Ethics and the Criminal Law Attorney

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PLAY
We have fun. We never take ourselves too seriously.

GROW
We embrace learning opportunities. The goal is to enhance our skills and knowledge so that we're always better than before.

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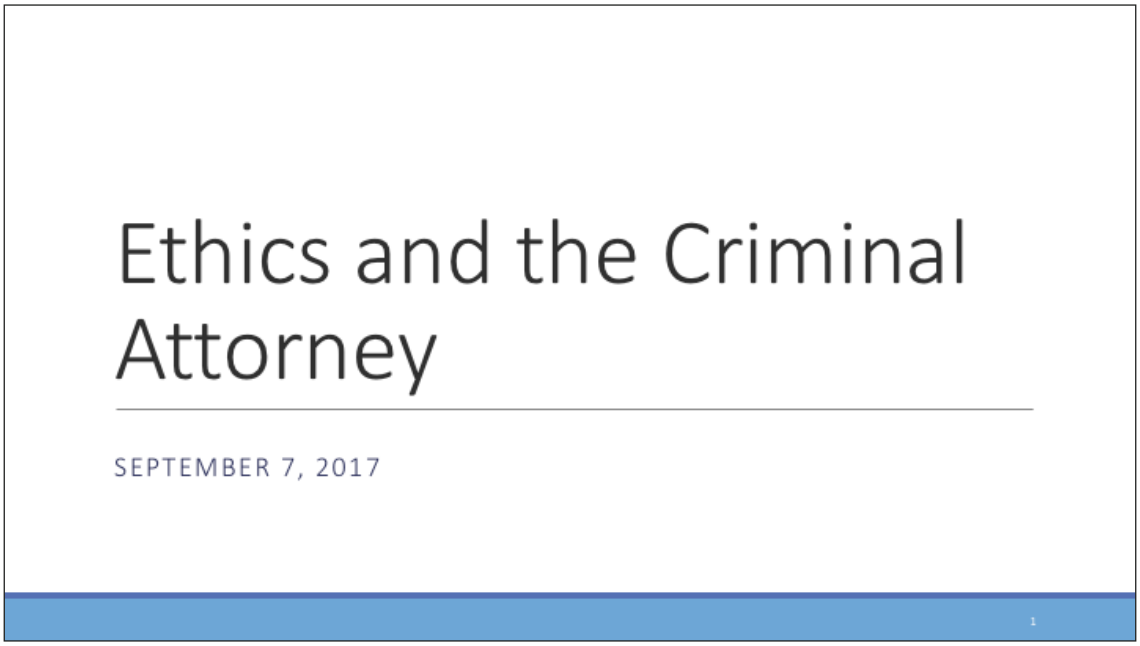

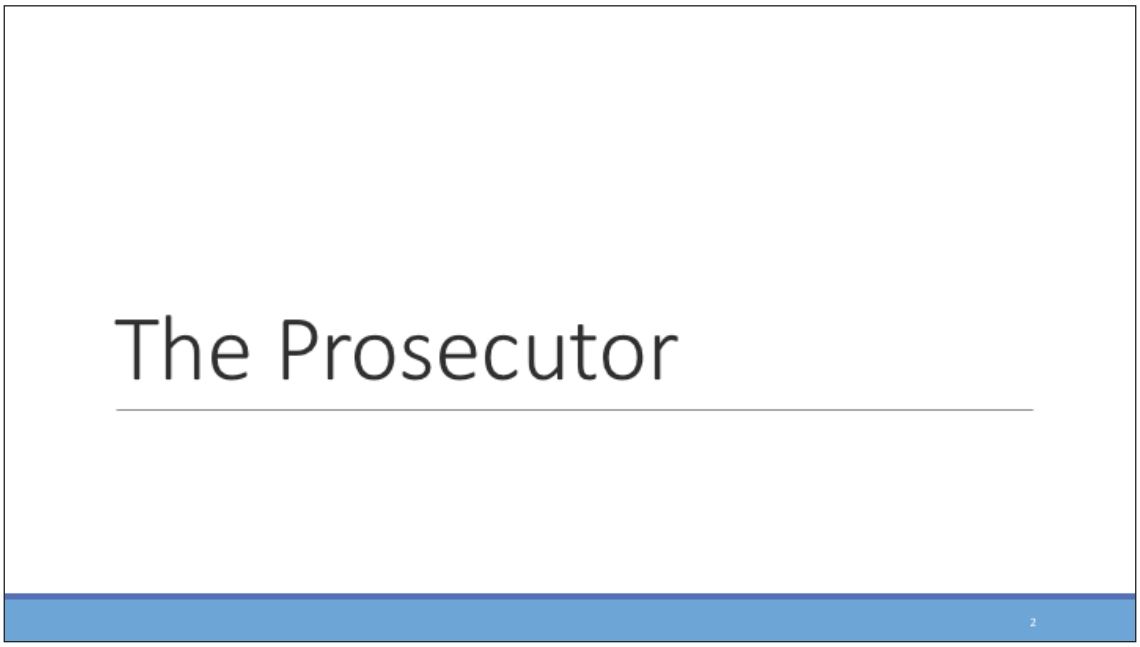

The Role of the Prosecutor

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."

