

Legal and Judicial Ethics for Criminal Practice in US
Afghan Defense Lawyers' Program
Public-Private Partnership for Justice Reform in Afghanistan

February 25, 2010
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- I.** Relationship between Criminal Defense Lawyers and Judges in US
 - A.** Defense lawyers must do these things, or they can face professional discipline.
 - 1.** *Zealously represent* defendants, even when it brings them into conflict with judges. [Duty of Zealous Representation]
 - 2.** *Demand judges be impartial*, and are expected to challenge judges who may not be impartial, but also have a duty to help maintain the impartiality of judges and the decorum of the court. [Duty to Maintain Impartiality and Decorum of Court]
 - 3.** *Advocate on behalf of their* clients, but must always be candid with the judge about the law, the facts and the evidence in the case. [Duty of Candor to the Court, ABA Model Rules 3.3]
 - B.** Judges must do these things, or they can face professional discipline.
 - 1.** *Maintain their own integrity* and avoid even the appearance of impropriety, so they must not favor prosecutors or defense lawyers. [Obligation to Promote Judicial Integrity and Avoid Impropriety]
 - 2.** *Remain impartial*, and avoid any one-sided (ex parte) contact with either defense lawyers or prosecutors.
 - 3.** *Disqualify themselves* in any proceeding if their impartiality might reasonably be questioned. [CANON 2: Judge Shall Perform Duties Of Office Impartially, Competently, And Diligently]
- II.** Defense Lawyer's Interaction with the Judge [ABA Model Rules of Professional Conduct]
 - A.** Defense lawyers must zealously represent their clients. This is an ethical duty, a professional obligation, and a constitutional requirement.
 - B.** Zealous representation requires
 - 1.** Challenging prosecutor
 - a.** The prosecutor has a duty to seek justice, not just convictions.

2. Challenging the judge when
 - a. Judge's impartiality can be questioned: If the judge has personal knowledge about the facts or bias concerning the case, or could appear to have one of these, the lawyer is expected to ask the judge to remove him or her self from the case. Example:
 - i. **Proper Behavior by Lawyer:** Judge announces before trial that this defendant has shown contempt for his community by this crime, so lawyer asks judge to disqualify himself. [Judge has expressed bias about the facts.]
 - ii. **Proper Behavior by Lawyer:** Judge announces before trial that whoever committed this crime has shown contempt for this community by this crime, so lawyer asks judge to disqualify himself. [Judge has expressed bias about the facts.]
 - iii. **Improper Behavior by Lawyer:** Judge announces before trial that evidence in this case may be upsetting but that no one should show their emotions in court, so lawyer asks judge to disqualify himself. [Judge has not expressed bias but has tried to prevent behavior that could harm decorum of court.]
 - b. Judge's impartiality can be questioned: If the judge has a relationship with a lawyer or party in the case that would prevent the judge from being impartial, defense counsel is expected to ask judge to remove him or her self from the case. Examples:
 - i. **Proper Behavior by Lawyer:** If a judge has the case of a man charged with stealing from a friend of the judge, the defense lawyer should ask the judge to remove him or her self.
 - ii. **Improper Behavior by Lawyer:** If a judge has the case of a man charged with stealing from a friend of the judge, the defense lawyer should not complain to a newspaper about the judge. [This is not a proper way to challenge the judge and it harms the decorum of the court.]
3. Vigorous advocacy on behalf of the defendant, but this advocacy must always be candid with the judge about applicable law, facts and evidence. ABA Model Rules 3.3(a)(1).
 - a. Candor with the court about applicable law. ABA Model Rules 3.3(a)(2). Examples:

- i. Proper Advocacy by Lawyer:** If judge *asks* the defense lawyer whether the maximum sentence for the crime is two years, when it is actually four years, the defense lawyer must explain the correct law to the judge, but can argue that two years is an appropriate sentence. [The lawyer does not knowingly make, or fail to correct, a false statement of law.]
 - ii. Proper Advocacy by Lawyer:** If judge *tells* the defense lawyer that the maximum sentence for the crime is two years, when it is actually four years, and that the defendant will get the maximum penalty of two years, the defense lawyer need not explain the correct law to the judge. [The lawyer never made or failed to correct a false statement of law.]
 - iii. Improper Advocacy by Lawyer:** If judge *tells* the defense lawyer that he wants to sentence the defendant to the maximum penalty, and *asks* the defense lawyer whether that is two years, it is improper for the lawyer to say, “I agree, Judge.”. The defense lawyer must correct the judge, unless the prosecution corrects the judge, otherwise he has made a false statement of law by agreeing with the judge, even though it was done to benefit the client. [The lawyer made a false statement of law.]
 - b. Candor with the court about the facts.** Lawyer who asserts a fact, or fails to correct a false statement about a fact, must know it or believe it is true based on reasonable inquiry. [3.3(a)(1)].
Examples:
 - i. Proper Advocacy by Lawyer:** If judge asks where a defendant works, and lawyer knows defendant has no job, the lawyer must acknowledge defendant has no job, but can argue the defendant will obtain a job.
 - ii. Proper Advocacy by Lawyer:** If judge does not ask whether a defendant works, and lawyer knows defendant has no job, the lawyer need not volunteer that the defendant has no job. [ABA Model Rule 3.3(d)]
 - iii. Improper Advocacy by Lawyer:** If judge asks whether defendant works, and lawyer did not ask defendant where he works, the lawyer cannot say, or allow judge to conclude, that the defendant works.

