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Ethics in Criminal Advocacy

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CHAPTER 16

ETHICS IN CRIMINAL ADVOCACY

Peter A. Joy and Ellen Yaroshefsky

The spotlight was on ethics issues in criminal advocacy in 2012. The United States Supreme Court decided three important cases that cut across criminal procedure and the ethical obligations of defense counsel or prosecutors, and two of these cases shed new light onto what effective assistance of counsel requires of defense lawyers at the pretrial stage. The news was also filled with concerns over *Brady* violations, which was the subject of one Supreme Court case, proposed legislation aimed at federal prosecutors, Department of Justice discipline of two federal prosecutors in a high profile case, and an inquiry into and possible disciplinary proceeding against a former prosecutor for allegedly withholding evidence that led to the wrongful conviction and incarceration of a man for more than twenty-five years. Elsewhere, the National Association of Criminal Defense Lawyers Ethics Advisory Committee tackled the thorny issue of whether a prosecutor seeking a waiver of ineffective assistance claims in a proposed plea agreement creates a conflict of interest between defense counsel and the defendant. Finally, some federal and state prosecutors found themselves on the hot seat in the court of public opinion, and, in some instances, before lawyer disciplinary authorities.

I. SIXTH AMENDMENT OBLIGATIONS OF DEFENSE COUNSEL IN PLEA NEGOTIATIONS

The United States Supreme Court decided two cases that expand upon a defense lawyer's obligation in the plea bargaining context—*Missouri v. Frye* and *Lafler v. Cooper*. These two cases provide much needed guidance to defense counsel concerning their pretrial obligations to clients.

In *Missouri v. Frye*,[1] the Court concluded that the Sixth Amendment's guarantee of effective assistance of counsel includes the negotiation and consideration of plea offers. Missouri prosecutors charged Galin Frye with the felony of driving with a revoked license and made two plea offers to Frye's counsel, each with expiration dates. Frye's lawyer never told his client about the offers and allowed them to lapse. Frye then pleaded guilty to a felony charge and was sentenced to three years in prison. He appealed alleging ineffective assistance of counsel, arguing that had he known of the plea offers, he would have plead guilty to a misdemeanor and received a lesser sentence. The Missouri appeals court agreed and concluded that Frye demonstrated a Sixth Amendment violation under the *Strickland v. Washington*[2] test to establish ineffective assistance of counsel.

In a 5-4 decision authored by Justice Anthony Kennedy, the Supreme Court held that defense counsel has an obligation to communicate plea offers to the accused and to advise the accused about the recommendation. If the plea recommendation lapses and defense counsel fails to communicate the offer to his client, his conduct is "deficient" under the first prong of the *Strickland* test. The Court noted that 95% of state and federal cases are the result of guilty pleas and said that "it is insufficient simply to point to the guarantee of a fair trial as a backdrop that inoculates any errors in the pretrial process."

To establish the second prong of "prejudice" under *Strickland*, the Court held that the defendant must show that there is a reasonable probability that: (1) he would have accepted the plea recommendation; (2) the prosecution would have not withdrawn the plea; and (3) the plea would have been accepted by the court. The Court acknowledged that a defendant has no right to receive a plea offer and remanded to determine whether Frye could demonstrate prejudice.

The dissent argued that Frye was not denied his constitutional right to a fair trial because counsel's mistake did not deprive him of any substantive or procedural right. The dissent also claimed that the majority's test for effective counsel in plea bargaining context was speculative and unworkable.

The companion case, *Lafler v. Cooper*,[3] also involved deficient legal advice. In *Lafler*, defendant Anthony Cooper rejected a plea offer, went to trial, was convicted, and received a harsher sentence than he would have under the plea offer. Cooper was convicted of shooting a woman in the thigh and

buttocks. On appeal, he claimed ineffective assistance of counsel because his lawyer told him that at trial he could not be convicted of intent to murder because he shot his victim below the waist. This clearly deficient advice resulted in Cooper rejecting the plea offer. The 6th Circuit overturned the conviction.

