Assistance of Counsel: Ethics and the Sixth Amendment

District of Kansas Ethics CLE

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A tension exists between *Gideon* and *Faretta*. The "guiding hand of counsel"[1] is, at times, at odds with our clients' autonomous right to "personally . . . make his defense."[2] These differing and sometimes discordant perspectives can present conflicts. Who makes the critical decisions? Who controls the defense? These decisions are often polarizing, charged with emotion, and clouded by an unpredictable judicial system. Often, the decisions fall somewhere on a spectrum. But attorneys, even with our clients' best interest at heart, sometimes slip from the role of legal counsel into that of an overly paternalistic guardian. Here we discuss the ethics of decision-making—the difference between what we can do ethically and what we should do to respect our clients' autonomy.

1. The Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

2. From *Gideon* to *Faretta*

2.1 *Gideon v. Wainwright*, 372 U.S. 335 (1963)

> "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Id.* at 344.
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> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces

[1] 372 U.S. 335, 345 (1963), quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1942).
[2] 422 U.S. 806, 819 (1975).

the danger of conviction because he does not know how to establish his innocence." *Id.* at 344-45, quoting *Powell v. Alabama,* 287 U.S. at 68.

2.2 *Faretta v. California*, 422 U.S. 806 (1975)

"The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.* at 819, 820.

"It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. . . . This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative." *Id.* at 820.

2.3 ABA Standard[3] 4-5.2

(a) Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

3. Decisions

3.1 Objectives vs. means

The distinction between "objectives" and "means" is often expressed as the difference between decisions that directly affect the ultimate resolution of the case or the substantive rights of the client and decisions that are procedural or tactical in nature. The client generally has control over the former, and the lawyer over the latter. See, e.g., *Blanton v. Womancare, Inc.*, 696 P.2d 645 (Cal. 1985)

"[A] n indigent defendant has no constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes,* 463 U.S. 745, 751 (1983).

[3] ABA Criminal Justice Standards for the Defense Function ("ABA Standards").

3.2 MRPC[4] Rule 1.2: 3.2.3

Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

3.2 ABA Standard 4-3.3

3.2.1 Client decisions

(b) The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:

(i) whether to proceed without counsel;

(ii) what pleas to enter;

(iii) whether to accept a plea offer;

(iv) whether to cooperate with or provide substantial assistance to the government;

(v) whether to waive jury trial;

(vi) whether to testify in his or her own behalf;

(vii) whether to speak at sentencing;

(viii) whether to appeal; and

(ix) any other decision that has been determined in the jurisdiction to belong to the client.

3.3 ABA Standard 4-5.2

[4] MRPC refers to the ABA's Model Rules of Professional Conduct, 2013 edition.

(d) Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced.

3.4 Sixth Amendment

Failure to pursue viable dispositive motions could violate the Sixth Amendment.

"[A] reliable trial may not foreclose relief when counsel has failed to assert rights that may have altered the outcome." *Lafler v. Cooper,* 132 S.Ct. 1376, 1381 (2013).

"Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

4. Competency

4.1 Competence to stand trial dictates ethical duty

"Requiring a lawyer to argue at the direction of one who may be mentally incompetent—that is, one who seems unable to comprehend the nature of the proceedings against him—serves neither the individual client nor the truth-seeking process. . . . the criminal lawyer's obligation to advocate the positions of his client is dependent on the client being mentally competent to stand trial." *U.S. v. Boigegrain,* 155 F.3d 1181, 1188 (10th Cir. 1998).

See, e.g., *Alvord v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir. 1984) (Given the defendant's competency, the attorney was ethically bound to follow the client's wishes).

4.2 RPC 1.14 Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

* * * *

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests**.**

4.2 Comment

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] . . . . . In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

4.3 ABA Standards 4-3.1

(c) Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish defense counsel's obligations to the client,

including maintaining a normal attorney-client relationship in so far as possible. In such an instance, defense counsel should also consider whether a mental examination or other protective measures are in the client's best interest.

(d) In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

4.5 *Sell v. US,* 539 U.S. 166 (2003).

"This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare." *Sell*, at 180.

"The court concludes that defense counsel's role is to represent the client's expressed desires or wishes, which may conflict with the client's best interests, and thus 2 representatives at this hearing are warranted, one to represent each "voice": from the perspective of the overall fairness of the criminal justice process, a defendant's representation by both legal counsel and a guardian ad litem assures that these twin voices—that is, both the defendant's expressed and best interests—are presented to the court." *U.S. v. Pfeifer*, 2015 WL 4774875, at *3 (M.D. Ala. Aug. 12, 2015) (internal quotation marks omitted).

5. Conflicts

5.1. Right to conflict-free counsel

"Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest . . . Here, petitioners were represented by their employer's lawyer, who may not have pursued their interests single-mindedly. It was his duty originally at sentencing and later at the revocation hearing, to seek to convince the court to be lenient. On the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him. If this was the case, the due process rights of petitioners were not respected at the revocation hearing, or at earlier stages of the

proceedings below." *Wood v. Georgia,* 450 U.S. 261, 271-72 (1981)(internal citations omitted)

5.2. Breakdown in Communications

5.1.1 MRCP 1.16 Terminating Representation

A lawyer may withdraw if. . . .

