

OKLAHOMA ADVANCED DUI SEMINAR  
ETHICS: IT'S ALL ABOUT VICES AND VIRTUES  
APRIL 19, 2019

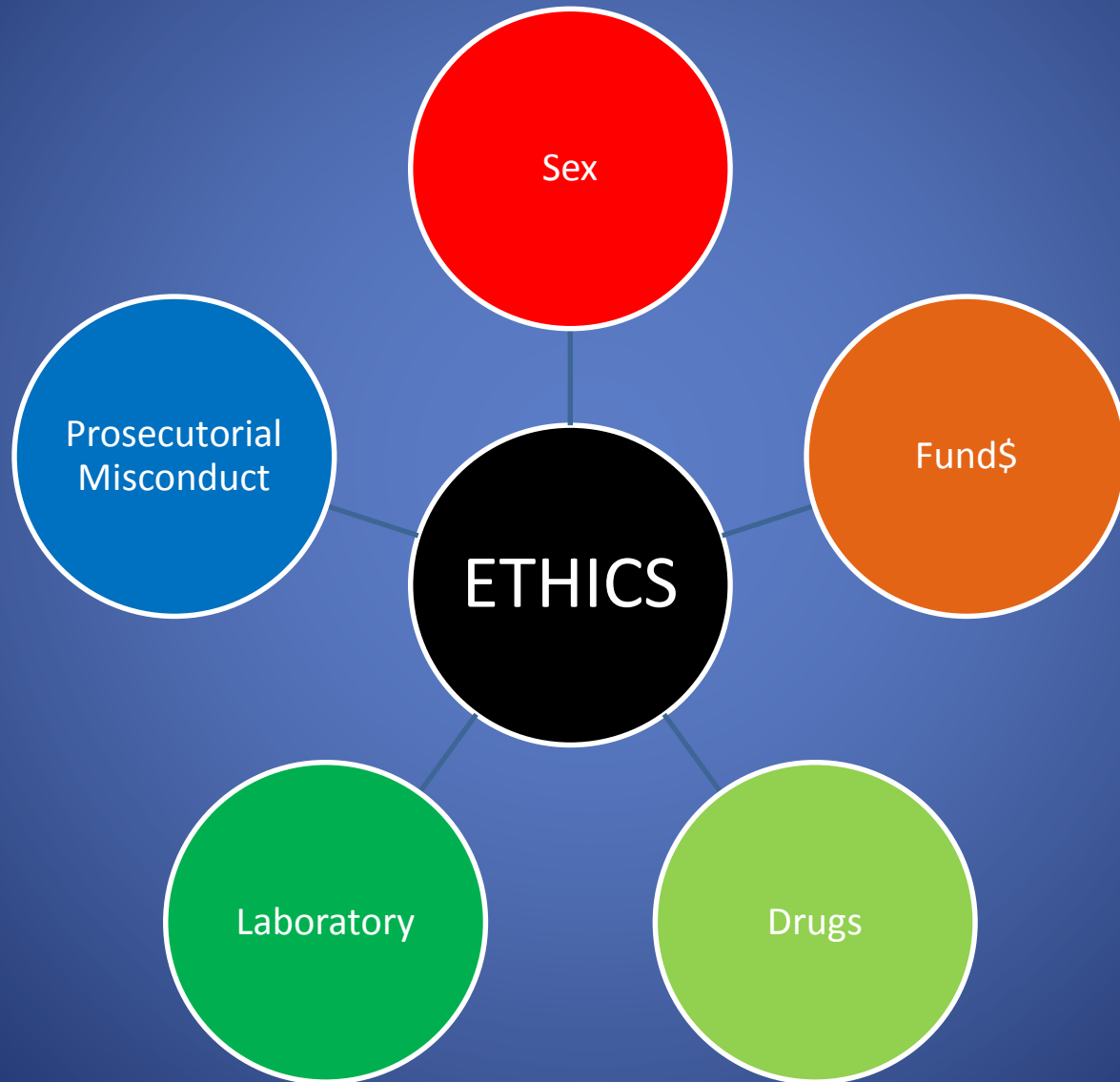


**Law Offices of  
Virginia L. Landry, Inc.**

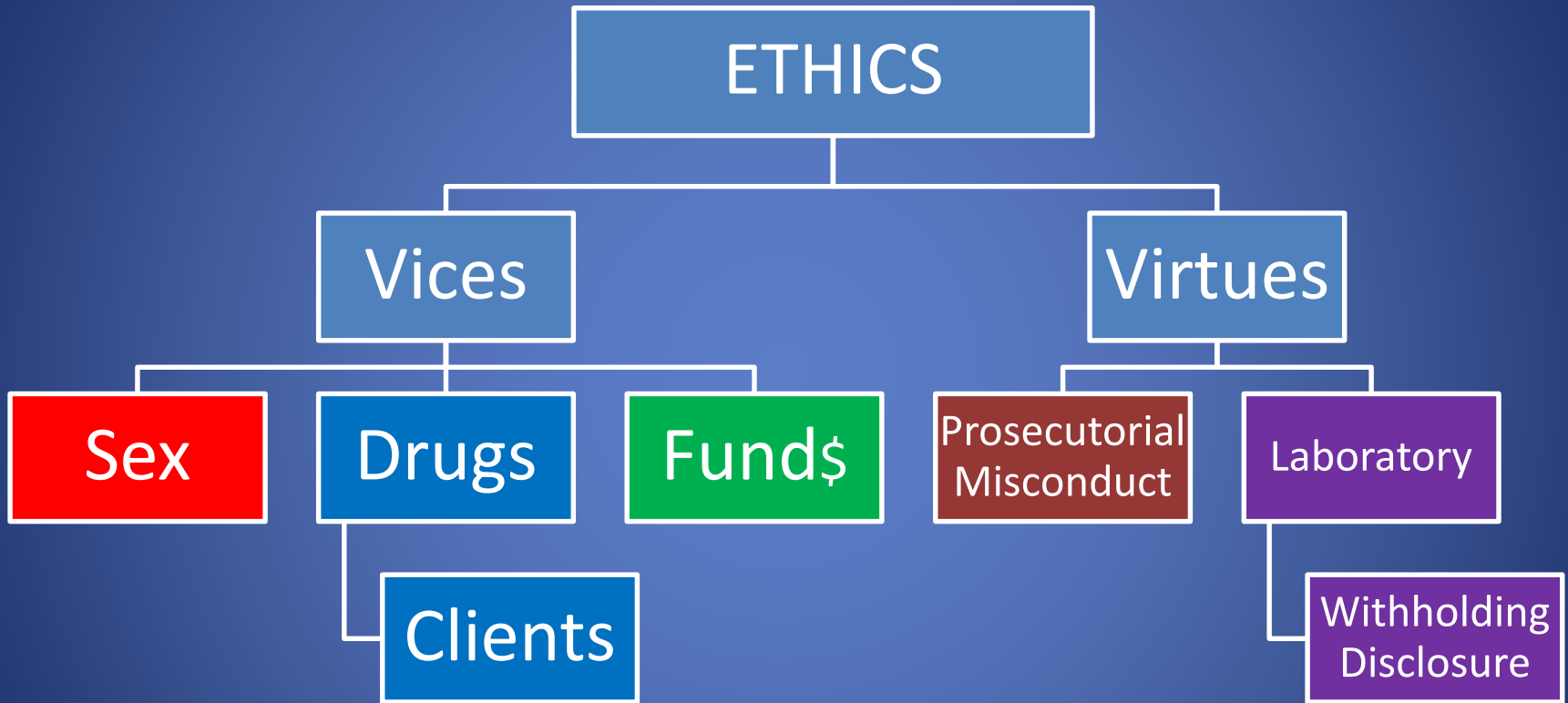
23046 Avenida de la Carlota, Suite 125  
Laguna Hills, CA 92653-1591  
949-585-7400

[virginia@landrylaw.net](mailto:virginia@landrylaw.net)  
[www.duiqueen.com](http://www.duiqueen.com)

# ETHICAL CONSIDERATIONS



# ETHICAL CONSIDERATIONS



OKLAHOMA BAR ASSOCIATION

VIA ORANGE COUNTY, CA

LA CONFIDENTIAL

# VICES

- SEX
- DRUGS
- FUNDS
- CLIENTS

# SEX





# OKLAHOMA RULE

- “A LAWYER SHALL NOT HAVE SEXUAL RELATIONS WITH A CLIENT UNLESS A CONSENSUAL SEXUAL RELATIONSHIP EXISTED BETWEEN THEM WHEN THE CLIENT-LAWYER RELATIONSHIP COMMENCED.”
- 2016 this rule was taken verbatim from ABA’s model rules