In another 5-4 decision authored by Justice Kennedy, the Supreme Court held that a defendant, who rejects a plea offer based on legal advice so deficient that it violates the Sixth Amendment and later is convicted at trial and receives a harsher sentence, can seek reconsideration of his sentence if he can show a reasonable probability that, but for the ineffective assistance of counsel: (1) the plea agreement would have been presented to and accepted by the court; and (2) the subsequent conviction and sentence (or both) under that plea agreement would have been less severe than the judgment and sentence that were actually imposed.

The dissent said that the only issue was whether or not Cooper received a fair trial and that a verdict based on a fair trial should not be disturbed because of the lawyer's mistake.

Missouri v Frye, Lafler v. Cooper and the Court's decision in *Padilla v. Kentucky,*[4] require defense counsel, prosecutors, and the courts to examine carefully how best to preserve a defendant's right to effective assistance of counsel at the plea negotiations stage. Many questions are left unresolved.

II. SUPREME COURT DECIDES *SMITH V. CAIN*, ANOTHER *BRADY* VIOLATION

In January 2012, the United States Supreme Court, in *Smith v. Cain,*[5] an 8-1 majority decision, held that Juan Smith's conviction should be reversed because prosecutors withheld favorable witness statements from the defense and the only evidence linking Smith to the crime was the testimony of that witness.

In 1995, Juan Smith was convicted of five murders in New Orleans on the strength of a testimony from a single witness, and Smith was sentenced to life without parole. There was no physical evidence tying him to the crimes and no other witnesses that connected him to the crime. At the trial, the witness testified that he saw the attacker face-to-face and that he had "no doubt" Smith was one of the attackers.

During state habeas proceedings challenging the conviction, Smith's lawyers obtained for the first time notes from a detective demonstrating that the witness said on the night of the murders that he "could not . . . supply a description of the perpetrators other then [*sic*] they were black males." Notes also revealed that five days after the crime the witness said he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." The detective also put in his notes about the sole witness, "Could not ID."

In addition to the witness's statements on the evening of the crime and shortly after the crime, the witness failed to identify Smith after the police showed the witness fourteen separate photo arrays in an effort to get the witness to identity the men responsible for the murders. Smith's photograph was in one of the photo arrays, but the witness was unable to identify anyone. Months later, after the witness saw a story in a New Orleans newspaper naming Smith as a suspect and including Smith's photograph, the witness identified Smith as one of the gunmen.

Chief Justice John Roberts wrote for the majority reversing Smith's conviction, stating that the prior inconsistent statements of the state's only witness and evidence against Smith met the *Brady* standard for reversal because it was "material" and there was a "reasonable probability" that it would have made a difference at trial. The Court also held that while evidence impeaching an eyewitness may not be material if the government's other evidence is sufficient to give confidence in the verdict, that was not true in Smith's case where the *only* evidence linking Smith to the crime was the witness's testimony.

Justice Thomas wrote a lengthy dissent that characterized the withheld statements as having "such minimal impeachment and exculpatory value as to be immaterial in light of the whole record." In reaching this conclusion, Justice Thomas assumed that the jury would not have doubted the witness's testimony even if they had learned of the witness's statements near the time of the crime that he was unable to identify the gunman and that the witness failed to identify Smith in a photo array.

While the Court found *Brady* violations and reversed the conviction, the majority opinion did not address the prosecutor's pretrial ethical obligations under Louisiana Rules of Professional Conduct Rule 3.8(d) to "make timely disclosure to the defense of all evidence or information known to the prosecutor

that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense." This ethical obligation is based on Rule 3.8(d) of the ABA Model Rule of Professional Conduct. In an amicus brief to the Court, the ABA had asked the Court to reaffirm that the prosecutor's ethical obligations to disclose exculpatory and mitigating evidence before trial are broader than the constitutional standards established for post-trial review of non-disclosure claims under *Brady v. Maryland*.[6] The ABA previously explained how a prosecutor's ethical duty to disclose evidence and information favorable to the defense is broader than the legal duty under *Brady* in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 09-454 (2009).

