

# Criminal Defense and Ethics: There's a Rule for That

Ellen Brotman, Esq.  
**BrotmanLaw**

Michael J. Engle, Esq.  
STRADLEY  
RONON

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## **HYPO 1: The Third Party Payor**

- President Trump has advised his White House and campaign staff that he will pay their legal fees on the condition that the attorneys who receive these fees enter into a joint defense agreement with his lawyers from which they cannot withdraw.
- Can the attorneys enter into this fee agreement?

## OPTIONS:

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- A. Yes, because nothing in the Rules prohibits third-party payment.
- B. Yes, because otherwise the witnesses would not have access to counsel under the Sixth amendment.
- C. No, because a client must be able to withdraw from a JDA.
- D. No, because the attorney's duty of loyalty is compromised.

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## HYPOTHESIS 2: The Joint Defense Agreement

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- Paul Manafort has accepted a plea agreement and cooperated in the Mueller investigation.
- Can Paul Manafort's attorney debrief attorneys of other targets or subjects of the investigation about the cooperation?

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## OPTIONS:

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- A. Yes, if Manafort's lawyer has his client's consent to divulge the information.
- B. Yes, because Rule 6(e) does not prohibit sharing information from proffers.
- C. Yes, but the discussions will not be deemed privileged.
- D. No, because it violates Rule 3.4 requiring Fairness to Opposing Party and Counsel.

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## HYPOTHESIS 3: Deception in Investigation

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- Defendant's lawyer sought to gather information about the past conduct of the victim and witnesses.
- The firm's lawyers hired and oversaw outside investigators who contacted friends of the victim and witnesses.
- The investigators pretended to be participating in a research project.
- Should the lawyer be disciplined?

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## OPTIONS:

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- A. No, because a lawyer's investigators may gather information by deceiving others about their motivations and identity.
- B. No, because, even though their use of deceit crossed the line, the law firm acted in good faith based on precedents such as *Apple Corps Ltd. v. Int'l; Collectors Soc'y*.
- C. Yes, because the firm's lawyers should have known that their use of deceit was impermissible, since they were seeking information about past conduct, no ongoing wrongdoing.
- D. Yes, because *Apple Corps Ltd. V. Int'l Collectors Soc'y* was wrongly decided, and lawyers may not direct their investigators to use any dishonesty or deceit.

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## HYPOTHESIS 4: The absent defendant

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- Defendant's lawyer received a call from her client's mother the night before a court date.
- The defendant's mother told the lawyer that her son would likely not make it to court the next day, as he just left the house "high as a kite."
- When the defendant is absent from court the next day, the judge asks defense counsel, "Do you have any information about why your client is absent from court?"

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## OPTIONS:

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- A. The lawyer should describe the mother's phone call.
- B. The lawyer should ask the judge to excuse her from answering in light of the attorney-client privilege.
- C. The lawyer should ask the judge to excuse her from answering in light of her confidentiality obligations.
- D. The lawyer should say, "I have no idea where my client is."

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## HYPOTHESIS 5: Is It BRADY?

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- A defendant is charged with robbery. The case turns on the complaining witness's testimony.
- The prosecutor announces "ready for trial" and the case is marked trial-ready.
- The defendant accepts a plea offer.
- Days before the scheduled guilty plea, the prosecutor learns of the complainant's death.
- The prosecutor does not disclose the complainant's death, and the defendant enters a guilty plea.

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## OPTIONS:

- A. Yes, because as a “minister of justice,” the prosecutor had an ethical duty to disclose any information necessary for the defendant to make a well-advised decision whether to plead guilty.
- B. Yes, because, given the prosecutor’s announcement that the case was “ready for trial,” failing to disclose the complainant’s death was impermissible deceitful.
- C. No, because the witness’s death was not exculpatory, and therefore the prosecutor had no constitutional, statutory or ethical duty to disclose.
- D. No, because the defense lawyer could have discovered the witness’s death through independent investigation.

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## HYPOTHESIS 6: Duty of Candor?

- The defendant was arrested for drunk driving in New Jersey. When the case was called for trial, the arresting officers did not wish to proceed.
- Both the prosecutor and the defense lawyer knew why: The defendant was a contributor to a group that supports police officers who are killed or injured in the line of duty.
- The prosecutor moved to dismiss the case, explaining truthfully (but incompletely) that “the officers do not wish to proceed with the summons at this time.”
- The defense lawyer stood by silently, and the judge dismissed the case based on the assumption that the officers lacked sufficient evidence to proceed.

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## OPTIONS:

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- A. Neither lawyer, because neither lied to the court.
- B. Only the prosecutor, because he owed the court a higher duty of candor than the defense lawyer.
- C. Only the defense lawyer, because, by remaining silent, he willfully assisted his client in a fraud on the court.
- D. Both the prosecutor and the defense lawyer, because both willfully failed to disclose information that was material to the court's decision.