# Purpose

- Attorney/Client relationship is fiduciary
  - Relationship is uneven, and attorney has highest position
  - Potential exists for attorney to violate fiduciary duties and client be unable to detect because of the personal relationship
  - Relationship may impair attorney's ability to “exercise independent professional judgment”



# EXAMPLES

- Working Together
- Dating After Case Concludes
- Divorcing Attorney

# Relationship prior to representation

- This rule does not preclude an attorney from having a sexual relationship with someone whom they were already involved with prior to representation, but
- may open the attorney up for a complaint if the client gets upset for any reason during or after the case is resolved

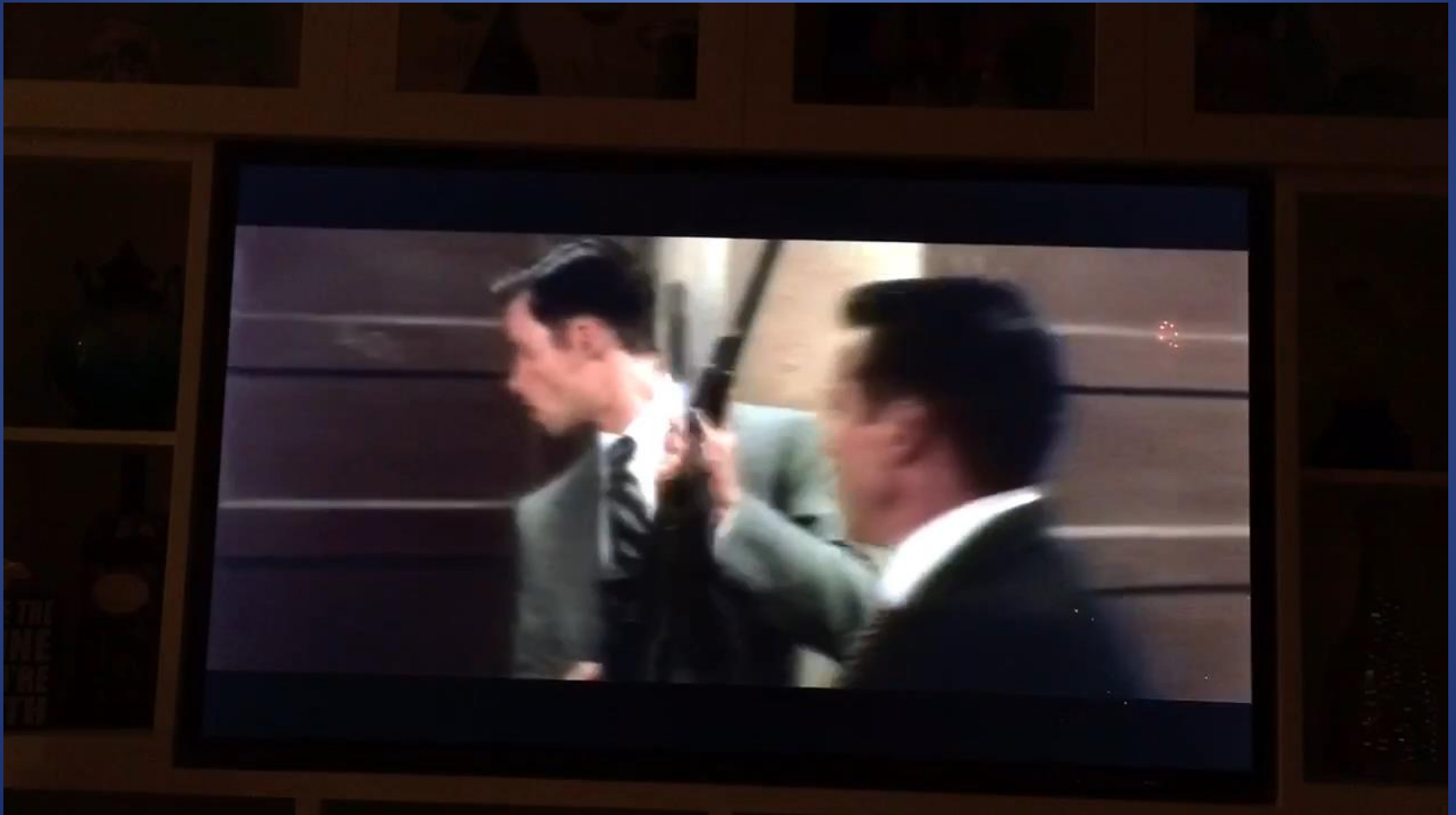
# Scenario: Unconnected Cases

- FACTS: You represent Client 1 with whom you are not having a sexual relationship, AND
- FACTS: On an unrelated case you represent Client 2 with whom you are having a sexual relationship
- If Client 1 does not like their outcome, but a great result for Client 2, Client 1 may file a complaint...

# Scenario continued

- Client 1 may now file a complaint alleging that your judgment was impaired on his/her case because of your personal relationship with Client 2, and the time you devoted to that case
- Standard of proof would be high, but you are still going to spend time and money fighting the allegations

# DRUGS





# DRUGS AND ALCOHOL ABUSE





# Common Rule Violations Common w/Substance Abuse Problems

- Diligence
- Communication With Clients
- Fees for Legal Services
- Duties as Counselor
- Delay of Litigation

# California's Help Programs

- California has “The Other Bar” programs available to help lawyers, judges, law students, and law school graduates with substance abuse issues

# THE OTHER BAR

- Assist Judges, Lawyers, & Law Students who “suffer from physical or mental disabilities that result from disease, disorder, trauma or age”; and
- Impairs their ability to practice
- Non-disciplinary
- Free

# Services Include

- Stress management
- Addiction
- Mental health issues
- Law practice issues
- Investigation & planning interventions
- Entry into treatment facilities
- Aftercare programs

# CONTINUED

- Peer support meetings
- Obtaining sponsors and mentors
- Will provide aftercare tracking and document your compliance if it is required
- Will provide free educational meetings and documentation on addiction, mental health, and a variety of other things