III. OFFICE OF PROFESSIONAL RESPONSIBILITY DISCIPLINES TWO PROSECUTORS FOR DISCOVERY VIOLATIONS IN THE *STEVENS* CASE

For the past several years, the Department of Justice (DOJ) has been plagued by *Brady* violations and public attention to the issue, and 2012 was no exception.[7] The DOJ Office of Professional Responsibility (OPR) finally made public its report into the prosecutorial misconduct involving the investigation and trial of then-U.S. Senator "Ted" Stevens of Alaska,[8] which first came to light in 2009. In its report, the OPR concluded that two of the prosecutors, Joseph Bottini and James Goeke, committed reckless professional misconduct by concealing exculpatory evidence that would have supported the Senator Stevens' defense and undermined the credibility of a key government witness.[9] The OPR recommended the suspension of Joseph Bottini without pay for 40 days and the suspension of James Goeke for 15 days without pay.[10]

The OPR did not find that either prosecutor acted intentionally to violate ethics rules, which contradicts an earlier finding by a special investigator the trial judge had appointed to consider whether the prosecutors had engaged in criminal conduct. To put the OPR findings in context, a brief review of Senator Stevens' case and its aftermath is necessary.

The DOJ indicted Senator Ted Stevens, and his trial took place while he was running for re-election in 2008. The government secured a guilty verdict on seven counts of making false statements, which likely contributed to his failed re-election bid. Prior to sentencing, an FBI agent involved in the prosecution made allegations of prosecutorial and governmental misconduct in the investigation and trial of Senator Stevens. Judge Emmett G. Sullivan, presiding over the case, held prosecutors in contempt when they failed to provide information to the defense and the court to explain the allegations of misconduct. The DOJ appointed a new team of prosecutors, who learned that the original prosecutors failed to comply with their obligation to disclose several pieces of favorable evidence to the accused.

The DOJ moved to set aside the verdict and to dismiss the indictment with prejudice. Judge Sullivan granted the government's motion and appointed Henry Schuelke III to look into the investigation and trial of Senator Stevens by the original team of prosecutors to determine how and why the original prosecution team did not honor their discovery obligation.

After an exhaustive investigation,[11] Schuelke found that the investigation and prosecution of Senator Stevens "were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."[12] Schuelke further found that two of the initial prosecutors on the case, Joseph Bottini and James Goeke, "intentionally withheld and concealed significant exculpatory information."[13]

Although Schuelke found that Bottini and Goeke had engaged in intentional misconduct, Schuelke determined that their conduct was insufficient to establish beyond a reasonable doubt that they violated the federal criminal contempt statute, which Schuelke concluded requires the intentional violation of a clear and unambiguous court order. Schuelke found that Judge Sullivan made it clear that prosecutors were obligated to turn over all exculpatory evidence, but that Judge Sullivan never issued an order because the prosecutors made repeated representations that they were complying with their disclosure obligations and such an order was unnecessary.[14]

Some were critical of the OPR findings and the recommended discipline, including the lawyers for former Senator Ted Stevens who called the suspensions "pathetic," and claimed that the DOJ had

"demonstrated conclusively that it is not capable of disciplining its prosecutors."[15] Senator Lisa Murkowski called for Mr. Bottini and Mr. Goeke to be fired, saying that she was "unconvinced" that their conduct was unintentional.[16]

Both Botttini and Goeke are appealing their suspensions to the Merit System Protection Board, which has yet to decide the case. The Stevens' case and its aftermath are sure to be in the news again in 2013.

