28 U.S.C. § 530B Ethical Standards for attorneys for the Government

- (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

WHAT ARE YOUR STATE'S (STATES') ETHICS RULES?

- State rules
- District court rules
- Multiple states of admission

ADVICE

- Your office's PRO
- PRAO

ATTORNEY ETHICS VS. GOVERNMENT ETHICS

- 28 U.S.C. § 530B vs. 5 C.F.R.
- PRO vs. Ethics Officer
- PRAO and OPR vs. IG

Rules of Professional Conduct divided into 8 parts

- Lawyer-client relationship
- Counselor
- Advocate
- Transactions with persons other than clients
- Law firms and associations
- Public Service
- Information about Legal Services
- Maintaining the Integrity of the Profession

Lawyer client relationship - government context

- Rule 1.1 — must provide competent representation
- Rule 1.3 — must act with reasonable diligence and promptness

Lawyer client relationship - government context

- Rule 1.6 — confidentiality
- Overlaps with many other duties, *e.g.*, grand jury secrecy, bank secrecy, medical privacy, maintaining law enforcement privilege.

Lawyer client relationship - government context

- Rule 1.7 prohibits conflicts of interest between clients and between attorney and client
- Conflict of interest certification in front of each new file
- Serious issues for civil attorneys representing government employees in *Bivens* actions.

Lawyer client relationship
Rule 1.9 — conflict of interest with former client

- 1. Cannot represent another person in "the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client."
  - This means that if the matters are close enough, we presume that you are going to use information.
  - Test is not: do the matters look similar? But were you likely to have learned something in the prior representation that would be useful to use in representing your new client?

Lawyer client relationship - government context

Rule 1.9 — conflict of interest with former client

- 2. Cannot use information relating to the representation to the disadvantage of former client.
  - Part two requires actual showing that information will be, is being, or was used.
  - Does not matter how unrelated the matters are

Leaving the government

- Cannot participate in any matter in which you participated "personally and substantially." See also 18 U.S.C. § 207(a)(1)(B)
- Screens with notice to the government
- Cannot use confidential government information

Lawyer client relationship - government context

- Organization as client — your role as executive as well as attorney

Lawyer as advisor — government context

- Rule 2.1 — independent professional judgment

Lawyer as advocate

- 3.1 — cannot bring a proceeding unless there is a basis for doing so that is not frivolous.
- DOJ requires that "no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." U.S. Attorneys' Manual § 9-27.220.

Lawyer as advocate

- 3.3 — Candor toward the tribunal
  - Can't lie to court, withhold material facts or legal authority
  - In *ex parte* proceeding must inform tribunal of all material facts which will enable tribunal to make an informed decision.
    - grand jury, compare *United States v. Williams*, 504 U.S. 36 (1992), with USAM § 9-11.233
    - wiretap application, search warrant application, compare *Franks v. Delaware*, 438 U.S. 154 (1978)
    - request for TRO, *qui tam* litigation
  - *Batson* challenges

Lawyer as advocate

- Rule 3.4(c) Fairness to Opposing Party and Counsel
- Cannot assert personal opinion as to:
  - Justness of cause
  - Credibility of witness
  - Guilt or innocence of the accused
- Can argue on your analysis of the evidence for any position or conclusion
- See generally discussion on "vouching" in *United States v. Walker*, 155 F.3d 180 (3d Cir. 1998).

Rule 3.4(c) Fairness to Opposing Party and Counsel

Calling a Witness or Defendant a Liar

- *United States v. Catalfo,* 64 F.3d 1070 (7th Cir. 1995) ("Where the character and credibility of the defendant are at issue and the evidence allows the inference that the defendant has been less than truthful, the prosecutor does not err in closing argument by referring to the defendant as a liar.")
- *United States v. Hernandez-Muniz*, 170 F.3d 1007, 1012, n.1 (10th Cir. 1999)

Rule 3.4(c) Fairness to Opposing Party and Counsel

Calling a Witness or Defendant a Liar

- *United States v. Dean*, 55 F.3d 640, 665-66 (D.C. Cir. 1995) ("Still, is there any reason in law why the words 'lie' and 'lying' should be banned from the vocabulary of summation, particularly in cases that turn on the defendant's credibility? We conceive of none, so long as the prosecutor sticks to the evidence and refrains from giving his personal opinion.")
- *United States v. Jacoby*, 955 F.2d 1527 (11th Cir. 1992)

Rule 3.4(c) Fairness to Opposing Party and Counsel

Calling a Witness or Defendant a Liar

- Beware of "vouching" – giving your opinion on credibility
- *United States v. Garcia-Guizar*, 160 F.3d 511 (9th Cir. 1998)
- *United States v. Rodriguez-De Jesus*, 202 F.3d 482, 485 (1st Cir. 2000) ("it is highly improper for a prosecutor to call a defendant a liar.")

