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ETHICAL CHALLENGES FACING PROSECUTORS AND DEFENSE ATTORNEYS IN WHITE-COLLAR CASES[†]

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I. INTRODUCTION

Good evening, I'm Mark Cohen, a founding partner of Cohen & Gresser LLP, a criminal defense attorney, and a former federal prosecutor who served in the U.S. Attorney's Office for the Eastern District of New York. I want to begin first by thanking the Dean, Professor Christian Johnson, the faculty and the Widener Commonwealth Law School for inviting me to speak here today. It is an honor to be delivering the Justice William Strong lecture this year, particularly given the weight of Justice Strong's jurisprudence in criminal justice.

One of Justice Strong's most notable opinions is *Strauder v. West Virginia*, an 1880 case where a Black man was convicted in West Virginia by an all-white jury.[1] Justice Strong, writing for the majority, held that a state law restricting juror eligibility to white men violated the Fourteenth Amendment because it deprived the defendant of "immunity from inequality of legal protection, either for life, liberty, or property."[2] As this case and Justice Strong's other jurisprudence demonstrates, he was strongly committed to ensuring the fair and equal administration of justice. I submit that

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[1] Strauder v. West Virginia, 100 U.S. 303, 305 (1880).

[2] *Id.* at 310.

is something that prosecutors and defense attorneys alike strive to do in their day-to-day practice.

Toward that end, this lecture focuses on the ethical challenges that white-collar attorneys on both sides face. I will begin by addressing these issues from the prosecutor's perspective and then address some issues that come up on the defense side. I then look forward to addressing any questions that the Dean, Professor Johnson or the audience may have.

I should mention, however, a few disclaimers at the outset. To the extent my comments today touch on any matters I have worked on or clients that my law firm has represented, my comments are based only on what is in the public record and nothing considered confidential under the rules of professional conduct. Anything I say is as a private citizen making observations about the cases and what I think the impact and potential lessons learned were. I am in no way making any representations on behalf of my clients.

II. ETHICAL CHALLENGES FACED BY PROSECUTORS

A. Should Charges be Brought at All?

Starting with the prosecutor's perspective, ethical issues can arise from the very beginning of an investigation. For example, prosecutors may face fundamental questions such as (1) is the conduct at issue criminal, and (2) even if technically criminal, should charges be brought against the defendant?

These are key questions that can seem simple but turn out to be quite challenging. I think this clip from *Seinfeld* about what a business write-off is captures this issue in a humorous way.[3] As I think is clear from the clip—neither Seinfeld nor Kramer has any idea what a write-off is, but Kramer is nevertheless convinced that the post office is doing them, and that they are permissible.

This is occasionally an issue in white-collar cases where there may be a concern that the conduct at issue violates the law even if one cannot pinpoint the exact regulation that prohibits it. White-collar cases may be particularly susceptible to this issue. In

[3] *Seinfeld*: *The Package* (NBC television broadcast Oct. 17, 1996).

contrast to so-called "blue collar crimes," like murder, arson or drug dealing, where the criminal nature of the conduct is obvious, white-collar cases often focus on a particular business practice that may seem aggressive or sharp, but that does not necessarily mean the practice is illegal. White-collar prosecutors must grapple with this question of whether the conduct at issue is actually criminal.

Take, for example, a series of prosecutions the United States Department of Justice (DOJ) launched in 2020 in connection with alleged price fixing in the poultry industry.[4] The DOJ indicted the executives of several chicken producers, alleging that they had conspired to rig bids made to restaurants and grocery stores to keep prices high.[5]

This practice may or may not have been objectionable on business or social grounds. But, at trial, all the evidence showed was that the executives exchanged pricing information.[6] Yet, under the law, that does not amount to an illegal agreement to fix prices. In fact, companies often try to suss out a competitor's pricing, so they can make their own internal pricing decisions. As long as there is no agreement with a competitor to keep prices at a certain level, there is nothing wrong with that. And ultimately this hole in the theory yielded limited results. While one company did plead guilty and another cooperated, five executives were acquitted of criminal antitrust charges.[7] And the DOJ dropped charges against eleven other defendants—nine individuals and two companies.[8]

Prosecutions under the Foreign Corrupt Practices Act (FCPA), which prohibits the payments of bribes to foreign officials, are another area that raises questions about whether the business conduct at issue is actually illegal. To prove an FCPA claim, the government needs to establish that the defendant:

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[4] Matthew Perlman, *Why DOJ's Chicken Price-Fixing Probe Fizzled Out,* LAW360 (Oct. 19, 2022, 8:16 PM), https://www.law360.com/articles/1541179/why-doj-s-chicken-price-fixing-probe-fizzled-out.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

(i) acted willfully and corruptly;
(ii) in making an offer or a payment to a foreign official;
(iii) to influence that official's performance of his duties;
(iv) for the purpose of obtaining or retaining business.[9]

But consider that, in many parts of the world, it is a common business practice to meet with high-level government ministers and take them out for a meal; if you do not do so, you risk being viewed as aloof and disrespectful. And so, when you are paying for those meals, you are doing it because it is considered the standard, bare minimum practice in that country and culture—you are not intending to break the law.

Is that conduct illegal? Again, such practices may or may not be objectionable from a business or social perspective. However, it is not clear that they are illegal, especially when you consider the FCPA's requirement of showing that the conduct was done "corruptly" and "willfully," meaning done for a bad purpose.[10] If you are having dinner with an official to stay competitive and not to secure an unfair advantage over your competitors, is that really "corrupt" or "willful" conduct? Corporate white-collar cases often hinge on tricky questions of intent like this one because criminal statutes generally require the government to prove criminal intent and it can be difficult to do so in a white-collar case when someone is engaging in a practice that is common in the industry.

One final example – we hear all the time about bankers, hedge funds and others in finance engaging in aggressive trades that may hurt a counterparty in the marketplace. But those practices are frequently permitted by the trading agreements between the parties. Now, those trades may be objectionable on commercial or other grounds, but it does not mean those practices are per se illegal.

Setting aside the question of whether the conduct at issue is actually criminal, there are other considerations that perhaps

[9] United States v. Kay, 513 F.3d 432, 439-40 (5th Cir. 2007) (citing 15 U.S.C. §§ 78dd-2, 78ff).

[10] *Id.* at 446.

should factor into a prosecutor's decision whether to bring charges. For example:

What effects would a criminal prosecution have on an industry, particularly a nascent one with little or no regulation?

What would be the effects on the company, its employees, its investors, shareholders and others in the relevant community if charges are brought against the individuals who run the company? Would it drive the company out of business?

Take, for example, the cryptocurrency industry, which is still fairly new and unregulated. Even now, there are fundamental regulatory questions that are unanswered, like: are cryptocurrencies securities? Should any rules that are adopted be aimed at restricting risk, requiring disclosures or both? What agency should be in charging of regulating it? And yet in the meantime, we have seen a string of high-profile cryptocurrency-related prosecutions. It is worth considering what the effects of these prosecutions are on cryptocurrency companies and the cryptocurrency industry. Do these prosecutions and the general lack of clear regulation have a limiting effect on the industry?

I submit that prosecutors should and do care about these factors in making prosecutorial decisions and not only about winning and getting another notch in their belt. Indeed, that is a principle the Supreme Court has emphasized. In the 1935 case, *Berger v. United States*, Justice Sutherland wrote:

> The United States Attorney is the representative not of an ordinary party to a controversy, but *of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done*.[11]

A "win" for a prosecutor should not be whether charges were filed but whether it was "just" to bring those charges. And it should also be considered a "win" if a prosecutor determines that there is *not* a sufficient basis to bring charges, or that the collateral

[11] Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

effects on the company, its stakeholders and the community would not justify the bringing of charges.

B. What are the Prosecution's Discovery Obligations?

Prosecutors continue to grapple with ethical questions throughout a case, including when it comes to their discovery obligations. Before we dive into those obligations, this clip from *Citizen Kane* helps underscore why these discovery obligations are so important.[12] Now as those of you who have seen *Citizen Kane* know, the main character, Charles Foster Kane, is a wealthy newspaper magnate, who, on his deathbed, utters the word "Rosebud." And the rest of the movie is structured as a mystery as to what his final word meant. We learn in the final moments of the movie that it is the name of his childhood sled, but it is a mystery for most of the movie. And I can tell you from the defense side that when you are working on a white-collar case, the government's case can seem as mysterious as "Rosebud." Sometimes all you have for a while is what is in the four corners of the indictment without a full understanding of all the evidence the government has.