(c)(1) withdrawal can be accomplished without material adverse effect on the interests of the client; or

(c)(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; and

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests.

5.1.2 Comment

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

5.3 ABA Standard 4-5.2

(e) If a disagreement on a significant matter arises between defense counsel and the client, and counsel resolves it differently than the client prefers, defense counsel should consider memorializing the disagreement and its resolution, showing that record to the client, and preserving it in the file.

5.4 IAC: Actual Conflict and Presumed Prejudice

"[A] defendant's right to counsel free from conflicts of interest is not limited to cases involving joint representation of co-defendants . . . but extends to any situation in which defendant's counsel owes conflicting duties to that defendant and some other third person." *U.S. v. Solomon,* 42 Fed. Appx. 88, **2 (10th Cir. 2002).

"Lopez's attorney had undermined his client's credibility moments earlier by denying the truth of the allegations in the pro se motion. . . ." *U.S. v. Lopez*, 58 F.3d 38, 42 (2d Cir. 1995).

Counsel here had "incentive to undermine the credibility, and hence the character, of his client in order to reduce the risk of recriminations for any improper conduct." This amounted to an actual conflict of interest. *Id.* at 42.

Counsel refused to participate in defending the client at a competency hearing because a motion to withdraw was pending. "Because counsel failed to test the prosecution's case, Collins was constructively denied counsel under *Cronic* and Mr. Collins "need not demonstrate prejudice." *U.S. v. Collins*, 430 F.3d 1260, 1265 (10th Cir. 2005) (internal quotation marks omitted).

"Morris has shown that an actual conflict of interest existed under the second test. [Attorney] Wasserman would seem to have a self-interest in protecting himself from a malpractice claim." *U.S. v. Morris*, 259 F.3d 894, 899 (7th Cir. 2001).

6. Stand-by counsel

6.1 "[P]articipation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself. The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear pro se exists to affirm the accused's individual dignity and autonomy." *McKaskle v. Wiggens,* 465 U.S. 168, 178 (1984).

6.2 ABA Standard 4-5.3

(a) An attorney whose assigned duty is to actively assist a pro se criminally accused person should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case, while still providing the attorney's best advice.

(c) In either case, the assigned attorney should respect the accused's right to develop and present the accused's own case, while still advising the accused of potential benefits and dangers the attorney perceives in the course of the litigation. . . .

5.2.2 A Far Cry from Co-Counsel

"[S]tandby counsel should strive to fulfill most of the ethical obligations required of ordinary counsel." Anne Bowen Poulin, *Ethical Guidance For Standby Counsel In Criminal Cases: A Far Cry From Counsel?,* 50 Am. Crim. L. Rev. 211, 214 (2013).

"Standby counsel inhabits a treacherous zone of representation, directed by the court to assist a pro se defendant who exercises an unusual level of control and may want no assistance whatsoever. Within that relationship, counsel must respect the defendant's constitutional right to self-representation. Counsel must not undermine either the defendant's actual control of the defense or the appearance that the defendant controls the defense." *Id.* at 213.

6. Litigation

6.1 MRPC 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

6.2 Comment

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

6.3 *See § 3.4 , supra. Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986).

6.4 Plea Bargaining

6.4.1 ABA Standard 4-5.1

(c) Defense counsel should promptly communicate to the client every plea offer and all significant developments, motions, and court actions or rulings, and provide advice as outlined in this Standard.

(i) After advising the client, defense counsel should aid the client in deciding on the best course of action and how best to pursue and implement that course of action.

6.4.2 *Lafler v. Cooper*, 132 S.Ct. 1376, 1387 (2012)

"If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it."

6.4.3 *Missouri v. Frye,* 132 S.Ct. 1399, 1408 (2012)

"This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."

6.5 Trial Defenses

6.5.1 Inconsistent Defenses:

***Mathews v. United States,* 485 U.S. 58, 64 (1988)**

"Federal appellate cases also permit the raising of inconsistent defenses."

And citing *Johnson v. U.S.,* 426 F.2d 651 (DC 1970) (in a rape case, defense could argue both that the act did not take place and that the victim consented).

6.5.2 NGRI

United States v. Theodore Kaczynski

"Kaczynski, however, would not agree with his legal team's advice that his best hope lay in the insanity defense. He had previously expressed fear that his political and social protest would be dismissed as the rantings of a lunatic. Denvir and Clarke believed that their client, even if competent, should not be allowed to doom himself while they stood idly by." *Who Decides: The Allocation Of Powers Between The Lawyer And The Client In A Criminal Case?* Jean K. Gilles Phillips, Joshua Allen, 71 KBA 28 (October 2002).

6.5.3 Confession defenses

Haynes v. Cain, 298 F.3d 375 (5th Cir. 2002), *en banc*, in context of IAC:

Majority: "Thus, when analyzing an attorney's decision regarding concession of guilt at trial, courts have found a constructive denial of counsel only in those instances where a defendant's attorney concedes the only factual issues in dispute." *Id.* at 381.