Lawyer as advocate

- Rule 3.5 — Impartiality and Decorum of Tribunal
  - Rule 3.5(b) prohibits ex parte contact, except as permitted by law

Lawyer as advocate

- Rule 3.6 — trial publicity
  - Cannot discuss if you know it will be prejudicial
  - test results
  - refusal of defendant to take tests
  - Identity or nature of physical evidence to be presented
  - Defendant's criminal record
  - Identity of witnesses or their expected testimony
  - Possibility of a plea, contents of a confession or refusal of defendant to make any statement

Lawyer as advocate

Rule 3.8 — Special Responsibilities of the Prosecutor

- Should not bring unsupported charges
- Make sure accused knows of right to counsel
- Not seek a waiver of important rights from an unrepresented defendant, such as preliminary hearing (Comment permits "lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.")
- Timely disclosure of all exculpatory evidence
- Exercise reasonable care to prevent investigators from making public statements that you are prohibited from making

Lawyer as advocate

MODEL RULE 3.8

- The prosecutor in a criminal case shall: ... 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;

Lawyer as advocate

DR 7-103. Performing the Duty of Public Prosecutor or Other Government Lawyer

- B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if unrepresented by counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused

Exculpatory evidence

All evidence

- See *In re Attorney C*, 47 P.2d 1167 *(*Colo. 2002*)* (limiting ethical requirement to constitutionally "material" evidence.)
- *Attorney C* opinion requires disclosure before the next hearing, not just before trial. *Compare United States v. Coppa*, 267 F.3d 132, 144 (2d Cir. 2001)("There is no *Brady* violation unless there is a reasonable probability that earlier disclosure would have produced a different result at trial...."); *United States v. Reyes*, 270 F.3d 1158, 1167 (7th Cir. 2001) (due process is satisfied as long as disclosure is made before it is too late for the defendant to make use of the material.)

Exculpatory evidence

Guilty pleas

- *In re Attorney C*, 47 P.2d 1167 *(*Colo. 2002*)* (holds that it is necessary even in guilty plea situation)
- *United States v. Ruiz,* 122 S. Ct. 2450 (2002). (If government has disclosed affirmatively exculpatory evidence, no *Brady* violation in withholding impeaching material in guilty plea setting.)

Lawyer as advocate

- Rule 3.10 — issuance of subpoenas to lawyers
- Depends on circuit, but some courts may require prior judicial approval before you can subpoena an attorney before a grand jury. *Compare, Baylson v. Disciplinary Bd. of Supreme Court of Pennsylvania*, 975 F.2d 102 (3rd Cir.1992) with *Whitehouse v. U.S. Dist. Court for Dist. of Rhode Island*, 53 F.3d 1349(1st Cir.1995); and *United States v. Colorado Supreme Court*, 189 F.3d 1281(10th Cir.1999)

Lawyer as advocate

- Rule 3.10 — issuance of subpoenas to lawyers
- Note that Department requires DOJ approval before you can subpoena an attorney. USAM § 9-2.161

Transactions with persons other than clients

Rule 4.1 — Truthfulness in statements to Others

- Cannot make false statement of material fact or law to a third person
- *In re Gatti,* 8 P.3d 966 (Ore.2000) held no law enforcement exception. Effectively prohibited undercover operations.

Transactions with persons other than clients

In re Gatti

- Raises issue what does it mean to "practice law" within the meaning of Rule 5.5 (prohibiting the unauthorized practice of law).
  - If you advise an agent in your district but the undercover operation ends up in Oregon?
  - If you are conducting a Cybercrime investigation and the target has a website, or is sending e-mails and it turns out s/he is in Oregon?

