Discovery in Criminal Cases & the Ethical Obligations of Defense Counsel

Live Webinar, October 17, 2023, 6:00-7:30pm

All attorneys have core ethical obligations that guide their interactions with their clients, adverse parties, and the courts. For criminal defense lawyers, especially those providing public defense representation, challenges such as limited time and resources, substantial workloads, and the goals of providing client-centered representation can create tensions between these ethical rules and the realities of their practice. This tension figures prominently on the topic of discovery, where lawyers are faced with hours of body worn camera footage, terabytes of digital data, rules that restrict disclosure methods, and challenges relating to limited access to clients who may be in custody. This program will help lawyers identify the ways to meet their ethical obligations while engaging in client-centered representation.

I. **Core Ethical Obligations**: at the heart of an attorney's role as an advisor and advocate for their client, are ensuring that they are competent, prompt, and diligent in their representation. Virginia Rules of Professional Conduct, Preamble. See also: ABA Criminal Justice Standards for the Defense Function, Part I
Attorneys must also provide the client with "an informed understanding of the client's legal rights and obligations and explains their practical implications." Virginia Rules of Professional Conduct, Preamble.

In addition to these ethical obligations, a criminal defense attorney should be mindful of relevant standards of practice. These standards help a lawyer identify practices that demonstrate zealous and constitutionally effective representation. For public defense lawyers in Virginia these include the Virginia Indigent Defense Commission's Standards of Practice. Additional guidance can be found in the ABA's Criminal Justice Standards for the Defense Function.

a. Competence. Rule 1.1 requires counsel to have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for representation." One of the critical aspects of this requirement is the ethical obligation for **thoroughness and preparation**.

- As explained in Comment 5, "Competence" "includes adequate preparation" and requires the attorney make factual and legal inquiries and analysis.
- Competency in Virginia relates not only to litigation, but also to plea negotiations, mitigation and sentencing, understanding the implications of a client's immigration status, and other collateral consequences of convictions.

b. **Diligence**. Rule 1.3 requires counsel to "act with reasonable diligence and promptness in representing a client" and to ensure that any delays do not cause harm to the client or the client's case.

- As explained in Comment 1, the lawyer must be a zealous advocate on behalf of the client. While the lawyer has "professional discretion" to determine the means by which a matter is pursued, they should do so in consultation with, and collaboration with the client. (See also Rule 1.2, Scope of Representation, "[a] lawyer shall abide by a client's decision concerning the objectives of the representation . . . and shall consult with the client as to the means by which they are to be pursued.)"

i. A lawyer also has a responsibility to control their workload so as to ensure they can provide proper representation to each case and client. (Rule 1.3, Comment 1; see also ABA Criminal Justice Standards for the Defense Function, 4-1.8 Workload)

c. Communication. Rule 1.4 directs that a lawyer "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

- Communication requires a lawyer inform the client "of facts pertinent to the matter."
  - The attorney should share with the client all evidentiary materials (subject to any protective orders issued by the court) and should discuss in depth the client's view of the facts. Standards: ABA Criminal Justice Standards for the Defense Function 4-3.3

- Such communication includes providing "sufficient information" to allow the client to "participate intelligently" in decisions about both the objectives of the representation and the means by which they are carried out. (See Comment 5 to Rule 1.4)
- The rule also requires the lawyer take the time to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."
  - In criminal cases, critical decisions left wholly to the client are the decisions of whether to testify at trial, whether to waive their right to a jury trial, and what plea to enter (See Rule 1.2, Scope of Representation) thereby making it essential that information impacting these decisions be conveyed in a way that the client can understand and use to inform their decision-making.

d. **Duty to Investigate**. The duty to investigate includes investigating the case against the accused as well as positive evidence that mitigates guilt and punishment. ABA Criminal Justice Standards for the Defense Function, 4-4.1

- The duty to investigate includes the duty to do so promptly and to do so even if the government's case appears strong or the

accused indicates a desire to plead guilty. ABA Criminal Justice Standards for the Defense Function 4-4.1

- A timely and thorough investigation is necessary in order to be able to meaningfully advise a client on the strength of their case, their likelihood of success at trial, and the pros and cons of accepting a plea. Investigation also helps inform client choices regarding whether to seek a jury or to testify.

e. **Scope of Representation.** Rule 1.2. A critical component of a lawyer's ethical responsibilities is to address the scope of their representation. A lawyer brings expertise and experience to bear, providing a guiding hand and offering important advice that helps inform a client's decision making. However, clients (subject to the limitations of Rule 1.2(c) and (e)), set the objectives of the representation. As it relates to criminal cases, there are several foundational decisions that are ultimately left to the client:

- Whether to accept a plea agreement/what plea is to be entered.
- Whether to waive or to seek trial by jury.
- Whether to testify.

