



NATIONAL CRIME VICTIM LAW INSTITUTE

*Protecting, Enforcing, & Advancing
Victims' Rights*

310 SW 4th Ave., Suite 540, Portland, OR 97204

Ethics & Victims' Rights: Emerging Challenges In a Rights Enforcement World

NCVLI Conference

Spring 2011

Overview

- ABA Model Rules of Professional Conduct

- *Available online at*

- http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

- Tricky Issues

- Discussion Hypotheticals

- 5-minute small group discussions

- Reporting back to the larger group

- Ethical Standards for Advocates

Model Rule 1.7: Conflict of Interest - Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) The representation of one client will be directly adverse to another client;
 - (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Model Rule 1.7: Conflict of Interest - Current Clients (continued)

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) The representation is not prohibited by law;
 - (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) Each affected client gives informed consent, confirmed in writing.

Tricky Issue #1

Multiple Victims

- Cases often have multiple victims (*e.g.*, direct victims of the criminal act and indirect victims, such as parents, family, etc.).
- Examples of issues that could present conflict for private attorneys:
 - Conferral with prosecution re: seeking the death penalty
 - Release recommendations
 - Sentence recommendations
 - Length, treatment, etc.
 - Restitution
- Rural communities or limited options for alternative victim representation?

Tricky Issue #2

Unconventional Forms of Representation

- Some jurisdictions allow private attorneys to be hired by the victim (“prosecuting witness”) to assist the local prosecutor.
 - *See, e.g.*, Kan. Stat. Ann. § 19-717 (permitting the prosecuting witness to hire counsel to assist the county counsel in the prosecution of a criminal case and providing for specified pre-dismissal procedures).
 - Decided not on an ethics basis but on the applicability of a statute, *see Pabst v. State*, 192 P.3d 630 (Kan. 2008) (holding that the privately retained attorney assisting the prosecutor is prohibited from representing a party in a civil matter that relies on the same set of facts).

Discussion Hypothetical

- Parents (Phil and Pam) of deceased capital murder victim Violet have retained victims' rights attorney Alice to represent their interests. Throughout pretrial proceedings and throughout the course of the trial, Phil and Pam have agreed on all issues, including that the prosecutor should seek the death penalty. During the sentencing phase of the trial, Phil and Pam are given the opportunity to present impact statements (their attorney has cautioned them that their jurisdiction won't let them comment on whether or not the death penalty should be imposed). After much contemplation, Phil decides that he has changed his mind and no longer believes the defendant should be sentenced to death. Phil tells Pam and she is very upset, as she strongly believes the defendant should be sentenced to death for the death of their daughter, Violet. During their next meeting with Alice, Phil and Pam explain the situation, and Pam indicates to Alice that she is concerned that, while Phil won't openly advocate against capital punishment, the tone of his statement might suggest mercy and contradict the tone of her statement, which will take a harsher stance. Is this a conflict? What should Alice do?

Model Rule 3.3: Candor Toward the Tribunal

■ Model Rule 3.3: A lawyer shall not knowingly:

- Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

...

- Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

Model Rule 8.4: Conduct Prejudicial to the Administration of Justice

- Model Rule 8.4: It is professional misconduct for a lawyer to:
 - ...
 - Engage in conduct that is prejudicial to the administration of justice;
 - ...
 - Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Conduct Prejudicial to the Administration of Justice

- *In re Bernard Glickfeld*, 479 P.2d 638 (Cal. 1971) (upholding censure of judge for referring to the victim “in an insulting and inexcusable manner” – in the underlying case, *People v. Beasley*, 85 Cal. Rptr. 501 (Cal. Ct. App. 1970), the judge made comments in a sexual assault case where the victim was accompanied to the courtroom by a police inspector. These comments included “I never heard of a sentencing procedure where people have to be in a court with a policeman holding their hand” and “I don’t want police inspectors sitting here in court holding some alleged victim’s hands . . . There is lots more work for the police to do in the county than sit here in this court.”).
- *Disciplinary Counsel v. O’Neill*, 815 N.E. 2d 286 (Ohio 2004) (upholding discipline of a judge who, *inter alia*, ejected the victim of a brutal attempted murder from the courtroom during plea and sentencing proceedings for whispering to a companion and, in a separate case, stridently refused to stay the proceedings following an unexpected plea to allow the victim to be present and give an impact statement and persisted in this refusal until the prosecutor provided her with a copy of the victims’ rights statute).
- *State v. Gonzales*, 125 P.3d 878 (Utah 2005) (finding moot defendant’s argument that he was denied his right to counsel where trial court responded to defense attorney’s unauthorized acquisition of the attempted rape victim’s counseling records by ordering him to write an apology to the victim, questioning whether the trial could be fair under the circumstances, and strongly suggesting that the attorney had created a conflict that “call[ed] into question the professional ethics of his continued representation of the defendant,” but where the attorney voluntarily moved to withdraw).