Transactions with persons other than clients

In re Gatti

- Rescinded by court order. See handout
- Generally not followed.
  - See Utah State Bar Ethics Advisory Opinion Committee, Opinion 02-05 (3/18/2002), 2002 WL 459018

Transactions with persons other than clients

Rule 4.2 Communications with Persons Represented by Counsel

- In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- Virtually identical to predecessor, DR 7-104(A)(1)

Rule 4.2 – Historical Perspective

- Old model: cops investigate; lawyers prosecute – When drafted in 1909 rule didn't consider criminal law
- Developments in criminal law and procedure in the 20th Century
- Investigative team concept
- Lawyer involvement is good for society and good for subjects of investigation

Transactions with persons other than clients - Rule 4.2

- In (1) representing a client, a lawyer shall not (2) communicate about the (3) subject matter of the representation with a (4) party the lawyer (5) knows to be (6) represented by another lawyer (7) in the matter, unless the lawyer has the (8) consent of the other lawyer or is (9) authorized by law to do so.

Transactions with persons other than clients - Rule 4.2

- Representing a client — generally not an issue, but you have to be acting in role as an AUSA. An agent who is a lawyer is not covered.
- Communicate — all forms of communication, includes copies of letters or pleadings sent to the party's attorney. (Service of subpoenas, complaints, civil investigative demands are "authorized by law.")
- Subject matter of the representation — the matters must be the same.

Rule 4.2

Same Matter

- If defendant under indictment and represented by counsel seeks to hire someone to kill a witness in the case, that is not the same matter. You may ethically run an undercover.
- Be aware of Sixth Amendment issues on admission of evidence. *Maine v. Moulton*, 474 U.S. 159 (1985); *Texas v. Cobb*, 532 U.S. 162 (2001)

Rule 4.2

- The person/party distinction
- "Knows" is defined in Terminology as "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."
- Terminology section also defines "reasonably should know."

Rule 4.2

- Be wary of related matters — parallel proceedings; private causes of action on closely related matters.
- Lawyer cannot say, “I represent the client in all matters.” See ABA Formal Opinion 95-396
- PRAO has an advice memorandum (1/18/02) on this with the case law in many states.

Transactions with persons other than clients - Rule 4.2

- Consent of the attorney
- Only the attorney can waive the rule. This is not a Sixth Amendment issue. The rule is designed to protect the lawyer-client relationship, not just the client.

Rule 4.2 – actions of agents

- Agent cannot do what you cannot do. See Rule 5.3 (b)(if you have direct supervisory authority must make sure that non-lawyer complies); Rule 5.3(c) — you are responsible if you order the conduct or ratify it.
- ABA Opinion 95-396 at fn. 55 – if lawyer not involved in agent's contact with represented person, use of the fruits as evidence is <u>not</u> ratification.

Transactions with persons other than clients - Rule 4.2

- Authorized by law.
- Generally, pre-indictment undercover contacts are OK. *United States v. Balter,* 91 F.3d 427, 435-436 (3d Cir.), *cert. denied* 519 U.S. 1011 (1996); *United States v. Johnson*, 68 F.3d 899, 902 (5th Cir. 1995); *United States v. Powe,* 9 F.3d 68, 69 (9th Cir. 1993); *United States v. Ryans* 903 F.2d 731, 739-740 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States v. Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920, 454 U.S. 828 (1981).

Transactions with persons other than clients - Rule 4.2

- Be aware of *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990)

Rule 4.2

This is real

- *In the matter of Howes*, 123 N.M. 311, 940 P.2d 159 (1997)
- AUSA taking represented defendant's phone calls and passively listening

Transactions with persons other than clients

- Authorized by law — not applicable in all jurisdictions. *E.g.,* Florida
- Can help if person says he wants to talk with you even though he has a lawyer and you have magistrate judge bless the conversation. See *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993)

Rule 4.2 and the organization. Comment

- In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a (1) managerial responsibility on behalf of the organization, and (2) with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or (3) whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(d).

Rule 4.2 and the organization. Comment

Person whose statement may constitute an admission

- Note the anomaly that (3) may turn on the law of evidence of the jurisdiction

Rule 4.2 and the organization. Comment

What does “admission” mean

- Option 1: Same as under the rules of evidence
  - *Weibrecht v. Southern Ill. Transfer, Inc*., 241 F.3d 875 (7th Cir.2001); *Cole v. Appalachian Power Co*., 903 F.Supp. 975 (S.D.W.Va. 1995); *Brown v. St. Joseph County*, 148 F.R.D. 246, 254 (N.D.Ind.1993).