Criminal discovery can be limited and come far too late from a defendant's perspective, which surprises most people, including attorneys who do not typically handle criminal cases. The defense is entitled to much less information in criminal cases than it is in civil cases. The civil rules generally allow for a party to pursue discovery regarding any matter that is "relevant" to a claim or defense.[13] By contrast, a criminal defendant is only entitled to disclosure of the specific categories of information identified in Rule 16 of the Federal Rules of Criminal Procedure and federal caselaw and statutes, which tend to be governed by a narrower "materiality" standard as opposed to a "relevance" standard.[14]

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[12] CITIZEN KANE (RKO Pictures & Mercury Productions 1941).

[13] *See, e.g.*, FED. R. CIV. P. 26(b)(1).

[14] *See, e.g.*, FED. R. CRIM. P. 16(a)(1)(E)(i). As the Court observed in United States v. Alexander:

> Ironically, in a criminal case – where a person's very liberty is at stake – pretrial discovery is more restrictive than in a civil case –

Other disclosures can come much later in the case. For example, under the Jencks Act, the government must produce prior statements made by trial witnesses but is not required to do so before the witness takes the stand *at trial*.[15] As a practical matter, many courts, in their discretion, require the prosecution to provide such material earlier than that point, but there is no set timeframe and the information is often provided close to trial. This timing also applies to impeachment evidence. A defendant's ability to subpoena documents from third parties or depose potential witnesses is also limited compared to civil cases. Given these limitations, many defendants must rely on prosecutors' judgments about what the government is or is not required to disclose and when to do so. This creates a serious ethical obligation on prosecutors to ensure that they are complying with their duties when it comes to discovery and producing evidence to the defense.

One area where we see prosecutors grapple with this obligation is the disclosure of exculpatory or impeachment evidence, i.e., evidence that could show a defendant's innocence or be used to discredit a witness. In the famous 1963 Supreme Court case, *Brady v. Maryland*, the Court held that a defendant's constitutional right to a fair trial requires the government to disclose material exculpatory evidence.[16] Less than a decade later,

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> where the recovery of money is usually the only issue. Unlike civil discovery, where mere relevance to claims or defenses and proportionality is the discovery standard, Fed. R. Civ. P. 26(b)(1), a defendant in a criminal case may receive the kind of discovery sought by these subpoenas only if the requested 'item is material to preparing the defense.'

United States v. Alexander, No. CR 15-295, 2016 U.S. Dist. LEXIS 151635, at *2-3 (E.D. La. Nov. 2, 2016).

[15] 18 U.S.C. § 3500(b)

> *After a witness called by the United States has testified on direct examination*, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

Id. § 3500(b) (emphasis added).

[16] Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request

the Court extended the *Brady* rule to impeachment evidence in *Giglio v. United States*.[17] In certain circumstances, if the prosecutor fails to disclose *Brady* or *Giglio* material on a timely basis, there is a risk that a court will reverse any conviction based on such failure.

However, the standards from these cases have their limitations—for one, they apply only to *material* exculpatory or impeachment evidence.[18] Also, it may be challenging for prosecutors to fulfill their *Brady* obligations, since, in investigating a case, it is not typically their role to think about the defense case. *Brady* requires them to switch hats and think like a defense attorney, which can have its limitations, as shown in certain extreme cases. For example, Judge Nathan in the Southern District of New York called out this very issue in a 2020 opinion in *United States v. Nejad*, where she took prosecutors to task for failing to disclose a potentially exculpatory document until one day before the government rested its case at trial.[19] In explaining the delayed disclosure, the prosecutors said that they had "trial blinders" on and did not recognize the potentially exculpatory value of the

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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.").

[17] Giglio v. United States, 405 U.S.150, 154 (1972).

> Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

Id. at 154-55.

[18] It is worth noting, however, that many states have also adopted an ethical rule based on ABA Model Rule 3.8(d), which requires a prosecutor to disclose *all* exculpatory evidence (not just material exculpatory evidence as required under *Brady*). *See, e.g., Variations of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N (Nov. 8, 2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-8.pdf; Miranda Thompson, *Restructuring "Justice": How States Can Decrease Prosecutorial Misconduct by Depoliticizing Accountability,* 34 WIDENER COMMW. L. REV. 329, 337-42 (2025).

[19] United States v. Nejad, 487 F. Supp. 3d 206, 219 (S.D.N.Y. 2020).

document.[20] Judge Nathan found that this and other violations warranted the rare step of dismissing the indictment on the defendant's motion (which the government did not oppose), even though the jury had already rendered a guilty verdict.[21]

Finally, it is also difficult to correct for a *Brady* violation, especially if it is discovered post-conviction, because the defendant must establish that, not only was there a *Brady* violation, but the defendant would not have been convicted *but for* the suppressed evidence.

