# 2009 CRIMINAL ADVOCACY PROGRAM - NUTS AND BOLTS SESSION September 25, 2009 Thomas M. Loeb, Esq. Farmington Hills, Michigan

### I. YOU AND YOUR CLIENT. WHO DECIDES WHAT?

- A. The client decides:
  - Whether to be represented by counsel, or whether to represent himself. *Johnson v. Zerbst*, 304 US 458, 464-465(1938); *Faretta v. California*, 422 US 806(1975).
  - 2. The right to hire an attorney of his choice. *United States v. Gonzalez-Lopez*, 548 US 140(2006).
  - 3. The right to plead not guilty. *Brookhart v. Janis*, 384 US 1, 7-8(1966).
  - A defendant has the ultimate authority to determine whether to plead guilty, the right to have a jury trial, waive a jury, testify in his or her behalf, or take an appeal. *Jones v. Barnes*, 463 US 745, 751(1983); *Wainwright v. Sykes*, 433 US 72, 93, n.1(1977).
  - The right to not stand trial while incompetent. *Cooper v. Oklahoma*, 517 US 348(1996).

A guilty plea is an event of "signal significance" in a criminal proceeding. By pleading guilty, defendant waives constitutional rights inherent in a criminal trial, including the right to trial by jury, the protection of self-incrimination, and the right to confront one's accusers. While a guilty plea may be tactically advantageous for the defendant, the plea is not simply a "strategic choice"; it is "itself a conviction". As such counsel lacks authority to consent to a guilty plea on a client's behalf, and a defendant's tacit acquiescence in the decision to plead is insufficient to render the plea valid. *Boykin v. Alabama*, 395 US 238(1969); *Florida v. Nixon*, 543 US 175(2004).

- B. The lawyer decides:
  - 1. How to manage the trial. *Taylor v. Illinois*, 484 US 400, 417-418(1988).
  - 2. What arguments to pursue. *Jones v. Barnes*, 463 US 745, 751(1983).
  - 3. What objections to make. *Henry v. Mississippi*, 379 US 443, 451(1965).
  - 4. What stipulations to make regarding admission of evidence.
  - Whether to waiving a trial within 180 days under the Interstate Agreement on detainers (IAD). *New York v. Hill*, 528 US 110(2000).

"Absent a demonstration of ineffectiveness, counsel's word on such matters is the last". *Gonzalez v. United States*, 128 S Ct 1765, 1769(2008).

# II. DO I HAVE TO DO EVERYTHING MY CLIENT DEMAND? WHAT IF HE WANTS ME TO FILE A MOTION I THINK IS FRIVOLOUS?

A. MRPC 1.2 SCOPE OF REPRESENTATION

(a) "A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the right of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client." (emphasis added).

### B. 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 for doing so that is not frivolous. A lawyer may offer 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 so defendant the proceeding as to require that every element of the case be established." (emphasis added).

## III. HOW DO I DEAL WITH MY CLIENT'S FAMILY? HOW ESPECIALLY DO I DEAL WITH MY CLIENT'S MOTHER SINCE SHE RETAINED ME?

MRPC 1.8 CONFLICTS OF INTEREST: PROHIBITED TRANSACTIONS

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- (f) "A lawyer shall not accept compensation for representing a client from one other than the client unless :
  - (1). the client consents after consultation;
  - (2). there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - (3). information relating to representation of a client is Protected as required by Rule 1.6. [MRPC 1.6 covers confidentiality of information.]

As we know, a person has a fundamental right not to stand trial while incompetent. *Cooper v. Oklahoma*, 517 US 348(1996). In deciding what

defense is best for the client, the decision is not always a tactical one reserved for the lawyer's judgment.

In *Cooke v. State of Delaware*, \_\_\_\_\_ A 2d \_\_\_; 2009 WL 2181678(Delaware Supreme Court 2009), the Delaware Supreme Court reversed a first degree murder conviction in a capital case, holding that defense counsel's pursuit of a verdict of "guilty but mentally ill" for a defendant who insisted he did not do the killing was tantamount to providing the defendant with no defense at all. The defendant was charged with offenses including capital murder on the basis of DNA evidence as well as witness identifications. Although the defendant was competent to stand trial and to enter a plea of not guilty, his attorneys advised the trial court that they would be asking the jury over their own client's objection, to find him guilty but mentally ill.