While tactical decisions are left to the lawyer, it is important to be mindful of both the client's objectives, and the client's expertise, in determining how to execute decisions. Lawyers should not reject client input on important decisions such as whether to seek a continuance, file an objection, or call a particular witness. Clients bring critical perspectives to the table and, ultimately, must bear the consequences of the case's outcome. For that reason, Comment 1 reminds attorneys that "[b]oth lawyer and client have authority and responsibility in the objectives and means of representation." Within the legal bounds of a lawyer's professional obligations, a "client also has a right to consult with the lawyer about the means to be used in pursuing those objectives." When possible, "the client-lawyer relationship partakes of a joint undertaking." Rule 1.2, Comment 1.

II. **Other Standards**. Not all issues can readily find resolution in the Rules of Professional Conduct. These rules provide foundational barriers for all attorneys. However, much of the challenge for defense lawyers lays in ensuring that while fulfilling their role, they are also being mindful of and responsive to the needs, opinions, and positions of their clients. Meeting ethical obligations and exercising your professional judgement, while also maintaining a client-centered approach to representation can be especially challenging. To help guide lawyers in these efforts, in addition to the Rules of Professional Responsibility, criminal defense lawyers can look to standards like the ABA's Standards for the Defense Function as well as the VIDC's Standards of Practice.

a. ABA Criminal Justice Standards for the Defense Function (ABA Defense Standards)
    - As explained in the introduction, the ABA Standards "are intended to provide guidance for the professional conduct and performance of defense counsel. They are not intended to modify a defense attorney's obligations under applicable rules, statutes, or the constitution. They are aspirational or describe 'best practices,' and are not intended to serve as the basis for the imposition of professional discipline."
    - The Standards recognize that the role of the defense lawyer is a challenging one. "Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity."

b. Virginia Indigent Defense Commission's Standards of Practice (VA SoP)
    - Virginia law requires the Virginia Indigent Defense Commission set standards for practice that apply to all public defenders and private attorneys who provide court-appointed representation. Virginia Code § 19.2-163.01. "The Standards give meaning to the Sixth Amendment Right to Counsel and further the overall goal of zealous and high-quality legal representation for each and every client.
    - "These Standards should not serve as a benchmark for ineffective assistance of counsel claims or attorney discipline hearings. Rather, they should serve as standards of practice for court-appointed counsel and public defenders providing indigent defense in Virginia. Failure to comply with these Standards can result in the removal of the non-compliant attorney from the list of counsel certified for court-appointed representation."
    - As it relates to discovery, VA SoP 4.2(A) directs "Counsel must pursue discovery procedures provided by the Constitution of the United States, the Code of Virginia, the Rules of the Supreme Court of Virginia, and any local practices of the court, and pursue such available informal discovery methods as soon as practicable unless there is a sound tactical reason for not doing so. In considering discovery requests, counsel should consider that such requests will trigger reciprocal discovery obligations."

III. **Application of Ethical Rules to Real World Representation**:

Below are a series of potential issues that can arise in representation. For each issue, consider the ethical, legal, and moral obligations and limitations an attorney may have when faced with these situations.

Background: You have been appointed to represent Donnie Davis.

- Mr. Davis is charged with robbery, a felony.
- William Wilson claims that he was walking home from work one evening when a man with a gun confronted him and took his backpack. According to Wilson, the backpack contained $1,500 in cash from work that he was supposed to deposit at the bank the next day.
- Two days later Davis was stopped for changing lanes without using a turn signal. A search of his car found Wilson's backpack in the trunk. The money was missing, but other items belonging to Wilson were found in the bag.
- Davis was arrested.
- Wilson later identified Davis from a photo lineup.