# OK Lawyers Helping Lawyers

- Peer to peer assistance
- Available to lawyers, judges, law students, and graduates of law school
- Focus is on stress, depression or addiction
- 6 hours of free short-term, problem-focused or crisis counseling
- 800-364-7886 24/7
- Non-urgent, in addition to the hotline
  - [onelife@plexusgroupe.com](mailto:onelife@plexusgroupe.com)



# RULE 6: BAD BEHAVIOR

- Oklahoma had an important change in 2018 where bad behavior was changed from “shall be” to “may be” suspended.
- Initially no value in self-reporting. Might be useful when a plea is imminent and mitigation is in place.

# RULE 7: DISCIPLINE

- Any plea of guilty shall be submitted to the Supreme Court (guilty plea, no contest, deferred sentence)
- Anything that generates a J&S (judgment and sentencing) must be reported within 5 days
- NOTE: A 1<sup>ST</sup> time simple DUI that is deferred and eligible for expungement will be reported and subjected to action that can include immediate suspension pending a hearing

# WAYS TO AVOID SUSPENSION

- DON'T DRINK/USE DRUGS AND DRIVE
- Deferred prosecution (not likely)
- Dismissal pre-plea
- Drug Court
- Successful Motion to Suppress
- Not Guilty

# EXAMPLE

- What happens when you are working late or decide to go back into the office after you thought everyone had left.
- Open on the desk of one of your associates is what resembles cocaine. Quick test confirms.
- What do you do?

# FUND\$



4/12/2019

# Fees

- Fees must be reasonable
- Cannot make an agreement for, or collect unreasonable fees
- There are 8 factors of reasonableness in OK
- Expenses must be agreed to in advance, or must reasonably reflect your actual expense



# Reasonableness Factors

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained

# Reasonableness Factors

5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. Whether the fee is fixed or contingent.

# OK ETHICS OPINION #317

- EVERY ATTORNEY FEE MUST BE EARNED AND MUST BE REASONABLE
- ORPC, Rule 1.5 comment [5]:
- “A lawyer may require advance payment of a fee, but is obligated to return any unearned portion.”

# EXAMPLE

- Basket of Goodies
- Watch
- Mexico Vacation

# FUND\$





# New Client Fee Agreements

- Model rule encourages the agreement be in writing
- California mandates the agreement be made “in writing, before, or within a reasonable time after commencing representation.”
- California also mandates changes in fee or expenses be “promptly communicated to the client, in writing.”