Both before and during trial, the defendant repeatedly asserted his disagreement with an objection to his appointed counsel and their pursuit of this insanity-based defense. The trial court refused the prosecutor's request to question the defendant about his wishes regarding counsel and, when the court did respond to the defendant's complaints, it told him that the choice of defense was counsel's to make.

The trial itself was messy. The defendant made several verbal outbursts, sometimes in front of the jury, claiming that he was neither guilty nor mentally ill and that his attorneys were "setting him up" with this phoney defense. His attorneys eventually called a psychiatrist who testified that, during pretrial examinations, the defendant would alternatively deny guilt and admit guilt. The defendant was found guilty and sentenced to death.

In overturning the conviction, the Supreme Court noted that one of the fundamental decisions reserved for the defendant alone to make is the right to plead not guilty. The court also noted that a second fundamental decision reserved for the defendant alone to make is the decision to testify. In this case, the defendant wanted to exercise his right to testify, but his attorneys refused to call him as a witness, believing that he would assert his innocence and contradict their position that he was guilty but mentally ill of the crimes charged. Ultimately the trial judge called Cooke to testify because his defense lawyers refused to do so. The court also held that the defense attorneys denied their client the right to an impartial jury trial by, from time to time, having their client removed from the courtroom when presenting evidence of mental illness, and during their closing argument, when they told the jury that Cooke's testimony about his innocence was not credible, should not be believed and was a manifestation of his mental illness.

In *Cooke, supra*, the court noted that the conduct of his defense attorneys was inherently prejudicial and did not require a separate showing of prejudice because, by negating his basic trial rights, they failed to function "in any meaningful sense as the prosecution's adversary". *United States v. Cronic*, 466 US 648(1984).

# IV. OTHER THOUGHTS

- A. Respect your client.
- B. Respect yourself
- C. CYA and KISS
- D. Be careful out there.

# Picked from the pool? Trial by jury doesn't include napt

One woman teetered on recariously high heels. Another worried aloud, aying she didn't speak much nglish.

One man nearly lost his ants as he removed his elt to go through the ecurity screening. Another appeared s if he were trying to ie his hands in knots nd shook visibly in

his chair.

We all gathered KRISTEN nside the jury assemyroom at the Frank SHAMUS vlurphy Hall of Justice SHAMUS n downtown Detroit early on a fo Phursday morning. We probthy numbered about 200 and ook our seats in a massive a waiting room stuffed with gray coustioned chairs that, despite file

It was hot, and I was tired, yet eager to discover what the day would bring. I'd never been called to jury duty before and part of me wanted to see what it was all about. The other part of me, truthfully, wanted nothing to do with the inconvenience that would accompany serving on a trial. We waited for about an hour when suddenly television

hour when suddenly televisions scattered about the room turned on and a video started to play. It was a primer on

> what to expect if selected to serve on a jury. Some neople watched atten

Some people watched attentively. Others slept through it or read their books, newspapers and magazines, paying the film no attention whatsoev-

attention whatsoev-

Their lack of interest worried me If those nappers, readers and distracted people were asked to serve on a trial, would

N serve on a trial, would they know what to do? And would they have the attention span to follow the court proceedings? I had my doubts.

My name was called to join a group that reported to a courtroom on the seventh floor. Our juror identification cards were placed into a glass canister, and a woman pulled out the cards one by one, asking the people she named to take seats in the jury box. Fourteen were seated, and the judge began an initial round of questioning. Would

the padding, were still uncom-

fortable.

take seats in the jury box. Fourteen were seated, and the judge began an initial round of questioning. Would each be willing to serve on a criminal trial expected to last three days? What did each of them do for a living? How about their spouses? He excused a few, and new names were drawn to replace them. Lawyers began their questioning, and more potential jurors

were dismissed.

Each time a name was called, I held my breath, but my anxiety was all for naught. My card was never drawn. As I left the courtroom with the others who weren't picked.

there was a collective sigh of relief. I was a little disappointed. I

I was a little disappointed. I found the whole process curi-

ous, and wondered what a jury of these people — a mishmash of folks that included an engineer, a teacher and a man who does stucco work, would find in this case.

At the same time, I was relieved. I wouldn't be asked to judge another person, with power to determine guilt on innocence in a way that would

> change the course of the accused's life forever.

Surely mistakes are sometimes made. Innocent people are convicted. The guilty at times go free. For better or worse, that's exactly what you get when you ask a jury made up of regular people who make very human mistakes to judge one another.

tion.

It's an imperfect system, but at least it strives at fair-

ness. I just hope that if I ever fi myself on the other side of the bench, the jurors pay atten-

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