IV. Senator Murkowski Introduces the Fairness in Disclosure of Evidence Act of 2012

In response to the discovery violations in the Senator Ted Stevens' case, Senator Lisa Murkowski of Alaska proposed the "Fairness in Disclosure of Evidence Act of 2012,"[17] which would require a federal prosecutor to disclose all favorable information to the accused.[18] The proposed legislation would remove the materiality requirement and require the disclosure of favorable *information* and not just *evidence*, which would expand a prosecutor's legal disclosure obligation and address a major problem with the current disclosure standard. If passed, the proposed legislation would make a prosecutor's legal disclosure duty equivalent to the ethical disclosure found in ABA Model Rule 3.8(d), which requires "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."

With respect to the timing of disclosure, the proposed legislation requires the prosecutor to disclose the covered information "without delay after arraignment and before entry of any guilty plea,"[19] thereby ensuring that the approximately ninety-five percent of defendants who plead guilty will make fully informed decisions. The legislation provides that a defendant may not waive any of the rights in the proposed statute unless: (1) it is done in open court; (2) the defendant makes the waiver knowingly, intelligently, and voluntarily; and (3) it is in the interests of justice.[20] This provision would ensure that prosecutors could not seek to obtain waivers of their disclosure obligations without judicial oversight. Another provision in the legislation establishes a continuing duty to disclose "as soon as is reasonably practicable upon the existence of the covered information becoming known, without regard to whether the defendant has entered or agreed to enter a guilty plea."[21]

In addition to court-approved waivers, the legislation provides for an exception to the disclosure obligation when the prosecutor obtains a protective order from the trial judge to withhold impeachment evidence of a potential witness not already known to the defendant upon a showing that disclosure of the information would present a threat to the safety of the potential witness or any other person.[22] This public safety provision appears to balance the defendant's disclosure rights with the interests of victims, witnesses, or other persons when the government has a reasonable basis to believe that their safety is at risk.

The proposed legislation states that when there is reason to believe that a prosecutor has failed to comply with these discovery obligations, the trial court may impose a remedy appropriate to the violation.[23] In determining the appropriate remedy, which ranges from postponement or adjournment of the proceedings to dismissal with or without prejudice, the court is to consider: "(i) the seriousness of the violation; (ii) the impact of the violation on the proceeding; (iii) whether the violation resulted from innocent error, negligence, recklessness, or knowing conduct; and (iv) the effectiveness of alternative remedies to protect the interest of the defendant and of the public in assuring fair prosecutions and proceedings."[24]

In addition to fashioning remedies to address the failure to disclose, the court would have the authority to order the U.S. Government to pay the defendant's costs and expenses, including reasonable attorney fees, if the court found that the violation "was due to negligence, recklessness, or knowing conduct by the United States."[25]

The Senate Judiciary Committee held a hearing on the proposed legislation in June 2012, and Deputy Attorney General James Cole testified against the proposal. Deputy Attorney General James Cole testified that while what occurred in the prosecution of Senator Stevens was "unacceptable . . . it does not

suggest a systemic problem warranting a significant departure from longstanding criminal justice practices."[26] In his testimony, Cole characterized the misconduct in the Stevens case as "an aberration" and said that discovery failures were "rare."[27] According to Cole, whatever problem there may be is not a problem about the scope of discovery but rather one of making sure prosecutors understand and comply with their existing discovery obligations.[28] He emphasized several steps that the DOJ was taking to enhance the training, guidance, and supervision of its prosecutors and argued that these steps would be more effective than the proposed legislation.[29]

Cole also contended that there would be three types of negative consequences if the proposed legislation became law: (1) it would put some witnesses and victims in harm's way and lead to intimidation of witnesses and victims if the government disclosed their statements to defendants prior to trial; (2) it would create a substantial risk that classified information may be disclosed and thereby threaten national security; and (3) it would place administrative burdens on prosecutors.[30]

Those supporting the legislation point out to the persistence of discovery violations and the need for meaningful action. Supporters also contend that Cole's arguments are based more on speculation and fear than fact. Some supporting the legislation point out that many states require prosecutors to turn over a list of witnesses prior to trial, and that typically there have not been problems with witness intimidation. Some also maintain that the legislation provides for protective orders when there is a legitimate concern that information about witnesses or other information posed a risk to individuals or national security.

