit of reasonable doubt.

The decision to prosecute is influenced by political and public pressures, the chance for conviction, the severity of the crime, a “gut” feeling of guilt or innocence, prison overcrowding, and the weight of evidence.

When deciding whether to charge, prosecutors consider;

- ✓ Legal sufficiency
- ✓ System efficiency
- ✓ Defendant rehabilitation
- ✓ Trial sufficiency

## **Prosecutor Considerations**

- ▶ will not prosecute a charge not supported by probable cause
- ▶ make reasonable efforts to assure the accused has been advised of their right to counsel and has been given an opportunity to obtain counsel
- ▶ make timely disclosure to defense of all exculpatory or mitigating evidence
- ▶ exercise reasonable care so associated staff doesn't make any out of court statements the prosecutor couldn't make
- ▶ consider the cost of resources required to prosecute
- ▶ determine if a reduction of the charge in exchange for a plea would serve the interests of justice

## **Plea Bargaining**

What are the ethical concerns about plea bargaining?

Pro:

- ✓ avoid trials,
- ✓ save money & time,
- ✓ defendant gets lesser sentence & record
- ✓ victim & witnesses don't have to testify

Con:

- ✓ innocent people prompted to plead guilty to avoid harsher sentence or record (ALFORD);
- ✓ fails to hold defendant fully responsible for their actions
- ✓ is it really justice?

Should the considerations be different for juveniles?

## **Ethical Issues for Judges**

## Role of the Judge

- In a jury trial:
  - makes sure the trial is fair
  - the rules of evidence are followed
  - makes decisions as to “matters of law”
  - explains the law to the jury
    - ▶ Jury
      - listens to the evidence
      - makes a finding as to what actually happened
      - applies the law provided by the judge to the facts to decide which party wins
- Court trial
  - also serves as the “finder of fact”

## Role of the Judge

Judges are expected to be impartial, knowledgeable, and authoritative.

They guide the prosecutor, defense attorney, and all the other actors in the trial process from beginning to end, helping to maintain the integrity of the proceeding – this is the ideal, but judges are human, with human failings.

There are a number of problematic issues in the perceived objectivity of judges. For instance, 87 percent of judges are elected, and much of the funds they raise for their campaigns comes from attorneys.

Judges' discretion occurs in two major areas: interpretation of the law and sentencing.

**Issue:** A Judicial Official inquired whether they may appear on the television show “The Amazing Race”.

Based upon the facts provided, the Judicial Official was advised that they may apply and participate, if selected, subject to the following:

The Judicial Official receives advance permission to take off the time and doing so does not interfere with the proper performance of their judicial duties.

The Judicial Official should make known to the show that their title may not be used for promotional or commercial purposes and the Judicial Official should retain the right to review and pre-approve the use of any biographical information about the Judicial Official to be used in connection with the show.

The Judicial Official’s association with their teammate does not result in a violation of the Code of Judicial Conduct (i.e. create an appearance of impropriety in violation of Rule 1.2, result in frequent disqualifications in violation of Rule 3.1, etc.).

**Issue:** A Judicial Official would like to participate in an adult co-ed summer soccer league run by an attorney volunteer coordinator. The league is self-funded and charges participants a \$135 registration fee which includes placement on a team, a per-player town field maintenance fee, a team shirt, referee fees, league liability insurance and an end of season pizza party. The league is open to everyone, but priority is given to town residents. It is not a lawyers’ league. Placement on a team is at the sole discretion of the team representatives and the League Coordinator. The Judicial Official will be paying for his/her own registration. The attorney who runs the league (and whose name appears as part of the league name) previously appeared before the Judicial Official when the Judicial Official was assigned to a different Judicial District, but does not appear before the Judicial Official in their current court location. All games are played in the evening.

Considering that:

the league is open to all adults,  
is self-funded,  
participation as a player does not involve the Judicial  
Official in any fund-raising activities,  
games are played outside of court hours, and  
the attorney who runs the program does not presently  
appear before the Judicial Official;

The Committee unanimously concluded that the Judicial  
Official's participation in the soccer league is permissible. If,  
however, the attorney who organizes the league should  
appear before the Judicial Official in the future, the Judicial  
Official should disclose the relationship.