Berger v. United States, 295 U.S. 78, 88 (1935)

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How Does that Ideal Square with Reality?—Charging

"First, it is a core principle that prosecutors should charge and pursue the most serious, readily provable offense. This policy affirms our responsibility to enforce the law, is moral and just, and produces consistency."

"By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences."

Memorandum from Attorney General Jeff Sessions to all federal prosecutors dated May 10, 2017

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How Does that Ideal Square with Reality?—Discovery

- The Federal system does not require pre-indictment discovery.
- Even post-indictment, the Federal system does not provide for "open file" discovery.
- Most notably, the *Jencks* Act (*see* 18 U.S.C. § 3500) does not require production of a witness's previous statements until the witness testifies at trial.

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How Does that Ideal Square with Reality?—*Brady* Material

"We now hold that the 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, irrespective of the good faith or bad faith of the prosecution."

Brady v. Maryland, 373 U.S. 83, 87 (1963)

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How Does that Ideal Square with Reality?—*Brady* Material (cont.)

"These considerations, taken together, lead us to conclude that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."

United States v. Ruiz, 536 U.S. 622, 633 (2002)

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How Does that Ideal Square with Reality?—*Brady* Material (cont.)

"[T]he Supreme Court has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial, and the reasoning underlying *Ruiz* could support a similar ruling for a prosecutor's obligations prior to a guilty plea."

Friedman v. Rehal, 618 F.3d 142, 154 (2d Cir. 2010) (citations omitted)

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How Does that Ideal Square with Reality?—*Brady* Material (cont.)

"[I]t is the Government's responsibility to determine what evidence is material and when such evidence should be disclosed in time for its effective use."

United States v. Gustus, No. 02 CR. 888 (LTS), 2002 WL 31260019, at *2 (S.D.N.Y. Oct. 8, 2002)

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How Does that Ideal Square with Reality?—Sentencing

"In most cases, recommending a sentence within the advisory guideline range will be appropriate."

"Each United States Attorney and Assistant Attorney General is responsible for ensuring that this policy is followed, and that any deviations from the core principle are justified by unusual facts."

Memorandum from Attorney General Jeff Sessions to all federal prosecutors dated May 10, 2017

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ABA Model Rules of Professional Conduct— Rule 3.8

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

. . .

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

. . .

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

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The Defense Attorney

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Professor Monroe Freedman—The Three Hardest Questions

(1) Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?

(2) Is it proper to put a witness on the stand when you know he will commit perjury?

(3) Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?

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Answering the Questions—Question 1

The answer is a resounding yes.

"[T]he most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views."

- What is the truth?
- Is any witness capable of telling the complete truth?
- The jury is entitled to know what may be influencing a witness's testimony.

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Answering the Questions—Question 2

This is the paradigmatic ethical question for defense attorneys.

The ABA Model Rules of Professional Conduct on this question are less definitive than might be expected.

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ABA Model Rules of Professional Conduct— Rule 3.3

(a) A lawyer shall not knowingly:

. . .

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

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ABA Model Rules of Professional Conduct— Rule 3.3 (cont.)

The level of knowledge needed to trigger the prohibition against presenting a criminal defense client's false testimony is very high.

- *United States v. Midgett*, 342 F.3d 321, 326 (4th Cir. 2003) ("Defense counsel's mere belief, albeit a strong one supported by other evidence, was not a sufficient basis to refuse [defendant's] need for assistance in presenting his own testimony.")

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ABA Model Rules of Professional Conduct— Rule 3.3 (cont.)

Commonwealth v. Mitchell, 781 N.E.2d 1237 (Ma. 2003) (When the question of perjured testimony by a criminal defendant arises, before defense counsel may invoke ethical rule requiring disclosure of client's intent to commit perjury, counsel must act in good faith and have a firm basis in objective fact; counsel can rely on facts made known to him, and is under no duty to conduct an independent investigation, although conjecture or speculation that the defendant intends to testify falsely are not enough, nor are inconsistencies in the evidence or in defendant's version of events enough to trigger the rule, even though the inconsistencies, considered in light of the Commonwealth's proof, raise concerns in counsel's mind that the defendant is equivocating and is not an honest person)

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ABA Model Rules of Professional Conduct— Rule 3.3 (cont.)

State v. McDowell, 669 N.W.2d 204, 223 (Wis. Ct. App. 2003) ("Except in the rarest of cases, attorneys who adopt the role of the judge or jury to determine the facts, pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment. And far more realistic for counsel to maintain the unique humility of 'not knowing,' absent an admission by the client." (quotations and citation omitted)

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Answering the Questions—Question 3

Again, the answer is a resounding yes. In fact, that is your job.

And an important analogue of this question is preparation of a witness for testimony. Is it proper to shape a witness's "memory" of the facts?

Again, the answer is yes—(and the government does it too, by the way).

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