Tricky Issue #1

- What happens when prosecution and defense are presenting a matter to the court and the victim disagrees with it?
 - *E.g.*, release conditions, plea, sentence

- Consider:
 - For example, Oregon's 2010 Uniform Trial Court Rules and various statutes require prosecutors to put on the record certain representations regarding victims' rights:
 - UTCR 4.100 requires prosecutors to file a notification of compliance (no later than 21 days after arraignment) indicating, *inter alia*, whether the victim requested and whether the prosecuting attorney agreed to assert particular rights or whether the victim expressed intent to independently assert these rights.
 - O.R.S. § 147.510(5) requires the prosecutor, at each critical stage of the proceeding at which a victim is present, to inquire whether the victim intends to assert any of his or her rights and to report this information to the court. The court is authorized to inquire independently, as well.
 - O.R.S. § 147.512 requires prosecutors at plea and sentencing hearings to inform the court whether the victim is present and, in cases involving violent felonies, requires the court to determine whether the victim agrees or disagrees with the plea agreement.

Tricky Issue #2

- What happens when a victim asks the prosecutor whether they have to speak with the defense?
 - Oregon Constitution Art. 1, § 42, for example, provides victims the right to “refuse an interview, deposition or other discovery request by the criminal defendant.”
 - Can telling the victim of this right impinge on the defendant’s rights and thereby interfere with the administration of justice?
 - Cases (in non-ethics contexts) have held that while prosecutors may not interfere with defense access to witnesses, they may advise witnesses of their right to refuse to speak to defendant or to defendant’s counsel.
 - *See, e.g., United States v. Black*, 767 F.2d 1334, 1338 (9th Cir. 1985) (“While the prosecution may not interfere with a witness’s free choice to speak with the defense, we agree with courts in other circuits that merely informing the witness that he may decline the interview is not improper.”).
 - Some jurisdictions have said that the best practice is for prosecutors to provide information about the right, but to also comment that it is in the interests of justice to be available.
 - *See, e.g., Ethics Comm. of Colo. Bar Ass’n, Formal Op 65* (1984).

Tricky Issue #3

- Can a prosecutor make a tentative offer of a plea to a defendant that is contingent upon the victim's approval – *i.e.*, give the victim “veto power” over the plea?
 - While not decided on ethics grounds, *see State v. McDonnell*, 794 P.2d 780 (Or. 1990) (holding that district attorney cannot delegate to others, even the crime victim, authority to control a plea offer, but noting that this does not mean that victims have no role in plea agreements and observing that victims “potentially play an important role in the plea negotiation process” and that “[d]istrict attorneys legitimately may consult with them”).

Tricky Issue #4

- What happens when a defense attorney is faced with a conflict between informing the court about an oversight with respect to victims' rights and the client's interests? Is there an obligation to bring this to the court's attention?
 - Does the analysis change/should it change if the victim's absence would result in the sentence being vacated on appeal and remanded for new sentencing proceedings in which the victim is given the opportunity to speak?

Discussion Hypothetical

- In Oregon, sentences can be vacated and remanded for new sentencing proceedings if the victim (having properly requested notification) is not notified of the sentencing proceedings and provided an opportunity to be heard. *See Barrett v. State*, --- P.3d ---, No. CC D110426M, SC S059423, 2011 WL 2084002 (Or. May 27, 2011). Attorney Alex, who represents Defendant Drake, knows that the victim, Victor, properly requested notice and has expressed a desire to present an impact statement at sentencing. Victor and Drake were not strangers at the time of the crime, and Drake tells Alex that he and Victor have been enemies ever since Victor stole his first girlfriend from him in the sixth grade. Drake is sure that Victor's statement will be inflammatory and worries that it will have a negative impact on the sentence the judge imposes. Alex has already told Drake that Victor has a right to be heard at sentencing and that he cannot prevent it. On the day of the sentencing hearing, however, Victor is not there. The prosecutor says nothing about Victor's absence during the hearing and the court does not notice it. Does Alex have an obligation to raise the issue?