Dissent: "Trial counsel's concession as to Haynes' guilt on the second degree murder charge can only be described as the functional equivalent to a forced guilty plea over the objection of the defendant. In short, Haynes had the constitutional right to decide whether he wanted his counsel to concede guilt on a lesser charge. Haynes informed trial counsel that he wanted a defense that contested both second degree and first degree murder. They refused to provide such a defense. As I see it, trial counsel did not have the authority to make that decision." *Id.,* at 387.

See, also, *State v. Carter*, 270 Kan. 426 (2000) (defense counsel's strategy of conceding felony murder in an attempt to prevent conviction of first degree murder even though the defendant

maintained his innocence on all charged crimes was the functional equivalent to entering a guilty plea and violated both the Sixth Amendment and defendant's due process rights to a fair trial).

7. Ineffective Assistance of Counsel Claims

7.1 Government- or Court-imposed IAC

ABA Standards of Prosecutorial standard 3-3.1 (d) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.").

Strickland notes that that prejudice can be presumed with "various kinds of state interference with counsel's assistance," in part because the government can easily prevent misconduct for which it is directly responsible. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

Warning against the possibility "that the Government may seek to 'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side." *Wheat v. U.S.,* 486 U.S. 153, 163 (1984). Deprivation of right to counsel is structural error.

"[IAC] [p]rejudice can result from government influence which destroys the defendant's confidence in his attorney. Thus, a change in defense counsel caused by the prosecution's misconduct itself establishes the requisite prejudice to vacate his conviction." *United States v. Amlani,* 111 F.3d 705, 711 (9th Cir. 1997).

See also Ake v. Oklahoma, 470 U.S. 681, 686 (1985) (trial court's denial of resources to hire expert denied the defendant's right to due process; conviction reversed).

7.2 Rule 5.1.2 Comment

"Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client."

7.3 Rule 1.6 Confidentiality Of Information

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * * *

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order.

7.2.1 Comment

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.

7.3 MRPC 1.9 Duties to Former Clients

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

7.4 ABA Formal Ethics Opinion 10-456

"[I]t is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably

believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer."

"Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant's ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so."

7.5 Other Resources

"[T]rial counsel should not invoke the confidentiality duty's self-defense exception to respond to ineffectiveness claims. The interests that underlie the confidentiality duty are paramount and should not be undermined in response to claims that pose little threat to a lawyer's career." Newmark, Jenna, *The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims,* 79 Fordham L. Rev. 699 (2011).

Eldred, Tigran, *Motivation Matters: Guideline 10.13 And Other Mechanisms For Preventing Lawyers From Surrendering To Self-Interest In Responding To Allegations Of Ineffective Assistance In Death Penalty Cases,* 42 Hofstra L. Rev. 473 (2013) (discussing *Purkey v. U.S,* 2010 WL 4386532 (WD Mo. 2010), in which the defense attorney provided a 114-page affidavit, reaching far beyond former client's IAC claims).

See also, *U.S. v. Rankin,* 2010 WL 5478472 (WD Va. 2010) (defense attorney refused, based on ABA Ethics opinion, to provide the government an affidavit refuting former client's claims against him); *U.S. v. Hicks,* 2010 WL 5441679 (SDWV 2010) (discussing the ABA opinion and the various ethical constraints in context of an IAC claim; "the Fourth Circuit is likely to approve only a narrow implied waiver of the attorney-client privilege, combined with the potential availability of a protective order to insure that privileged information is used only for the purpose of litigating the federal habeas corpus claim . . . it appears to be necessary for the district courts, when considering habeas corpus petitions alleging denial of effective assistance of counsel, to supervise the government's requests for disclosure of

privileged communications between defendant and defense attorney.").

8. Conclusion

8.1 Uviller, Richard, Arthur Levitt Professor of Law, Columbia University.

"I am inclined to leave most decisions to the educated, experienced, detached, and benevolent participants—the lawyers. Conceptually, I tend to see them more as guardians than agents. And in the pragmatic dimension, I am particularly attentive to the formidable obstacles to micro-management by the client of a case on trial." *Calling The Shots: The Allocation Of Choice Between The Accused And Counsel In The Defense Of A Criminal Case*, 52 Rutgers L. Rev. 719, 724-25 (2000).

8.2 Luban, David, Professor of Law, University of Maryland

"Philosophical ethicist David Luban [has] termed this approach 'paternalistic' and at odds with the liberal credo prevailing in the United States. Our humanist tradition celebrates individual autonomy, the argument runs, and criminal defendants should be counted among our humans. While autonomy may be surrendered by voluntary, presumed, or hypothetical choice, Luban contended, it may not be lost merely by the assumption of superior judgment in the person to whom it is transferred. However well intentioned, the professional's conception of the subject's best interest should not govern decisions, overriding the subject's conflicting idea of his own interest." *Id.* at 725; David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 457.

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