Given these limitations, it may be time to think about whether the process can be reworked in favor of an alternative approach. For example, several states have adopted what is called "open file discovery" through which the defendant essentially gets access to whatever the prosecutor has in their files—witness names and statements, forensic evidence, police reports—without regard to whether the evidence is material or whether the prosecution is likely to introduce the evidence at trial. In New Jersey, for example, state prosecutors are required to inform defendants of "*any persons* whom the prosecutor knows to have *relevant* evidence or information."[22]

An open-file approach could be beneficial. It gives both parties the opportunity to review the evidence and test it early on in a case and allows for fulsome defense analysis and investigation. The strongest arguments against open file discovery are that it could result in witness intimidation, violate victim privacy or jeopardize ongoing investigations that involve covert surveillance or undercover agents. But those concerns are often not present in white-collar cases, which makes it an area where open file discovery would be a good fit.

Those are just some of the ethical challenges faced by prosecutors in white-collar cases. I'll now switch hats and discuss some ethical issues that white-collar defense attorneys face.

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[20] *Id.* at 222.
[21] *Id.* at 207.
[22] N.J. CT. R. 3:13-3(b)(1)(F) (emphasis added).

III. ETHICAL CHALLENGES FACED BY DEFENSE ATTORNEYS

A. Who is the Client?

Like prosecutors, even the most seemingly basic of questions can raise ethical issues for defense attorneys – such as the question of who is your client? This question comes up a lot particularly in white-collar matters where the potential clients may be the company, the board of directors, and individual employees and where an attorney might be retained to represent multiple witnesses in an investigation (this is often referred to as serving as "pool counsel").

Now you might say, "why not represent everyone?" Let's look first at one clip involving a multiple representation. This scene is from the show, *Breaking Bad*, and as some background, the three men in the scene are Saul Goodman, a sleazy lawyer character on the show, and Walter White and Jesse Pinkman, the show's anti-heroes—good guys turned criminals.[23]

Now what you see there is Saul establishing an attorney-client relationship with both Walter White and Jesse Pinkman. But as you can likely guess, representing multiple clients with potentially conflicting interests is never that simple. And for those of us who have watched the show, we know that Walter and Jesse were frequently in conflict with each other. In a white-collar matter, it is becoming a best practice to separate counsel for the company versus employees from the outset of an investigation or potential dispute.

Turning back to the original question—who is the client?—it's important to know the answer to this question but also to keep it top of mind throughout the case because who your client is and who you owe a duty of loyalty to should drive the strategy of the case. If you are representing the company, your duty is to the company—not any of the individuals that may be involved in the case.

First, under ABA Model Rule 1.13(b), if you, as the company's lawyer, learn that an employee is (i) violating a duty

[23] *Breaking Bad: Better Call Saul* (AMC Cable Network Apr. 26, 2009).

they owe the company or violating the law and (ii) that violation is likely to result in substantial injury to the company, you have a duty to take steps to act in the company's best interest.[24]

Second, if you are representing the company, you have a duty under Model Rules 1.3(f) and 4.3 to make that clear to individual officers or employees you may interact with in the course of the case—for example, if you interview individual employees as part of an internal investigation.[25]

This type of disclosure typically comes in the form of an "*Upjohn* warning," which is colloquially called a "corporate

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[24] MODEL RULES OF PRO. CONDUCT r. 1.13(b) (AM. BAR. ASS'N 2023)

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

Id.

[25] MODEL RULES OF PRO. CONDUCT r. 1.13(f) (AM. BAR. ASS'N 2023) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR. ASS'N 2023)

> 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.

Id.