Model Rule 4.2: Communication with Person Represented by Counsel

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order.

Tricky Issue #1

“Represented Person”

- Traditionally viewed to protect any represented person.
 - The American Bar Association’s comments on Model Rule 4.2 note that the scope of the model rule is very broad: “This Rule applies to communications with *any* person who is represented by counsel concerning the matter to which the communication relates.” *Model Rules of Prof’l Conduct* R. 4.2, cmt. 2 (emphasis added).
 - ABA Formal Op. 95-396 (July 28, 1995): the “no-contact” rule is designed to apply broadly to protect the lay person from the possibility of attorneys utilizing their legal training to gain advantage in a situation where the lay person has acknowledged unfamiliarity with the legal complexities by retaining counsel: “The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. Implementing this fundamental premise, the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.”

Tricky Issue #1

“Represented Person” (continued)

- *Compare* Conn. Bar Ass’n, Ethics Op. 98-25 (noting that a Victim Advocate – who is an attorney with the state Office of the Victim Advocate – only represents a victim after filing an appearance in the case. The Victim Advocate also only represents the victim with respect to their rights and not with respect to the substance of his or her testimony, so prosecutors are restricted from independently contacting victims about rights-related matters but not about substantive testimonial matters or availability for proceedings).

Tricky Issue #2

“Subject of the Representation”

- Translating to victims:
 - What about a victim who has a civil attorney representing him/her in a suit against the defendant when the civil attorney has not been specifically retained re: victims’ rights issues?
 - *Compare* with a victims’ rights attorney representing the victim with respect to rights associated with a criminal case
 - Does the analysis change if defense attorney vs. prosecutor?
 - The prosecutor may have certain obligations to communicate with victims when providing notice and information under victims’ rights laws – what then?
 - O.R.S. § 147.502(2), for example, explicitly says that victim notice requirements must be made through the victim’s attorney if the victim is represented
 - Keep in mind: *consent is an exception* – Victims’ attorneys routinely allow prosecutors to have direct contact with victims, even if the rules would otherwise prohibit it. It may be helpful to create a written agreement at the outset regarding the scope of the authorized unrepresented contact.

Tricky Issue #2

“Cause Another to Communicate”

- **In combination with Model Rule 4.2:**
 - Model Rule 8.4(a) provides that is professional misconduct for a lawyer to violate or attempt to violate the rules or “do so through the acts of another”
 - Model Rule 4.1 mandates truthfulness in material statements to others.
- **Judge finds private investigator guilty of violating victim’s rights**
 - “Judge Horner found Johnson guilty of not clearly identifying himself as a private investigator for a defense attorney when interviewing [victim], who had been a victim of assault last December. [Victim] had testified against Johnson at the first hearing Feb. 13. ‘If she was of the understanding that you represented (the defendant), she wouldn't have given you the time of day,’ Horner said. ‘You did not notify her that she need not talk with you.’”
 - Story by: Jillian Beaudr, Published to Web: 3/10/2009
<http://www.itemizerobserver.com/ArcStoryPage.asp?Database=Story&StoryID=14626>

Tricky Issue #2

“Cause Another to Communicate” (continued)

- ***In re Taylor*, OSB No. 09-20, Order Approving Stipulation for Discipline (Or. Sept. 18, 2009)**
 - Reprimanding attorney for conduct of investigator. Attorney moved to obtain the victim’s DHS records and the motion was denied. His investigator used a blank subpoena to subpoena victim’s high school for education records. Neither the attorney nor his investigator had any reason to believe that the records contained exculpatory information, and neither one of them obtained permission from the victim or the court to acquire the records. The school responded to the subpoena by sending a copy of the victim’s school records directly to the attorney, in violation of Oregon law. Rather than return the records or notify the school, the attorney reviewed them, forwarded portions to his client, and used the information contained in them to support his second motion to obtain the victim’s DHS records. The court granted that second motion, and, after an in camera inspection of the DHS records, delivered redacted DHS documents to the parties. Upon learning that the attorney had obtained the victim’s school records, the victim’s attorney moved to suppress both the school and DHS records on the ground that both had been improperly obtained. The court granted the motion. A complaint was then filed against the attorney with the Oregon State Bar, and the Bar ultimately entered into a stipulation for discipline.