SCENARIO 1: **You have received discovery that includes police reports, body camera footage, the photo array, and several laboratory reports. None of the discovery material is identified as restricted dissemination materials.**

Question: In general, what obligations do you have regarding providing the client access to the discovery materials?

Answer: You must provide the client with access to the material, at least to the extent that the client may read, view, hear or see the material. Unless restricted by agreement, court order or other law, you must provide the client with copies of the material. **Rule 1.4(c)** requires that "[a] lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter."

See **also Comment [5] to Rule 1.4** ("A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.") The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party.

In order for an accused to make meaningful decisions about how to proceed in a case including whether to accept a plea offer, whether to proceed to trial, whether to demand

a jury, and whether to testify in their own behalf, they must be armed with as much information as possible. This includes being able to personally view all video and recorded evidence.

See also: ABA Criminal Justice Standards for the Defense Function 4-3.3 (Interviewing with the Client): The attorney should share with the client all evidentiary materials (subject to any protective orders issued by the court) and should discuss in depth the client's view of the facts.

See also, ABA Defense Standard 4-3.3(c)(i), "As early as practicable in the representation defense counsel should also discuss and share with the client the evidentiary materials relevant to the matter."

Question: What obligations do you have to allow Mr. Davis to view the materials himself (as opposed to providing a summary or overview)?

Answer: Unless restricted by protective order, agreement, or other law, you must permit the client to review the material. This is especially important for video and photos, as a verbal description may not be sufficient communication.

Question: Mr. Davis wants a copy of the discovery materials. Do you have to give it to him?

Answer: Unless restricted by law, court order, or agreement, the client has a right to a copy of the discovery.

See also, ABA Defense Standard 4-3.9, Duty to Keep Client Informed and Advised About the Representation. "(b) Defense counsel should promptly comply with the client's reasonable requests for information about the matter and for copies of or access to relevant documents unless the client's access to such information is restricted by law or court order. Counsel should challenge such restrictions on the client's access to information unless, after consultation with the client, there is good reason not to do so."

Question: Mr. Davis asks you to make 2 copies of the materials. Do you have an obligation to provide more than 1 copy? Does it matter why he needs additional copies?

Answer: Generally, no. The attorney is only required to provide a single copy of the discovery. However, if an agent of the client needs a copy to use in furtherance of the client's goals and objectives of the representation, additional copies are to be provided.

The attorney may charge a reasonable fee to the client for additional copies if the client has funds or resources to pay for the copies. The attorney may also place reasonable limits on the number of copies to be provided.

Question: Mr. Davis asks you to send a copy of the discovery to his mother. Do you have to do that?

Answer: Yes. You must follow the client's instructions although you must also explain any risks of sharing the information with a family member.

See also, ABA Defense Standard 4-5.1, Advising the Client. "(g) Defense counsel should advise the client to avoid communication about the case with anyone including . . . other possible witnesses, persons in custody, family [and] friends."

Question: Mr. Davis is being held in jail. What are your obligations to review discovery with him if he is custody?

See also, ABA Defense Standard 4-2.2 (c), Confidential Defense Communication with Detained Persons. "All detention or imprisonment institutions should provide adequate facilities for private, unmonitored meetings between defense counsel and an accused. Private facilities should also be provided for the review of evidence and discovery materials by counsel together with their detained clients."

Question: Mr. Davis asks for a copy of his discovery. You are concerned about him having a copy while he is in jail, as those items could be viewed by other incarcerated individuals, making it easier for someone to use that information against him. Do you have to provide him a copy if, in your professional opinion and experience, you believe there is significant risks for the client and/or their case by doing so?

Answer: You must fulfil the role as an advisor, explaining and counseling the client on the risks that may exist, such as other incarcerated individuals or jail staff reading their materials. This includes counseling the client about the risks of sharing the information with family members and friends. The attorney's obligation is to inform the client of the risks associated with misuse of the information, but also to abide by the client's decision (after making them aware of the risks). As the attorney, you may not unilaterally decide that it is in the client's best interest not to have the information and withhold it.

Question: Can you as lawyer ever decide not to share discovery with a client?

