

Criminal Law – Ethics Update

Presented by Laurel Gift for
The Pennsylvania Bar Institute

Overview

- Amendments to the Rules of Professional Responsibility
- Key Professional Conduct Rules and Recent Case Law

Amendments to the Rules of Professional Responsibility

- Amendments to the comments to Rule 1.1 (Competence) and Rule 1.6 (Confidentiality of Information) stressed the importance of lawyers familiarizing themselves with the policies of the courts concerning the Public Access Policy of the Unified Judicial System of Pennsylvania.
 - With particular attention to the disclosure of sensitive or confidential information.

Public Access Policy – Appellate and Trial Case Records

- Confidential information includes:
 - SSN, financial account numbers, drivers' license numbers, SID, minors' names and dates of birth, and abuse victims' addresses and contact information.
- A contemporaneously filed Confidential Information Form should be filed with the pleading.

Public Access Policy – Appellate and Trial Case Records

- Confidential documents include:
 - Financial source documents;
 - Minors’ educational records;
 - Medical/psychological records;
 - CYS records; and
 - Marital property inventory.
- These documents should be filed with the court under a cover sheet designated, “Confidential Documents Form.”

Amendments to the Rules of Professional Responsibility, cont.

- Rule 1.15 Safekeeping Property
 - Effective July 1, 2018, a new section was added concerning “unclaimed or unidentifiable IOLTA funds.”
- Rule 7.3 Solicitation of Clients
 - Lawyers may not solicit a party who has been named as a defendant or respondent in a domestic relations action until proof of service appears on the docket.

Key Professional Conduct Rules and Recent Case Law - Overview

- New cases this year addressed:
 - Competence (Rule 1.1);
 - Fees (Rules 1.5 and 5.4);
 - Confidentiality of Information (Rule 1.6); and
 - Conflict of Interest (Rule 1.7).

Competency Cases

- Counsel appointed to represent a client during a revocation hearing was ineffective for proceeding to a *Gagnon II* hearing prior to adjudication of the new charges giving rise to the parole violation. *Commonwealth v. Moriarty*, 180 A.3d 1279 (Pa. Super. 2018).
- It is *per se* ineffective counsel to fail to secure a translator when necessary and to fail to object if the Court proceeds without a translator. *Commonwealth v. Diaz*, 183 A.3d 417 (Pa. Super. 2018).

Competency Cases, cont.

- An unreasonably limited investigation of potential mitigation evidence for presentation during the sentencing phase of a capital case may amount to deficient performance. *Abdul-Salaam v. Sec. of PA Dept. of Corrections*, 895 F.3d 254 (3d Cir. 2018).
- Counsel may be ineffective for failing to raise a defense to a fleeing and attempting to elude police charge relating to unmarked police cars. *Commonwealth v. King*, ___ A.3d ___, 2018 WL 4102591 (Pa. Super. 2018).

Fee-Splitting

- *SCF Consulting, LLC v. Barrack, Rodos & Bacine*, 175 A.3d 271 (Pa. 2017)
 - A consulting firm brought a civil suit against a law firm for breach of contract.
 - The consulting firm claimed it had an oral agreement with the firm concerning its share of the firm's annual profits resulting from matters originated by the consulting firm.
 - The Court held that the fee-splitting agreement entered into in violation of the Rules was not *per se* unenforceable as a public policy violation.
 - Note: a majority of jurisdictions generally refuse to enforce agreements that violate professional conduct rules.

Office of Disciplinary Counsel v. Cynthia Baldwin

- The ODC charged Baldwin with violating 4 Rules of Professional Conduct:
 - Baldwin concurrently represented Penn State and individual employees in grand jury proceedings without adequately informing the individuals that there was a potential conflict (Rule 1.7);
 - Baldwin failed to advise her individual clients that it might be advisable to assert their right against self-incrimination (Rule 1.1);
 - Baldwin failed to resist the subpoena issued to her and wrongfully disclosed confidential client communications during her testimony before the grand jury (Rule 1.6); and
 - Baldwin engaged in conduct that was prejudicial to the administration of justice (Rule 8.4)

Office of Disciplinary Counsel v. Cynthia Baldwin

- Background:
 - Three Penn State employees were charged with perjury based on their Grand Jury testimony and other criminal conduct relating to Sandusky's criminal acts.
 - The Superior Court dismissed the perjury related counts because the appellants were denied counsel as a result of Baldwin's conflict of interest and violations of client confidentiality during her own testimony before the grand jury.

Office of Disciplinary Counsel v. Cynthia Baldwin

- Rule 1.7/Conflict of Interest Analysis:
 - Baldwin conducted a reasonable investigation designed to determine whether PSU interests were consistent with the interests of the individual employees.
 - She met with each employee individually.
 - She provided *Upjohn* warnings.
 - Baldwin made a distinction between representing the individual employees in their individual capacities and representing them in their capacities as employees of the University. The client was unaware of this distinction. This was a violation of Rule 1.2, but not Rule 1.7.

Office of Disciplinary Counsel v. Cynthia Baldwin

- Rule 1.1/Competency Analysis:
 - Baldwin properly advised the employees of the grand jury process and their rights during that process.
 - Baldwin reviewed the proposed testimony of each witness before permitting them to testify.
 - The judge advised each witness of their right against self-incrimination.
 - The ODC failed to present evidence that Baldwin did not advise her individual clients of their 5th Amendment privilege.

Office of Disciplinary Counsel v. Cynthia Baldwin

- Rule 1.6/Disclosure of Confidential Information Analysis:
 - Baldwin's representation of the individual employees concluded prior to her testimony;
 - Baldwin was herself under criminal investigation for obstruction at the time of her testimony;
 - A process was developed in conjunction with the GJ judge to prevent the disclosure of client communications; and
 - The employee clients lied to Baldwin about the existence of documents and what they knew about Sandusky.

Office of Disciplinary Counsel v. Cynthia Baldwin

- Rule 1.6/Disclosure of Confidential Information Analysis:
 - An attorney does not have to move to quash a subpoena issued to her regarding confidential communications with a client;
 - Appearing and invoking privilege as to those questions that inquire into confidential communications is a reasonable approach; and
 - The confidentiality rule is far broader than the scope of information protected by the attorney-client privilege.

Office of Disciplinary Counsel v. Cynthia Baldwin

- Rule 1.6/Disclosure of Confidential Information Analysis:
 - Rule 1.6 permits a lawyer to reveal such information relating to a representation as she reasonably believes necessary to establish a defense to a criminal charge or to respond to allegations against her in any proceeding.
 - The Rule also permits disclosure if necessary to mitigate or rectify the consequences of her client's criminal acts in which her services had been used.

Office of Disciplinary Counsel v. Cynthia Baldwin

- Rule 1.6/Disclosure of Confidential Information Analysis:
 - With respect to a specific set of disclosures, the Hearing Committee concluded that it was not unreasonable for Baldwin to rely on:
 - the advice of her counsel;
 - the prosecuting attorney; and
 - the supervising judge of the grand jury.

Office of Disciplinary Counsel v. Cynthia Baldwin

- Rule 8.4/Administration of Justice Analysis
 - Rule 8.4 states that it is professional misconduct for a lawyer to engaged in conduct that is prejudicial to the administration of justice. Rule 8.4(c).
 - The Hearing Committee concluded that Baldwin lacked intent and that she did not act in reckless disregard of the administration of justice.
 - The perjury and lies by the individual employees were deemed to be the supervening cause of the dismissal of some of the criminal charges.

Questions?