Model Rule 4.3: Dealing with Unrepresented Person

- “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

Tricky Issue #1

- How can the role of the prosecutor be properly communicated to the victim? What about a victim advocate based in the prosecutor's office?
- Complications:
 - Victims often believe the prosecutor is there to protect them and be their attorney
 - Prosecutors can, at times, assert rights on behalf of the victim
 - Brady Obligations/Disclosures

Tricky Issue #2

- A defense attorney communicates with an unrepresented victim of domestic violence who is now recanting and does not want to proceed. Is there a violation?
 - *See, e.g., In re Lawrence*, 98 P.3d 366 (Or. 2004) (en banc) (finding that an attorney who represented a victim's husband violated ethical rules by giving advice to the victim regarding an assertion that her rights were being violated by the state's refusal to drop domestic violence charges against her husband because the rule applies where there is a "reasonable possibility" of the interests conflicting – the court found that the "objective personal interests of an alleged batterer and the batterer's victim are inherently adverse").

Advocate Ethics, abridged

- National Victim Assistance Standards Consortium (1999-2003) published a set of ethical standards for victim advocates and other victim assistants, which are currently in the process of being evaluated, updated, and disseminated (initiated by OVC in 2010).

NVASC Ethical Standards for Victim Assistance Providers (2003)

■ Ethical Standard 1.1

- The victim assistance provider understands his/her legal responsibilities, limitations, and the implications of his/her actions within the service delivery setting and performs duties in accordance with laws, regulations, policies, and legislated rights of persons served.

■ Ethical Standard 1.3

- The victim assistance provider maintains a high standard of professional conduct.
 - *Commentary:* “The victim assistance provider is to avoid impropriety and the appearance of impropriety Such conduct may include . . . interference with the administration of justice.”

■ Ethical Standard 1.4

- The victim assistance provider achieves and maintains a high level of professional competence.
 - *Commentary:* “The victim assistance provider is to take all necessary and reasonable steps to maintain continuing competence in service provision, including knowledge of relevant scientific and professional information related to the services he/she renders.”

■ Ethical Standard 3.1

- The victim assistance provider respects and attempts to protect the victim's civil rights.
 - *Commentary* indicates that the victim retains the right to release his/her confidential information and to have that right protected.
 - *Commentary* indicates that this includes the victim's right to know all exceptions to confidentiality, including any duty to report elder abuse and child abuse.

■ Ethical Standard 3.2

- The victim assistance provider recognizes the interests of the person served as a primary responsibility.
 - *Commentary:* “[T]he victim assistance provider should pursue the best interest of the person served and should advocate for what the victim desires. . . . When conflicts arise between the victim’s interests and those of the victim assistance provider or program, the victim assistance provider is to offer verbal disclosure to the victim, give the victim a referral for an alternate provider, or seek professional consultation regarding appropriate resolution of the conflict.”

■ Ethical Standard 3.4

- The victim assistance provider respects the victim's right to self-determination.

- *Commentary:* “When victim wants are at stark odds with the victim assistance provider’s perception of the victim’s best interest, the victim assistance provider can present information to help the victim gain a fuller perspective. Nevertheless, the victim assistance provider is to ultimately encourage the victim to make his/her own decision, and the victim assistance provider is encouraged to support the victim in this decision.”

Discussion Hypothetical

- Amy, a victim advocate, is employed by a county prosecutor's office and is new to her job. The first victim she is assigned to work with is Val, whose husband has been charged with a domestic violence offense. Val is upset and embarrassed that all of this is being made public and wants the prosecutor to drop all charges and allow her husband to move back home with her and their children. Amy believes that this course of action is not in Val's best interests, as she understands that police have been called to the house on previous occasions to respond to reports of domestic violence. Val repeatedly tries to tell Amy that she is seeing a mental health therapist and wants to tell her about the therapist's opinions, since she believes this information supports her position. Amy is concerned about Val potentially revealing confidential information that might have to be disclosed to the defendant as Brady material. Val is persistent about wanting the charges dropped and her husband home. What issues does Amy face and what should she do?



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