Answer: No. Even if there is a restriction prohibiting you from providing a copy, you must reveal to the client the relevant information so that the client can make an informed decision about the representation, i.e., accept plea offer, go to trial, etc. See discussion above regarding the duty of communication under Rule 1.4.

Question: The discovery materials are very long. Can you give Mr. Davis an oral summary of them instead of giving him a copy?

Answer: No, not unless there is a restriction in place prohibiting you from providing a copy of the material, in which case you may provide him with an oral summary of the information.

Question: What if you read all the materials to him verbatim? Could you then opt not to give Mr. Davis a copy of the materials?

Answer: No. Unless otherwise restricted by law, court order or agreement, you may not decide to read discovery in lieu of providing a copy to your client.

Question: If Mr. Davis was on bail rather than in jail, does that change any of your obligations regarding discovery?

Answer: Whether the client is incarcerated or out on bail, the obligation to share discovery with the client is the same, although the logistics may be different. This includes not only providing the client with the materials but taking the time to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment 5, Rule 1.4.

SCENARIO 2: View only at CA's Office: Rather than provide you with copies of the discovery, local practice is for the prosecutor only to make the discovery available in their office for you to view.

Question: What obligations do you have to document what you are seeing?

Answer: To the extent practicable, you must document the information and material you are reviewing.

Question: Do you have an obligation to copy down information verbatim?

Answer: If necessary, yes, important relevant information should be documented verbatim, unless the volume of the material makes it impractical to do so.

Question: You have your cell phone with you, can you just take a photograph of the materials?

Answer: Yes, *unless* you have agreed to the CA's policy prohibiting photography or copying.

Question: Mr. Davis wants to go with you to the CA's Office to view the discovery? Can you bring him? Are there any things you should do before bringing Mr. Davis to a meeting at the prosecutor's office?

Answer: Yes. Mr. Davis could be able to explain some of the materials that you might not otherwise recognize or attach any importance to. It is important, however, that you also fulfill your obligations to advise Mr. Davis of any things he should be cautious of, such as discussing case information, as you will potentially be in places in which others with adverse interests will be present.

SCENARIO 3: Extensive Content: The discovery you were provided includes 50 hours of recorded telephone calls from the jail. You have other cases and don't believe you can devote 50 hours to listening to these calls.

Question: In general, what are your obligations?

Answer: Defense counsel, especially public defenders, and court-appointed counsel, similarly have obligations to defend cases with competence and reasonable diligence.

Rules 1.1 and 1.3 do not impose a "one-size-fits-all" requirement to review "every minute" of all recordings in all criminal cases. While what constitutes reasonable diligence and competence is fact specific and depends upon numerous factors such as the client's goals or objectives, the decision not to fully review all of the content can impact your ability to be fully prepared, give the client informed advice, and to be able to zealously defend your client. Attorneys have an ongoing obligation to monitor their workload and to take steps as necessary to limit the number of cases they handle to ensure they have adequate time and attention to devote to each case. Rule 1.3, Comment 1.

See also, ABA Defense Standard 4-1.8, Appropriate Workload. "(a) Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced and should work to ensure competent representation in counsel's existing matters."

Negotiation of a plea is a "critical stage" in a case to which a client is entitled to effective assistance of counsel. Attorneys have an obligation to not only timely inform clients of plea offers being made (*Missouri v. Frye*, 566 US 134 (2012)) but to effective assistance regarding the negotiation of the plea as well as the advice given to a client about whether to accept the plea. *Id.* See also, *Hill v. Lockhart*, 474 US 52 (1985). In order to effectively negotiate a case on behalf of the client and advise a client about whether to accept any pleas offered, an attorney must have a thorough understanding of the evidence against the client, the strength of the state's case, the nature and strength of the defenses available, and evidence in mitigation of guilt and/or punishment. This requires knowledge and understanding of the evidence, including that which is provided via discovery.

Question: Can you delegate the responsibility of listening to all the calls to your paralegal?

Answer: Yes, you can ask a paralegal or other support staff who is properly trained to listen to the calls and summarize the content, provided the summarization is complete and thorough. However, this individual cannot make legal judgments regarding the probative value, admissibility, or relevance of the content of the recording.