The proposed law was not passed in 2012. It is unclear whether Senator Murkowski and the other sponsors of the legislation plan to reintroduce it in 2013. The ABA Criminal Justice Section and the National Association of Criminal Defense Lawyers (NACDL) have long pushed for criminal discovery reforms, and many associated with both groups supported the passage of this legislation.

V. Waivers of Ineffective Assistance of Counsel in Plea Agreements are Unethical

In October, 2012, The National Association of Criminal Defense Lawyers (NACDL) issued Ethics Advisory Committee Formal Opinion 12-02 concluding that defense counsel presented with a waiver of ineffective assistance claims in a proposed plea agreement has a conflict of interest that has constitutional implications for the client.[31] Specifically, because the right to effective assistance of counsel includes the plea bargaining process, such a waiver creates a violation of the Sixth Amendment right to conflict-free counsel, and a consequential violation of the right to due process of law under the Fifth and Fourteenth Amendments. In addition, NACDL found that the ethics rules prohibit such agreements because the waiver is a prospective attempt to limit lawyer liability in violation of Model Rule of Professional Conduct 1.8(h) (1).[32]

The NACDL opinion also includes a finding that prosecutors who propose a plea agreement limiting ineffective assistance claims create a situation where the criminal defense lawyer has a conflicting duty to the client and a personal interest to avoid being accused of ineffective assistance. As a result, the prosecutor violates Model Rule of Professional Conduct, Rule 8.4,[33] by knowingly inducing other lawyers to violate their ethical duties and by engaging in conduct prejudicial to the administration of justice.

The NACDL opinion referred to various state bar ethics opinions that had found such provisions to be unethical, including the Florida State Bar Ethics committee that had reached a similar result months before.[34] In prior years, the state bars of Virginia,[35] Alabama,[36] Missouri,[37] Vermont,[38] and Ohio,[39] held such waivers to be unethical on various grounds. The Texas Court, in Professional Ethics Committee Op. 571 (2006), did not announce a per se prohibition, but cited ethics rules that made the allowance of such waivers questionable. Only Arizona, in Arizona Ethics Op. 95-08 (1995), has reached a contrary conclusion—but solely on the ethics rule prohibiting prospective waiver of a lawyer's liability.

VI. Michael Morton's Texas Wrongful Conviction

In the first case of its kind, Ken Anderson, a former prosecutor and currently a sitting state judge in Texas, is the subject of Court of Inquiry for intentionally withholding key evidence when, in 1987, he prosecuted Michael Morton for the murder of his wife in their home. Despite the defense attorney's repeatedly requests from Anderson for witness statements and other key evidence, the exculpatory evidence was never produced and Morton was convicted. He was innocent.

In 2005, Morton with the assistance of the Innocence Project, began legal proceedings to test the DNA in the case. The Williamson County district attorney, John Bradley, fought the request for DNA testing for six years, based upon advice from Judge Anderson. Finally a judge ordered the DNA test, and after serving nearly 25 years, Morton was exonerated by DNA and freed from prison. His case was highlighted on CBS's 60 Minutes on March 25, 2012.

The Court of Inquiry, authorized by Judge Sid Harle of Bexar County District Court, is an investigative process to examine the prosecutor's conduct in the original trial. The lawyers questioned the lead sheriff's investigator, an assistant district attorney who worked with Judge Anderson and the former prosecutor himself. If the Court of Inquiry finds that Judge Anderson committed serious acts of misconduct by concealing material evidence, disciplinary action by the state bar association and a criminal prosecution could follow.