# Oklahoma Retainers

- Rule 1.15 of the Oklahoma Rules of Professional Conduct requires that funds provided by a client for retainers (until the monies are earned), flat fees (until the moneys are earned), filing fees, deposition and expert witness expenses be deposited in an interest-bearing trust account IOLTA

# QUICKBOOKS

- OKLAHOMA BAR JOURNAL
  - Cheryl Clayton, thank you, 10 screenshots for your set-up to be in compliance
  - USING QUICKBOOKS FOR IOLTA TRUST ACCOUNTING

# EXAMPLE

- Represent DUI Drug client in court
- Dr. Up My Nose has been taking pharmaceuticals from his practice shared with three other MDs
- All four Doctors are being investigated by the Board for insurance fraud
- Are you able to represent Dr. Up My Nose in front of the Board on DUI Drugs? Should you?

# When fees are earned

- Fees not earned until benefit conferred upon client, or you have performed a legal service for the client
- Flat fees are permitted, but must be deposited into trust fund until earned
- Telling your client in your agreement that you will/may have to pass on other cases may protect you against a claim of unreasonable fee (See Iowa v. William Vilmont)

# Case Scenario

- Took a \$2,500 non-refundable retainer
- Worked 4 hours at \$225 per hour; case dismissed
- Refused to refund any portion on basis that he had to refuse other cases
- Court said was too high of a fee, client wasn't informed he would have to refuse other work
  - Villamont Case

# Nonrefundable prohibited

- California forbids nonrefundable retainers and nonrefundable fees
- Any agreement that purports to make fees or retainers nonrefundable are also prohibited, and *per se* unethical but...



- NEITHER OSC NOR ORPC expressly prohibit advance fees which are designated as non-refundable retainers, but...
- ORPC Rule 1.16(d) provides upon termination of representation, the lawyer must refund “any advance payment of fee that has not been earned.”

# CLIENTS



# STICKY AREAS

- Misrepresentation
- No Follow Through
- Appearing in Court Under the Influence
- Forged Proofs
- Unable to Locate
- Mr. Green Motions
- True and/or Abusive Addicts