While staff may be used to undertake preliminary evaluation of video and audio evidence, it is the lawyer who ultimately must be responsible for the case, the review and assessment of evidence and the communication of that information to a client. Lawyers should be cautious in relying too heavily on support staff to fulfill this obligation as the staff may lack both the legal expertise to recognize potential evidentiary and constitutional issues that are implicated by various portions of the recordings and the attorney should have the best grasp of the overall case evidence and is in the best position to determine what evidence is important.

Question: If you have a paralegal review the materials, what are your ethical obligations to review their work?

Answer: Under the rules a lawyer may use a non-lawyer assistant to review materials (Note, the non-lawyer assistant is bound by the same rules of confidentiality as the lawyer). However, the rules further require that the lawyer review their work product. Rule 5.3. The duty of a lawyer to supervise the work of a legal assistant is well established. ABA Formal Op. 506 (June 7, 2023).

Question: Is it ok to "spot" review them, checking portions of the call for relevant information?

Answer: Yes, if this is *in addition to* having the paralegal listen to them in their entirety and summarize them. Otherwise, no, a spot review risks overlooking material information.

Question: Do you have an ethical obligation to tell Mr. Davis that the recordings were reviewed by a paralegal?

Answer: Generally, no, there is no duty to inform a client that support staff have reviewed material. However, if you, as the attorney, did not fully review your paralegal's work, you *do* have an obligation to disclose that to the client.

Question: If the prosecutor indicates they have reviewed the materials and indicates there is nothing of substance on the recordings, do you have to review them?

Answer: Yes, you must still review them as part of your obligation of diligence. Part of the role of the defense lawyer is to bring their expertise and experience to the review of the case facts and evidence. This includes identifying information that may support a

defense, reduce guilt, or mitigate punishment. The information itself may lead to other witnesses or new theories of inquiry. It can also provide additional insights that may indicate mental health concerns or difficulties in understanding and processing information you have provided to Mr. Davis.

Question: Does that change if it is Mr. Davis who indicates he is confident there is nothing of substance on the recordings, do you still have to review them?

Answer: No.

Question: You have reviewed the recordings and did not find anything of value. Mr. Davis, however, wants to listen to the recordings. Do you have to make the recordings available to Mr. Davis?

Answer: Yes, if there is a practical means of permitting him access to the recordings and there is no restriction on dissemination of the materials.

Question: If Mr. Davis were in custody and you had to go to the jail to allow him to listen to the recordings do you have to go?

Answer: You have an obligation to make discovery available to Mr. Davis. If he is in custody and can only access this information through your presence at the jail, then you must do so. If the jail permits it, you can have a paralegal or other support staff review the materials with Mr. Davis. If this is done, it is important to ensure support staff does not give Mr. Davis any legal advice (such as whether the recordings are admissible).

SCENARIO 4: Alibi and Strategic Choices: Mr. Davis tells you he was not the person who committed the robbery and provides information about an alibi, including an alibi witness. You know that if you request discovery, under Rule 3A:11, you will be obligated to share the alibi witness information with the prosecutor as part of your reciprocal discovery obligation. From prior experience, you know that the prosecutor will send the police to talk with your alibi witness and you worry that the witness may decide not to testify if the police start to harass him.

Question: Can you decide not to ask for discovery in order to not have to disclose your alibi information?

Answer: No, you cannot make this decision without the client's consent. The decision to forego discovery must be made by the client, after consultation with you. This consultation would require discussion of the pros and cons of foregoing discovery.

Question: What if Mr. Davis tells you he wants you to file for discovery despite your confidence that this will substantially harm his chances for success at trial?

Answer: You must abide by the client's decision even if it is against your professional judgement. While strategic decisions are largely left to the lawyer's professional judgement, the decision to forgo discovery is one which could mean depriving the client of access to critical case information that can help inform their decisions such as whether to accept a plea offer, whether to testify, and whether to seek trial by jury.

See VA SoP 1.0 (B), Lawyer-Client Relationship, "As a general matter, ***the client,*** after consultation with the lawyer, holds the ultimate decision making authority over lawful objectives of the representation. The lawyer, owing to his or her training and experience, generally chooses the means of obtaining the client's objectives." (See also Comment, "Because of the lawyer's knowledge, skill, and experience, clients normally defer to the lawyer with respect to the means used to accomplish the client's objectives. If the lawyer has reason to believe the client may disapprove of a particular course of action, the lawyer should consult with the client. The lawyer should give genuine consideration to the client's request, but the lawyer retains the ultimate decision as to means . . . . If the lawyer pursues means that the client disapproves of, the lawyer should explain to the client the reasons for his or her course of action and how it best seeks to accomplish the client's objective.")