The State Bar of Texas also has a disciplinary petition pending against Ken Anderson. The petition contends: "[b]efore, during and after the 1987 trial, (Anderson) knew of the existence of several pieces of evidence and withheld same from defense counsel."

VII. More Prosecutors on the Hot Seat

In New Orleans, the U.S. Attorney for the Eastern District of Louisiana, Jim Letten, resigned in December 2012. His resignation was prompted by the revelations that former First Assistant U.S. Attorney Jan Mann and former Assistant U.S. Attorney Sal Perricone were involved in a scandal involving the anonymous online comments and criticisms of targets of federal inquiries and other active criminal matters. Both Mann and Perricone admitted using aliases to post comments on *The Times-Picayune* newspaper website. Mann and Perricone are now defendants in separate defamation lawsuits, which have been stayed by agreement of the parties pending the outcome of a criminal investigation into the prosecutors' actions.

In Spring 2012, Perricone was discovered as an anonymous poster to the newspaper website, and he resigned. At the time, Letten claimed that Perricone had acted alone. In November 2012, Mann, who was Letten's top assistant, was identified as another anonymous poster in the office. After Mann admitted to her role she was initially demoted and later resigned. It was the revelation that Mann too had been involved in the anonymous postings that prompted Letten to step down.

Elsewhere, a disciplinary panel of the Arizona Supreme Court disbarred Maricopa County's elected prosecutor, Andrew Thomas, and his deputy, Lisa Aubuchon, and suspended deputy prosecutor Rachel Alexander for six months and a day after more than a year-long secret investigation. The state bar allegations against them included: abusing prosecutorial authority to prosecute political enemies without probable cause or evidentiary basis; filing civil and criminal cases against political rivals to embarrass and burden them; and engaging in dishonesty and fraud. Thomas declined to appeal his disbarment, but Aubuchon and Alexander are appealing.

The panel's unanimous opinion was over 230 pages long. It detailed thirty-three claims of ethical misconduct, finding clear and convincing evidence of ethical violations by one or more of the respondents on nearly all claims. The panel found violations that included: conflicts of interest; breach of client confidentiality; breach of the duty of competency; bringing a frivolous lawsuit; making false statements of fact or law to a tribunal; making improper extrajudicial statements that have a likelihood of materially prejudicing adjudicative proceedings; bringing actions that had no purpose other than to embarrass, delay, or burden third persons; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.[40]

In deciding the appropriate discipline, the aggravating factors included for Thomas and Aubuchon were a dishonest and selfish motive and their substantial experience in the practice of law. For Thomas, Aubuchon and Alexander, the aggravating factors included: a pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders; and refusal to acknowledge wrongful nature of conduct. The panel also found that for all three the mitigating factor was absence of a prior disciplinary record. In the concurring opinion, the public member of the panel characterized the conduct of the prosecutors as a "multi-year-wreck-of-a-ride, operated by Andrew Thomas and staffed by Aubuchon and Alexander, [that] outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law."[41]

Whether the discipline for Aubuchon and Alexander will be affirmed, modified, or vacated, remains to be seen. In the meantime, it is reported that Andrew Thomas is considering a 2014 run for governor in Arizona.

Endnotes, Chapter 16

[1] 566 U.S. ___, 132 S. Ct. 1399 (2012).

[2] 466 U.S. 668, 686 (1984).

[3] 566 U.S. __, 132 S. Ct. 1376 (2102).

[4] 559 U.S. ___, 130 S. Ct. 1473 (2010).

[5] 565 U.S. ___, 132 S. Ct. 627 (2012).

[6] 373 U.S. 83 (1963).

[7] In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that that failing to disclose evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

[8] Office of Professional Responsibility Report, Investigation of allegations of prosecutorial misconduct in United States v. Theodore F. Stevens, Crim. No. 08-231(D.D.C. 2009) (EGS), Aug. 15, 2011, *available at* http://www.leahy.senate.gov/imo/media/doc/052412-081511Report.pdf.