- c. Candor with the court about the evidence. [ABA Model Rules 3.3(a)(3)].
 - i. **Proper Advocacy by Lawyer:** A witness called by a lawyer testifies to something the lawyer *suspects may be* false, and the lawyer does not ask the witness to correct the testimony.
 - ii. **Proper Advocacy by Lawyer:** A defendant testifies to something the lawyer *suspects knows is* false, and the lawyer counsels the defendant against this, and explains the consequences, does not ask the witness to correct the testimony. [The criminal defendant has a right to testify in his own defense, and even if the lawyer knows this is false, the lawyer may not refuse to allow the criminal defendant to testify in his own behalf.]
 - iii. **Improper Advocacy by Lawyer:** A witness (other than the criminal defendant) called by a lawyer testifies to something the lawyer *knows is* false, and the lawyer does not ask the witness to correct the testimony.

- C. Lawyers must maintain the impartiality and decorum of the court by not seeking improper influence with the court and avoiding improper ex parte communications. [ABA Model Rule 3.5]
 - 1. Lawyers must not seek to influence a judge, court official or juror by prohibited by law. [ABA Model Rule 3.5(a)] Examples:
 - a. **Proper Advocacy by Lawyer:** Lawyer gives a speech at a university after a case has ended criticizing a judge's decision in the case. [A public statement about a legal decision is not prohibited by law, and after the case has ended it cannot be intended to influence the judge.]
 - b. **Improper Advocacy by Lawyer:** Lawyer criticizes a judge's decision, while the case is ongoing, by telling the judge's assistant the judge made a serious mistake. [This is an ex parte communication that is improper, because the case is ongoing and it is about a substantive matter, and is an improper effort to influence the court.]

 - 2. Avoiding improper ex parte (one-sided) communication with the court, court officials or jurors. [ABA Model Rule 3.5(b)] Examples:
 - a. **Proper Advocacy by Lawyer:** Lawyer appointed to represent a poor defendant needs funds from the court to travel to interview a witness, and files a request with the court without notifying the

1. Judge must avoid bias, prejudice and harassment and must require lawyers who appear in his or her court to do the same. [Model Rule 2.3]
 - a. Prohibited bias, prejudice, or harassment includes that based on race, sex, gender, religion, national origin, disability, age, sexual orientation, marital status, socioeconomic status or political affiliation. [Model Rule 2.3(B)]
 - b. Harassment is any verbal or physical conduct that belittles or shows hostility toward a person on any of these bases. [Model Rule 2.3, Comment 3].
2. Judges must avoid ex parte communications: a communication between a judge and a lawyer from one side of a matter when the other side is not present. Judges must not initiate, allow or consider such communications, except if expressly allowed by law. [Model Rule 2.9(A)]. Exceptions: When circumstances require it (the other side cannot be reached) and
 - a. The communication concerns an emergency, scheduling, or administrative matter; and
 - b. The judge does not think a party will gain a procedural, substantive, or tactical advantage from such communications; and
 - c. The judge notifies the other side and permits opportunity to respond.
 - d. If the Judge inadvertently receives unauthorized ex parte communication and it relates to substantive matters, then he must promptly notify the other side and allow an opportunity to respond [Model Rules 2.9(B)].
3. Judge must disqualify him or her self in any proceeding in which his or her impartiality might reasonably be questioned. [Model Rule 2.11(A)]
 - a. Bias or Personal Knowledge: if the judge holds a bias concerning a party or lawyer, or has personal knowledge of relevant facts.
 - b. Prior Involvement as a lawyer, witness or judge: If judge served as a lawyer, material witness or judge in another court in a matter; or
 - c. Economic Interest: If judge or spouse or children hold economic interest in the matter or a party; or
 - d. Involvement in the Proceeding: If the judge know anyone closer than a cousin is a party, lawyer, material witness or interested third-party.