See also, ABA Criminal Defense Standard 4-5.1(i), "After advising the client, defense counsel should aid the client in deciding on the best course of action to and how to best pursue and implement that course of action," and Standard 4-5.2 (d), "Strategic and tactical decisions should be made by defense counsel, after consultation with the client.

. . Such decisions include how to pursue plea negotiations, how to craft and respond to motions, and . . . what witnesses to call, whether and how to conduct cross-examination, . . . what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced."

SCENARIO 5: Prosecution Requires You Limit Disclosure of Information: The prosecutor offers to provide you with the name and relevant information about the confidential informant who provided law enforcement with the information that formed the basis for the pursuit and subsequent stopping of Mr. Davis. However, they will only provide the information if you agree not to share it with Mr. Davis. They indicate this is being done out of concern for the informant's safety. *Note: this is not being designated as "Restricted Dissemination Material" under Rule 3A:11 but is a condition placed by the prosecutor prohibiting any disclosure to the defendant.*

Question: Can you agree to receive information that you cannot share with Mr. Davis without consulting him first?

Answer: Absolutely not. Absent state or federal law, a rule of court, or court order to the contrary, an agreement that in any way limits the lawyer's ability to give information to his client would be prohibited according to the analysis in LEO 1854. This is a decision that you cannot make unilaterally, and you must discuss with your client, Mr. Davis, the risks and benefits of entering into an agreement of this nature.

In **LEO 1854**, the VSB Ethics Committee suggested that it might be possible, in the context of a plea offer, to agree to withhold from the client/defendant the identity and involvement of a CI. The committee stated:

> "Rule 1.4(c) would permit the defense counsel to withhold such information from the defendant if the defense counsel believes that the defendant has enough relevant information about the pertinent facts to make an informed decision [to accept or reject a plea offer]; however, whether Witness X's identity and involvement is additional information that must be disclosed to the client in order for the client to make an informed decision about accepting or rejecting the plea offer is fact specific and must be determined on a case-by-case basis."

But the current scenario is different because the CA is not making a plea offer conditioned on withholding from Mr. Davis the information about the CI. The CA is simply refusing to provide the CI's information unless you agree to keep it secret from Mr. Davis.

See also, **LEO 1864**.

Question: After the case ends Mr. Davis requests a copy of his file, should you include the CI information?

Answer: No. The material is in the file only because you agreed (with the client's informed consent) not to share the information with the client.

Question: Does it matter if Mr. Davis was acquitted or convicted?

Answer: No.

SCENARIO 6: Inadvertent Disclosures: The CA has provided several documents and police reports. Most of the reports have witness Wilson's social security number and full DOB blacked out, however one report fails to redact that information.

Question: In general, what are your obligations relating to inadvertent disclosures?

Generally, there is no obligation to return or not use information that has been given to you by inadvertence by your adversary. Rule 4.4(b) carves out an exception if you know that the inadvertently delivered information is privileged. The reports containing Wilson's personal identification information is not privileged. Rule 4.4(b) only applies if the information that has been inadvertently disclosed is "privileged," i.e., protected under the attorney-client or attorney work product privileges.

Additionally, as a general rule, you are not under any ethical duty to disclose that your adversary has made a mistake, error, omission or has misunderstood facts or legal issues. An arguable and very unclear exception to this principle applies when you and the other lawyer have agreed to a material term, and the opposing counsel by mistake either omits the term or mistakenly alters it from what had been agreed.

However, if there is a protective order entered that specifies that Wilson's SSN and/or DOB is to be kept confidential, and/or redacted if revealed in any documents produced in discovery, at attorney would be wise to follow Rule 4.4(b) and inform the CA of the mistake. Even though Rule 4.4(b) does not apply, you run the risk of violating a court order, or possibly violating state or federal law by using or disseminating Wilson's SSN or DOB. A lawyer may not knowingly disregard a court order entered in the course of a proceeding. Rule 3.4(d).