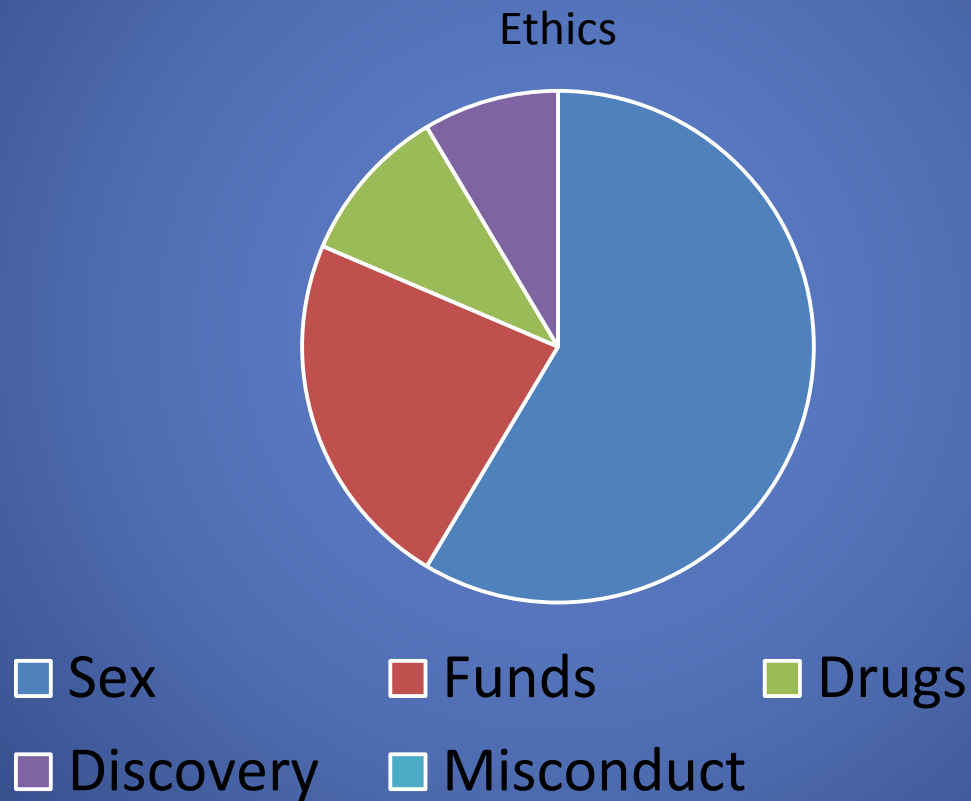
# Example

- Complaint charges your client with a third DUI when in fact, you have material proof that the client is actually a fourth, therefore felony case. Prosecutor fills out a plea form, giving credit for residential treatment at statutory minimum. An additional 180 days is stayed pending successful completion of the alcohol program and other probationary terms.
- You know D picks up Drunk in Public

# Scenarios

- Duty to disclose error in paperwork?
- Duty to disclose probation violation?
- Moral obligation to refer to further treatment?

# ETHICAL CONSIDERATIONS





# VIRTUES

- PROSECUTORIAL MISCONDUCT
- LABORATORY
- WITHHOLDING/DISCLOSURE

# SPECIAL RESPONSIBILITIES

- IN CALIFORNIA, PROSECUTORS' DUTIES HAVE INCREASED TO 7 REQUIREMENTS BY STATE RULES
- THERE WERE 9 COMMENTS TO THOSE RULES

# COMMENTS

- A Prosecutor has the responsibility of a MINISTER OF JUSTICE and NOT SIMPLY THAT OF AN ADVOCATE.
- Better start using that quote in motion work!

# OC Public Defender Makes Snitch Filet



<http://www.ocweekly.com/2014-03-27/news/moxley-confidential-fernando-perez-scott-sanders-tony-rackauckas-sandra-hutchens/full/> (4 YEARS AND COUNTING)

# Special Responsibilities

- Most common violations are:
  - Discovery violations
  - Making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused
  - Failing to exercise due care to prevent investigators, law enforcement personnel, and others from making extrajudicial comments

# DISCOVERY VIOLATIONS





# LABORATORY



# CHECKLIST

- Machine Maintenance
- Calibration Records
- Proficiency Testing
- Changes To Procedures
- Personnel Issues
- Junk Science

# WITHHOLDING/DISCLOSURE



# DISCLOSURE

- “make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

(WATCH FOR WAIVERS)

# COMMENT

- The disclosure obligations in paragraph (d) are NOT LIMITED TO EVIDENCE OR INFORMATION THAT IS MATERIAL as defined by BRADY V. MARYLAND (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny.



# Failure to Disclose Mitigating Facts

- At least one court has held that a Prosecutor's failure to disclose mitigating facts to defense counsel required a resentencing
- *United States v. Severson*, 3 F.3d 1005, (1012-13 (7<sup>th</sup> Cir. 1993) – government withheld impeachment evidence in a drug case



# Plea Deals

- Prosecutors in federal court must disclose all terms of a plea deal whether the Judge requests them to or not. *United States v. Abbott*, 241 F.3d 29, 35 (1<sup>st</sup> Cir. 2001)
- Courts are split on whether fact-bargaining is legal. Fact-bargaining is the stipulation of facts that may make potential sentences lower, i.e., lower BAC, less amount of drugs, etc.

# Fact-bargaining questioned

- There is a growing number of law review articles and courts discussing whether a prosecutor and defense counsel can fact-bargain a case.
- *United States v. Dukes*, 936 F.3d 1281, 1282 (D.C. Cir. 1991) – resentencing required due to ethical violations on both sides

# Good Faith

- There is a difference between a good faith doubt that Prosecutor can prove an element, and pleading to a lesser included charge
- But, you should carefully document your good faith belief and consider disclosure to the court

# I CAN'T DANCE!



# Clients are in Need of Your Services

- Charge appropriate fees
- Help others in need
- Share thoughts and new ideas
- Keep involved in your organizations

THANK YOU FOR THIS OPPORTUNITY



# Thank You



Thanks to Lorena Hughes, an extremely intelligent and hardworking Paralegal at the firm, for assisting with this PPT presentation



# Copy of Slides

- TEXT TO: 949-531-7060
- ENTER: ETHICSinOK

AND FOLLOW THE PROMPTS