## **Ethics in General**

## Potential Conflicts of Interest in General

- ▶ conflicting business or financial interests
- ▶ solicitation of gifts
- ▶ book & movie rights resulting from representation
- ▶ provide financial assistance to client
- ▶ lend money, pay court costs unless repayment contingent on outcome or client is indigent
- ▶ accept money from others without consent
- ▶ make deal for two or more clients unless all agree
- ▶ make deal limiting malpractice claim
- ▶ benefit financially from client's cause of action
- ▶ have sex with client unless relationship preceded attorney / client relationship
- ▶ part-time prosecutors present a host of ethical issues.
- ▶ political and career aspirations also present potential conflicts of interest.

## The CSI Effect and Trials

- ▶ Hair analysis has error rates ranging from 28% to 68%.
- ▶ Much of the "science" of arson investigation has been disproved.
- ▶ The accuracy of the chemical composition tests the FBI labs use to match bullets has been questioned.
- ▶ Careless laboratory procedures can render DNA Testing results useless, and there are no enforced guidelines or criteria for forensic laboratories conducting DNA tests.
- ▶ Studies show that about a quarter of fingerprint analysis matches are false positives.
- ▶ There is no accurate way to measure the reliability of bite mark comparisons, yet forensic dentists are used to obtain convictions.

Jurors expect definitive forensic evidence in many cases.

Tactics used by both defense lawyers and prosecutors:

- ▶ using witnesses with less than credible reasons for testifying,
- ▶ preparing witnesses (both in appearance and testimony),
- ▶ asking confusing or misleading questions,
- ▶ drawing erroneous conclusions from the testimony or evidence, and
- ▶ “shopping” for experts.

## **Jury Consultants**

- ▶ A “good” juror is not someone who unbiased and fair, but, rather, one who is predisposed to be sympathetic to that attorney’s case.
- ▶ Jury experts identify those potential jurors who are predisposed to believe the case presented by the attorney.
- ▶ Jury experts also advise the attorney about how best to present his case.
- ▶ Jury experts often utilize shadow juries, mock trials, focus groups, etc.

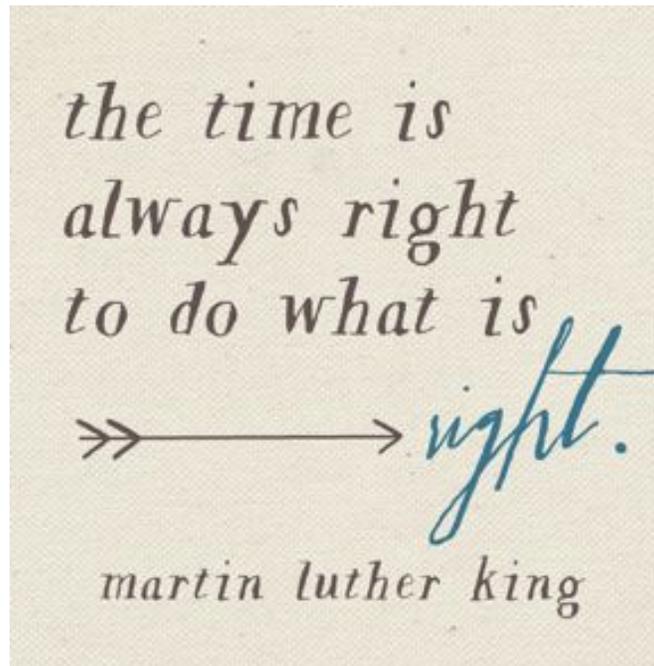
Is the use of jury consultants fair?

**Some final thoughts....**

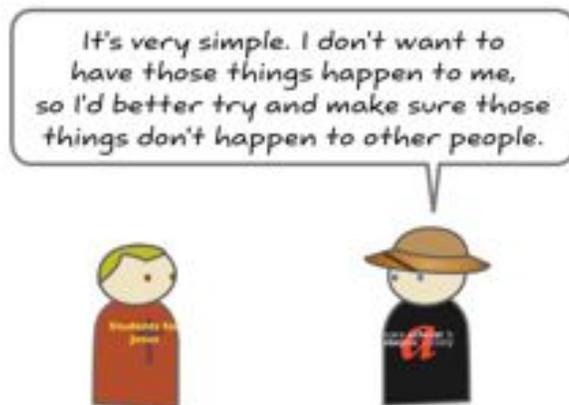
**Ethics involves many factors**

right  
Implications  
wrong  
Ethical  
actions  
fairness  
honesty  
compassion  
decisions justice integrity

**Ethics is never not a consideration**



**Ethical decisions are not difficult**



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