In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient. Applicable statutes, regulations, or common-law rules may require affirmative disclosure in some circumstances, for example disciplinary rules in some states requiring lawyers to disclose a client's intent to commit life-threatening crimes or other wrongful conduct. Restatement (Third) of Law Governing Lawyers § 98 cmt. e (2000).

Virginia's Rule 4.1(b) indicates as follows: [i]n the course of representing a client a lawyer shall not knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. But in this hypothetical situation, the redaction of Wilson's information is simply a matter of an agreement with the CA. Your conduct in using the improperly redacted information could be a breach of contract, but using the information would not be a criminal or fraudulent act. So, Rule 4.1(b) would not be violated simply because you discover and use the poorly redacted information.

Again, most authorities say the lawyer may remain silent and not disclose information, especially if disclosure would be detrimental to or prejudice the client.

Question: What if the information accidentally included in the material were internal or personal notes of the CA about the case?

Answer: This information, though accidentally produced, falls in the category of pure attorney work product and is therefore privileged from discovery. Rule 4.4(b) applies, and you would be required to inform the CA and abide by the CA's instructions regarding disposition or destruction. You are prohibited from using privileged information.

Question: If you know information was provided to you inadvertently, can you turn that information over to Mr. Davis?

Answer: Maybe. Depends upon the specific circumstances. If Wilson's SSN and DOB are the subject of a court order prohibiting sharing that information with Mr. Davis, the answer is "NO." If Wilson's SSN and DOB are not the subject of a protective order, you would not be violating any ethics rules by sharing the information with Mr. Davis. You would still need to satisfy yourself that doing so does not violate any state or federal law.

Question: If you return/destroy the inadvertent record, can you still use what you recall of that information to do additional investigation and research or during cross-examination? Could you use it to file a *Brady* Motion to disclose the information?

Answer: No. Though it is not possible to "unlearn" what you have already learned by inadvertence. Nevertheless, if the information is protected under a court order, it would be ethically impermissible to use the information you were not supposed to have for any purpose, even to conduct further research and investigation on Wilson, or to obtain impeachment or other information to attack Wilson's credibility on cross-examination. You could file a *Brady* motion to ask the Commonwealth to disclose the information. It is an open question as to whether filing the *Brady* motion is itself an improper "use" of the

inadvertently disclosed SSN and DOB. But Comment [3] to Rule 4.4 suggests that the filing of such a motion may **not** be an improper use under that Rule.

SCENARIO 7: Restricted Materials: By agreement with the CA, Wilson's address and phone number have been redacted from the police reports. You are at the CA's office reviewing a report that has Wilson's address and phone number blacked out, however, if you hold the paper up to the light, you can see through the blackout and can read the excised information.

Question: Can you copy the information down and use it? Do you have an obligation to tell the CA of the problem?

Answer: Although there is no ethics ruling on point, a useful analogy is the various state bar ethics opinions that have been issued regarding an attorney's mining and use of "metadata" that has been inadvertently delivered by an adversary. Metadata is information contained but not patently visible in an electronic document. If the person sending the electronic document has not exercised reasonable diligence to scrub or remove the metadata, a person receiving the electronic document may look for and find the metadata. Metadata can reveal facts about an electronic document that the sender may not want you to know such as the author, date, changes, revisions, etc., which could prove useful to you or potentially detrimental to your opponent.

State bar ethics opinions have struggled with whether it is unethical for lawyers to search for and use metadata that an adversary has inadvertently allowed to remain in an electronic document that has been delivered to the opponent. There is a split of opinions on this issue. Some states hold that any affirmative effort to search for, find and use metadata that was not intended for the receiving attorney to see, is unethical and violates Rule 4.4(b) or other ethics rules. Other opinions hold that it is not improper to search for, find and use metadata, if the sending attorney has failed to use reasonable diligence to remove or scrub the metadata before sending the electronic document.

The Virginia State Bar has not weighed in on this issue; however, the majority view is that a lawyer may not ethically search for, find, and use metadata when the lawyer knows that such information was not intended to be included in the electronic document.