Miranda warning." *Upjohn* warnings are derived from the 1981 Supreme Court case, *Upjohn Co. v. United States*, which recognized that, in certain circumstances, the attorney-client privilege protects communications between a company's attorneys and the company's employees.[26] An *Upjohn* warning is a procedural warning that puts employees on notice that any privilege that covers their communications with company counsel is held by the company, not the individual employee.[27]

A proper *Upjohn* warning has four key components: (i) informing the employee that counsel is gathering information to provide legal advice to the company; (ii) counsel represents the company and not them as an individual; (iii) explaining that the conversation is privileged, but the privilege belongs to the company; and (iv) notifying them that the company may waive the privilege and disclose the contents of any conversations with the employee to third parties, including the government.[28]

An *Upjohn* warning is important for multiple reasons. It helps you satisfy your ethical duties by clearing up any confusion about who you represent. It also makes clear that the privilege is held and controlled by the company and protects against a claim that actually the privilege is held by the employee. Yet, this can be difficult to address in practice. For example, it is common for an employee being interviewed in a corporate investigation to say, "Well, you are my lawyer too, right?" Or the employee may be sitting in a meeting with a senior executive or the company's general counsel who he has known for years and assumes that they are all being represented by the same lawyer. Company counsel must make sure that the *Upjohn* warnings are properly delivered in such circumstances.

Another common scenario that triggers ethical issues for white-collar attorneys is if an attorney is serving as so-called "pool counsel," meaning they represent multiple witnesses in the same investigation. One important aspect of this type of representation

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[26] Upjohn Co. v. United States, 449 U.S. 383, 393-395 (1981).

[27] *Id.* at 389-391.

[28] Brian L. Blakeley et al., *Avoiding the Out-House: Dealing with In-House Counsel in a Corporate World,* 36 CORP. COUNS. REV. 33, 44-45 (2017).

is you represent each client individually, not as a unified group, so each client makes separate decisions about their case—they do not need to all agree to proceed the same way.

Even though these are separate representations, structuring a representation in this way can be advantageous to the individual clients because they have counsel who is well-versed in the case and has insights into more angles of the case than an attorney who represents just one client.

This representation, however, can lead to potential conflict and confidentiality concerns. How should an attorney handle these potential issues?

Regarding a potential conflict among the attorney's clients: ABA Model Rule 1.7 requires that an attorney not represent a client if it would be directly adverse to another client or if there is a significant risk that the lawyer would be materially limited by his duties to another client.[29] While Rule 1.7 only restricts the attorney if they determine a conflict actually exists, it provides helpful guidance in determining what to do at the outset of the representation when the attorney is not yet aware of an actual conflict. The attorney should explain to their clients the pros and cons of a pool representation and make them aware of the possibility of a future conflict arising. This can be covered in the attorney's engagement letter with the client. The attorney should also learn what they can at that point from company counsel or their clients to inform themselves of whether there is a conflict or whether one is likely to arise. If the attorney does become aware of a conflict, the attorney must consider whether they can still competently represent both clients. If the attorney has concerns

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[29] MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR. ASS'N 2023)

> [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; or (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.

Id.

about doing so, they should withdraw from the representation of one or both clients and help them find separate representation.

B. What are the Client's Goals?

A client's goals in a white-collar case can also raise ethical issues for defense attorneys, particularly where there is a disagreement between an attorney and client about how best to achieve those goals. One scene from the 1982 Paul Newman movie, *The Verdict*, shows an example of the sorts of disagreements that may arise.[30] As background, Paul Newman's character in the movie, Frank Galvin, is a washed-up lawyer whose friend refers a medical malpractice case to him involving a patient who went into a coma following surgery. It is expected that the hospital will pay a meaningful settlement and in fact the hospital makes such an offer. All Galvin has to do at that point is convey the offer to his clients. And his clients, the patient's sister and brother-in-law, have made clear that they want to settle so they can use the funds to pay the patient's medical expenses. However, after Galvin visits the patient in the hospital, he has a change of heart and decides that he wants to forgo settlement and pursue the case to trial without first consulting with his clients. In this scene, the patient's brother-in-law, Galvin's client, expresses outrage at Galvin for failing to disclose and consult with him about the settlement offer.

Now this is a stark example where an attorney and his client disagreed over strategy. And it seems that they even disagreed over what the goals should be—the client wanted a quick and certain settlement, whereas Galvin was motivated by a desire for the patient to have her day in court. But these issues do arise in white-collar cases in the real world. Clients vary dramatically in personality, background, sophistication and risk tolerance and may have strong views on how the defense should proceed that may be at odds with an attorney's legal and strategic advice. This can occur particularly frequently in white-collar cases where the claims at issue involve complicated issues within the client's specific area

[30] THE VERDICT (20th Century Fox Studios 1982).

of expertise—for example, accounting or complex financial products—and thus the client may feel particularly strongly that they know how to best address those issues with the Court or the jury. How should an attorney handle this?