[9] *Id.* at 670-72.

[10] Letter from Ronald Weich, Assistant Attorney General, to Senator Patrick J. Leahy, Senate Judiciary Committee Chair, and Representative Lamar S. Smith, House Judiciary Committee Chair (May 24, 2012), *available at* http://www.documentcloud.org/documents/359786-5-24-12-doj-letter-to-chairmen-leahy-and-smith-2.html.

[11] In Re Special Proceedings, Mis. No. 09-0198 (Nov. 21, 2011), *available at* http://s3.documentcloud.org/documents/268207/stevens-report-order.pdf.

[12] *Id.* at 1.

[13] *Id.* at 28.

[14] *Id.* at 29–30.

[15] Charlie Savage, *Prosecutors Face Penalty in '08 Trial of a Senator*, NEW YORK TIMES, May 24, 2012, *available at* http://www.nytimes.com/2012/05/25/us/politics/2-prosecutors-in-case-of-senator-ted-stevens-are-suspended.html.

[16] *Id.*

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[17]Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012).

[18]*Id.* § 3014(b).

[19] S. 2197 § 3014(c)(1).

[20] S. 2197 § 3014(f). This section of the proposed law is essentially a legislative veto to the U.S. Supreme Court's decision in *United States v. Ruiz*, 536 U.S. 662 (2002). In *Ruiz*, the Court approved of an express waiver of the prosecutor's obligation to disclose impeachment evidence and evidence that bore on affirmative defenses as a condition of a plea agreement. *Id.* at 633. The agreement in question indicated that the government had turned over information bearing on "factual innocence"; the Court stated that was sufficient protection against an innocent defendant being convicted. *Id.* at 631.

[21] S. 2197 § 3014(c)(2).

[22] *Id.* § 3014(e).

[23] *Id.* § 3014(h)(1)(B). The remedies in the proposed legislation are:
"(B) Types of remedies. A remedy under this subsection may include –
(i) postponement or adjournment of testimony or evidence;
(ii) exclusion or limitation of testimony or evidence;
(iii) ordering a new trial;
(iv) dismissal with or without prejudice; or
(v) any other remedy determined appropriate by the court."

[24] *Id.* § 3014(h)(1)(C).

[25] *Id.* § 3014(h)(2).

[26] *Ensuring that Federal Prosecutors Meet Discovery Obligations: Hearing on S. 2197 Before the Senate Judiciary Comm.*, 12th Cong. 1 (20112) (statement of James M. Cole, Deputy Att'y Gen., U.S. Dept. of Justice) *available at* http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html.

[27] *Id.* at 6–7.

[28] *Id.* at 1.

[29] *Id.* 2–4.

[30] *Id.* at 4–6.

[31] See Model Rule of Professional Conduct 1.7(a) which provides in part "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."

[32] Model Rule 1.8(h)(1) states that "A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement . . ."

[33] It is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . . (d) engage in conduct that is prejudicial to the administration of justice . . .

[34] Florida Bar Advisory Ethics Op. 12-1 (2012).

[35] Virginia State Bar Ethics Op. 1857 (2011).

[36] Alabama Bar Ethics Op.RO-2011-02 (2011).

[37] Missouri Formal Ethics Op. 126 (2009).

[38] Vermont Ethics Op. 95-04 (1995).

[39] Ohio Ethics Op, 2001-06 (2001).

[40] In re State Bar of Arizona v. Andrew P. Thomas, Lisa M. Aubuchon & Rachel R. Alexander, PDJ-2011-9002, Opinion and Order Imposing Sanctions (April 10, 2012), *available at* http://www.azcourts.gov/Portals/9/Press%20Releases/2012/041012ThomasAubuchonAlexander_opinion.pdf.

[41] *Id.* at 245.