Moreover, in many of the ethics opinions about using metadata, the particular jurisdiction's version of Rule 4.4(b) becomes critically important. That is because many states have adopted the ABA's MR 4.4(b) which protects *any* document that was misdelivered or inadvertently sent. In contrast, Va. Rule 4.4(b) only applies if the inadvertently sent document is *privileged*.

If, in this case, you and the CA have agreed that Wilson's address and phone number are to be protected from discovery, there is arguably a reasonable expectation that such

information is not to be used or disclosed. That said, the analyses in some of the preceding questions relies either on an application of Rule 4.4(b), which does not apply because Wilson's address and phone number is not covered by the attorney-client privilege or work product privilege; or the existence of a court order prohibiting the use or disclosure of the information. In this instance, neither of these circumstances are present.

Assuming the restricted dissemination materials calling for redaction of Wilson's address and phone number are only an agreement between you and the CA, and not embodied in any protective order entered by a judge, the RPC would ***not*** prohibit you from using the information that was intended to be redacted. There have been a number of ethics opinions holding that the RPC does not prohibit a lawyer from exploiting an error, omission or misapprehension by an adversary.

See, for example, **Virginia LEO 1215** (1/31/89) (explaining that a lawyer may not disclose to the court or the prosecutor that the court had granted a continuance at the prosecutor's request and set the lawyer's client's first degree murder trial one day after the expiration of statutory speedy trial, as doing so would harm the interests of the client, and the lawyer neither was consulted in setting the date or consented to the continuance.)

See also **Virginia LEO 1400** (3/12/91) (explaining that a criminal defense lawyer representing a client found guilty of a felony is under no duty to reveal that the sentencing document later signed by the judge erroneously stated that the defendant was found guilty only of a misdemeanor (assuming that the lawyer did not endorse the document or otherwise participate in drafting it); concluding that the lawyer was ethically obligated not to reveal the error, because the revelation would damage the client.). Under DR:7-101(A)(3), "it would be unethical for an attorney to reveal information that would prejudice or damage his client.").

Interestingly, while the ABA Informal Opinion states that the lawyer does not have a duty to inform the client of the adversary's error, the committee does not address whether the lawyer would be obligated to exploit the adversary's error if the lawyer did inform the client of the mistake. In another case, a lawyer was disciplined for exploiting an adversary's mistake in drafting a final decree of divorce. Roanoke Lawyer gets reprimand in case with divorce drafting error, Va. Law. Wkly., Nov. 9, 2010 (Richard L. McGarry represented his sister in her divorce, and in drafting the final order the husband's lawyer made a mistake. The sister owed her ex more than $11,000, but the order, drafted by the husband's attorney, switched the parties, and stated the man owed the money. The judge entered the order on Oct. 15, 2007. A short time after the order was entered, Strentz discovered the error and asked McGarry to cooperate in presenting a corrected order. He refused and instead contacted the Division of Child Support Enforcement and demanded that the agency take action to collect the arrearages. On Oct. 25, Strentz mailed McGarry notice of a hearing for Nov. 6 to correct a clerk's error as set forth in Virginia Code § 8.01-428.2. The provision is an

exception to the general rule that a court order becomes final after 21 days. The matter was not heard that day because the judge was ill.

Despite Strentz's effort to correct the order, McGarry wrote the Division of Child Support Enforcement on Nov. 5 that the order was final and could not be modified under Rule 1:1 of the Rules of the Supreme Court of Virginia even if Strentz claimed she had made a mistake. On Nov. 8, McGarry wrote Strentz contending that the error was a 'unilateral mistake' that could not be corrected.

The VSB district committee concluded that McGarry had violated Rule 3.4 of the Rules of Professional Conduct, in taking action that 'would serve merely to harass or maliciously injure another,' and Rule 4.1, in knowingly making a false statement of fact or law. They issued a public reprimand.)

In summary, other than those specifically covered by judicial opinions, ethics rules or opinions, lawyers have no duty to speak up when the adversary misunderstands something or makes a mistake. And the absence of the affirmative duty to disclose a client's confidence in that setting presumably means that lawyers have a duty to remain silent.

Question: What if instead you received a copy of the discovery, but the CA had not done a complete job of blacking out the phone number and you were able to read the number from what was visible. Could you use that information to call the witness?

Answer: Yes, as the information is not privileged or the subject of a protective order.