Model Rule 1.2 provides some guidance on how decision making should be allocated between client and attorney.[31] Rule 1.2(a) generally draws a distinction between the client's "objectives" and the "means" used to pursue those objectives, allocating to the client the determination of what the objectives are and requiring the lawyer to consult but not necessarily defer to the client on the means used to pursue those objectives.[32] It also reserves specific fundamental decisions for the client, including: (i) whether to settle; and, in criminal cases: (ii) whether to plead guilty, (iii) whether to waive a jury trial, and (iv) whether to testify.[33] Frank Galvin's decision to turn down the settlement offer without first consulting with his client appears to be a violation of Rule 1.2.

While Rule 1.2 delineates how decisions ought to be allocated between client and attorney, it does not offer much guidance on how to resolve disagreements that may arise between client and attorney. The rules encourage defense attorneys to engage with their clients and try to reach a mutually agreeable resolution. The comments to Rule 1.2 say that a lawyer should "consult with the client and seek a mutually acceptable resolution of the disagreement."[34] But that of course doesn't guide an attorney as to exactly how they can go about achieving that resolution. For example, if you as the defense attorney learn that your client was not responsible for certain accounting calls, but rather it was your client's direct report with whom your client has a close and friendly relationship, you might want to cross-examine that witness very aggressively. However, your client may object to using such an approach with someone the client considers a good friend.

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[31] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2023).
[32] MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR. ASS'N 2023).
[33] *Id.*
[34] MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 2 (AM. BAR. ASS'N 2023).

While this would seem to be a tactical decision that is for the attorney to decide, the best route is to try to find a solution that satisfies both you and the client. For example, is there a way to make the points without the cross-examination being so aggressive? Is there a way to show that the witness made the accounting calls at issue, but those calls were reasonable, such that neither person is at fault?

Ultimately, the best that a defense attorney can do is to provide thorough and competent counsel and advice to the client without substituting his or her judgment for the client's decision.

C. How to Handle Media Scrutiny?

Another challenge defense attorneys may face, particularly in high-profile white-collar matters, is intense media scrutiny surrounding the case. For example, recall this scene from *The Sopranos* where one of the characters, Junior Soprano, is on trial, walks out of court into the media scrum and is literally knocked over by a boom mic.[35]

Now while many defendants are not literally assaulted by the media frenzy, in this day and age, it can almost feel that way. What is striking to me about the high-profile matters I have worked on that have garnered a lot of media attention is how the attention comes from not only traditional media—*The New York Times*, *The Wall Street Journal*, Bloomberg—but also new media—websites with no print presence at all, YouTube personalities, other social media, and how pervasive it can be 24/7. And what's interesting about this issue is that it is an area where the rules feel out of step with the modern media.

The rules seem to permit the prosecutor to hold a press conference where they can lay out what their case is in some detail with PowerPoints, charts, etc. but it is unclear what, if anything, defendants can say in response.[36] And in the face of this uncertainty, the classical approach for defense attorneys is to not

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[35] *The Sopranos: Whoever Did This* (HBO Network Nov. 10, 2002).

[36] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.6(a) (AM. BAR. ASS'N 2023); E.D.N.Y. & S.D.N.Y. LOCAL R. 23.1.

respond to statements by the prosecutor to the media or other reporting on the case at all.

But intense media scrutiny raises a good question of whether the categorical "no comment" that defense lawyers typically give should have exceptions. In some cases, a defense attorney might be dealing with a situation where the vast majority of articles written were unfavorable, and face the question of what can we do, if anything, to address this overwhelmingly negative media attention that is undoubtedly shaping public opinion and the potential jury pool? And it suggests that in the modern world, where new and old media is an unavoidable part of everyday life—not just for those closely tracking the news—we may need to broaden the rules to allow the defense to respond on a case-by-case basis. As defense lawyers, in certain situations, we may need to be more willing to set aside the old "no comment" playbook and be more open to directly addressing some of the media frenzy that may spring up around big cases.

IV. CONCLUSION

That concludes my prepared remarks for today. I hope they provided some insights into the ethical challenges faced by both prosecutors and defense attorneys. As you can see, there are many challenges on both sides of the aisle in white-collar practice, but those challenges and how they are constantly evolving is just one reason why this is such an exciting and interesting area to practice in. Thank you again to the Dean, Professor Johnson, the faculty, and the Widener School of Law for hosting us.