Rule 4.2 and the organization. Comment

What does “admission” mean

- Option 2: Limited to the “control group”
  - *Johnson v. Cadillac Plastic Group, Inc.*, 930 F.Supp. 1437, 1442 (D.Colo.1996); *Fair Automotive Repair, Inc. v. Car-X Serv. Sys.*, Inc., 128 Ill.App.3d 763, 771, 84 Ill.Dec. 25, 471 N.E.2d 554 (1984); *Wright v. Group Health Hosp.*, 103 Wash.2d 192, 200, 691 P.2d 564 (1984)

Rule 4.2 and the organization. Comment

What does "admission" mean

- Option 3: Covers only those employees who have the authority to commit the organization to a position regarding the subject matter of the representation.
  - See *Johnson v. Cadillac Plastic Group, Inc.*, 930 F.Supp. 1437, 1442 (D.Colo.1996); *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347, 764 N.E.2d 825 (2002);

Rule 4.2 and the organization. Comment

What does “admission” mean

- Option 4: prohibits communication with officials who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer or whose own interests are directly at stake in a representation.
- *Niesig v. Team I*, 76 N.Y.2d 363, 371, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990); *Weider Sports Equip. Co. v. Fitness First, Inc.*, 912 F.Supp. 502 (D.Utah 1996); *Branham v. Norfolk & W. Ry.*, 151 F.R.D. 67, 70-71 (S.D.W.Va.1993); *State v. CIBA-GEIGY Corp.*, 247 N.J.Super. 314, 325, 589 A.2d 180 (1991); *Dent v. Kaufman*, 185 W.Va. 171, 406 S.E.2d 68 (1991); *Strawser v. Exxon Co., U.S.A.*, 843 P.2d 613 (Wyo.1992)

Rule 4.2 and the organization. Comment

Safe Harbor

- If employee has own counsel, then don't have to deal with employer counsel – go through employee's counsel.

Rule 4.2 and the organization

Former employees

- Generally not covered. See ABA Formal Opinion 91-359
- Be careful when inquiring about attorney client privileged information

Rule 4.2 and the organization — hypothetical

- Investigation of the XYZ Corp. Attorney calls you and tells you he represents the company. Can you talk to anyone without his blessing?
- Agents interview a secretary and ask her what happened when the first grand jury subpoena was served. She replies, “I saw my boss start to shred documents.”
- Then when asked, “What did you do?” she responds, “He seemed so inept at the shredder that I went over and helped him.”

Rule 4.2 and the organization — hypothetical

- Your are the duty AUSA one day when Mr. Jones arrives at the door. He says he is a vice president of the ABC Corp. and that he has reason to believe his company is violating the environmental laws. He says that he complained about this to his superiors and the company appointed in-house counsel to look into the matter. He has the report of in-house counsel which finds no violations and he is outraged because he thinks it is a white wash. Can you talk to him? Can an agent?

Rule 4.2 and the organization — hypothetical

- *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000) (OK where employee says lawyer is trying to suborn perjury)

Rule 4.2 — the future

ABA Ethics 2000 Commission

- Amends the last phrase to read, "unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."
- Narrows the class of prohibited persons to those "who supervise, direct or regularly consult with the organization's lawyer concerning the matter or who have authority to obligate the organization with respect to the matter."
- Eliminates those whose admissions can bind the company from the class

Law Firms and Associations

- Rule 5.1 supervisors are responsible for making sure their subordinates obey the rules.
- Supervisor responsible if s/he ordered or ratified a violation or knowing of a violation fails to take steps to mitigate.

Law Firms and Associations

- Rule 5.2 — Supervisees have a complete defense if they follow a supervisor's advice if the advice is "a reasonable resolution of an arguable question of professional duty."
- By implication, no "Nuremberg" defense
- *In the matter of Howes*, 123 N.M. 311, 940 P.2d 159 (1997) (AUSA disciplined despite receiving OK from supervisor)

Maintaining Integrity of the Profession

- Rule 8.5 Choice of Law — only a few jurisdictions have it. (District of Columbia, Illinois, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Wisconsin)
- Otherwise
  - What court am I before?
  - Where am I licensed? (If licensed in more than one state, where do I principally practice, unless conduct has a predominant effect in another jurisdiction in which you are licensed.)

Final Thoughts

- Whatever burdens these rules may impose, they are the rules of the game
- We must follow them for two reasons:
  - Playing by the rules is what distinguishes us from the people we prosecute;
  - Our licenses and livelihoods may depend on it.