Ethics Essay

for

The Lawyer As Witness in Criminal Law Cases

Friday, December 13, 2024
9:30 a.m. – 12:00 Noon

By

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The Model Rules of Professional Conduct ("MRPC") are created and published by the American Bar Association ("ABA"), serving as a set of guidelines for lawyer ethics that individual states can choose to adopt and incorporate into their own rules of professional conduct; essentially, they are a model code that is not inherently binding but can be used as a basis for state-specific lawyer ethics regulations. The State Bar of Georgia has established the Georgia Rules of Professional Conduct ("GRPC"), adherence to these rules is mandatory for licensed practicing attorneys in Georgia. The rules listed in GRPC are largely modeled from the MRPC.

A cursory review of the MRPC, reveals a general belief that standards of conduct should not differ depending on the law lawyer's practice. However, the single exception to that rule is the regulation of prosecutorial behavior. The Model Rules of Professional Conduct specifically addresses the behavior of prosecutors and created Rule 3.8 and titled it "Special Responsibilities of a Prosecutor".

The initial promulgation of these rules related to a prosecutor, I would argue, was the obvious need to ensure adherence to a set of rules because the power a prosecutor holds. Further, unlike other areas of the law where an attorney has a client, a prosecutor does not have a client but has the distinctive responsibility of ensure "that justice is done." It is certainly arguable, that while the initial rules were organically required, the later additions were based on necessity in curtailing prosecutorial "bad actors."

Rule 3.8(d) generally addresses the prosecutor's responsibility of timely disclosure of evidence favorable to a defendant.[1] The general belief was that Rule 3.8(d) merely put into a rule what was addressed in *Brady v. Maryland.* Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. *Brady v. Maryland,* 373 U.S. 83 (1963). The substance of 3.8(d) and the holding in *Brady* having substantial similarity. Despite the advancement of Rule 3.8(d), there wasn't much change in behavior for several decades. The lack of change is attributed to several reasons: (1) general reluctance of ethics regulator to bring meaningful charges against prosecutors, (2) the lack of definition of "materiality," and (3) it wasn't until 2009 the ABA issued an advisory opinion related to Rule 3.8(d). It is important to note, Rule 3.8(d) does not use the word "materiality" and instead states "all evidence." Therefore, removing the prosecutor's discretion in determining materiality. In response to the 2009 ABA opinion, every state has now adopted Rule 3.8(d).

The ABA amended Rule 3.8 in 2008 to add Rules 3.8(g) and 3.8(h). While 3.8(d) addresses the disclosure of evidence during the trial phase, Rules 3.8(g) and 3.8(h) addresses the disclosure of information related to a convicted defendant. Specifically, 3.8(g) requires the prosecutor to disclose new, credible, and material evidence creating a reasonable likelihood Defendant did not commit the

[11] This paper does not address Rules 3.8(a), (b), (c), (e), and (f) as it is not relevant to this discussion.

evidence for which he was convicted. Rule 3.8(h) requires a prosecutor to disclose the discovery of clear and convincing evidence establishing a defendant did not commit a crime.

If the ABA was intending for these additional rules to improve issues related to the disclosure of post-conviction evidence, these new rules suffer from the same flaws as the initial Rule 3.8(d). Less than half of the states have adopted Rule 3.8(g) into their enforceable rules and even less have adopted 3.89(h). Furthermore, Rules 3.8(g) and (h) suffer from the same ambiguities of the original rule in 3.8(d). These ambiguities allow the holder of the information the sole discretion in determining what is credible, material, or clear and convincing. Comment 9 seemingly concedes this point by stating a prosecutor's independent judgment made in good faith, even though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

"Better that ten guilty persons escape, than that one innocent suffer." William Blackstone, *Commentaries on the Laws of England*, vol. 4, *Of Public Wrongs* (1769), 352. Unsurprisingly, the rules to which a criminal defense attorney must adhere are in stark contrast than those of a prosecutor. The preamble of the MPRC implies a lawyer's fiduciary obligation to their client, the legal system, and to the public. The remainder of the preamble further clarifies these obligations. As a prosecutor does not have a client, their obligations lie solely with the legal system and to the public; their part of the system is to seek justice. Given what is at stake in the representation of a criminal matter, does a defense attorney have more of a priority to their client at the detriment to the legal system and public? Most of us are aware of multiple instances in which it is alleged a prosecutor has behaved badly, how many examples are provided of when a defense attorney has behaved badly?

It is safe to say, attorneys that dedicate all or part of their practice to criminal litigation, have an inherent competitive drive and little difficulties expressing their opinions. Our friends and colleagues would not describe us as wallflowers. Whatever the motivation, all of us seek a result we define as a "win." I've been on both sides, and I admit my internal motivations have changed from my time as a public defender, private defense attorney, and then to prosecutor. Whatever those motivations are, we have all been in a position where those motivations conflict with a lawyer's obligation to the legal system and the public. Does that conflict cause us to be less respectful of others in the court system, less diligent to a client because we don't like working on their case or don't like the client, using legal procedure to harass or intimidate others, devoting less time to serve pro-bono clients? There are numerous instances we have all faced throughout our respective legal careers in which we are forced to decide of advancing one cause at the sacrifice of others. The 9th preamble of the MRPC directly addresses this issue:

> [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional

> Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Getting past the conflicts listed above, post-conviction appellate review will usually involve conflicts with other lawyer and judges. When confronted with a post-conviction review, an appellant's relief is usually grounded on allegations of: (1) ineffective assistance of trial counsel, (2) judicial error, or (3) prosecutorial error. Making a challenge under any of these claims, maybe perceived as an attack on the abilities or ethics of trial counsel or judge. Casting fault on others will inevitably lead to some difficult conversations. Given the pride of most litigators (and especially judges), admission of fault is difficult to accept. When these situations arise, it becomes even more difficult to maintain a level of cooperation and civility that our rules of ethics require. Complicating matters further, there are obvious landmines that will present themselves in post-conviction reviews. A client may prefer their attorney to conduct themselves in a hostile manner. A state appellate attorney may find it difficult to accuse a trial attorney, who may happen to work done the hall or is a friend, of having done something improper. Trial attorney for a defendant may have a desire to "fall on the sword" for their defendant and manufacture an ineffective claim where one does not exist. It is at these times our ability to make decisions within the spirit of MRPC will be tested.

Justice Harold G. Clarke, in an article titled "Professionalism: Repaying the Debt", stated ethics is a minimum standard which is *required* of all lawyers, while professionalism is a higher standard *expected* of all lawyers. When determining which path to take, the difficult choice will most likely be the right choice. Our aim should not be to follow the spirit of the rules; however, to use those rules as the baseline in the manner we conduct ourselves. This will not only restore the public's trust in our system, it will also allow for justice for both sides of the courtroom.