

Garden State CLE presents:

**Ethical Issues in the HBO
series "The Night Of"**



Lesson Plan

Introduction

This highly acclaimed HBO eight-part mini-series was based upon a British production called "Criminal Justice." It was originally supposed to star the late James Gandolfini as the protagonist, attorney John Stone. However, upon Gandolfini's passing in 2013, the role went to John Turturro.

Directed by Steve Zaillian, the series was shot in a classic film-noir style and portrays how the workings of the criminal justice system can devastate defendants, their families, friends and entire communities.

Beyond the dark and brooding aspects of the story line, "The Night Of" has special significance for practicing attorneys as it explores a large number of critical ethics issues that are common to both the civil and criminal practice.

This Garden State CLE will explore some of those issues.

Plot

Nasir "Naz" Khan is a naive Pakistani-American college student living in Queens, New York. While using his father's cab one night with intentions to attend a popular party, Naz picks up a young woman, Andrea. After a night of sex and drugs with the woman, Naz wakes and finds her stabbed to death; he has no recollection of what happened. Naz leaves the scene but is arrested for a minor traffic violation shortly after. At the station, he declines to answer calls to his mobile phone from his parents, who are worried about him and trying to reach him. When searching Naz, the police find a knife in his pocket matching the suspected murder weapon. In addition, several witnesses identify him as having been at the crime scene. Naz is interrogated by detective Dennis Box and eventually asks for a lawyer, but one is not provided, until world-weary, struggling defense attorney John Stone hears of the case and steps in to represent Naz.

Chapter I

"I'm here to see my client."



RPC 7.3 Personal Contact with Prospective Clients

- (b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:**
- (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;**
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Ohralik v. Ohio State Bar Association, 98 S. Ct. 1912 (1978).

(a) A lawyer's solicitation of business through direct, in-person communication with the prospective clients has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client.
P. 1917.

(b) The State does not lose its power to regulate commercial activity deemed harmful to the public simply because speech is a component of that activity.
Pp. 1918-1919.

(c) A lawyer's procurement of remunerative employment is only marginally affected with First Amendment concerns. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests.
Pp. 1919-1920.

(d) In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions, especially members of the Bar. Protection of the public from those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of “vexatious conduct” is a legitimate and important state interest. Pp. 1920-1922.

(e) Because the State's interest is in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury to the person solicited is immaterial. The application of the Disciplinary Rules to appellant, who solicited employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert, does not offend the Constitution. Pp. 1922-1925.

Chapter II

"The truth doesn't help
you."



Part 1 - Candor

RPC 3.3 Candor Toward the Tribunal (a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;**
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;**
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;**
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or**

(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Part 2 - Proof of Facts

**Mitchell v. United States, 526 U.S. 314,
330 (1999)**

The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.

Nix v. Whiteside, 475 U.S. 157, 166 (1986)

In *Strickland*, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause." Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth.

Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908.

Chapter III

"Right place....Right time"



RPC 3.1 Meritorious Claims and Contentions A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

For written pleadings, see Rule 1:4-8(a)(2) which excuses writings from being ruled as frivolous when the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Chapter IV

"I won't rest until
everything that can be done
is done"



RPC 1.5 Fees (a) A lawyer's fee shall be reasonable.

The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
- (3) the fee customarily charged in the locality for similar legal services;**
- (4) the amount involved and the results obtained;**
- (5) the time limitations imposed by the client or by the circumstances;**
- (6) the nature and length of the professional relationship with the client;**
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;**
- (8) whether the fee is fixed or contingent.**

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case.

Chapter V

"He is barely a lawyer"



Part 1

RPC 4.2 Communication with Person Represented by Counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented.

Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel.

Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Note:

In the criminal context, the rule ordinarily applies only after adversarial proceedings have begun by arrest, complaint, or indictment on the charges that are the subject of the communication. See State v. Bisaccia, 319 N.J. Super. 1, 22-23 (App. Div. 1999).

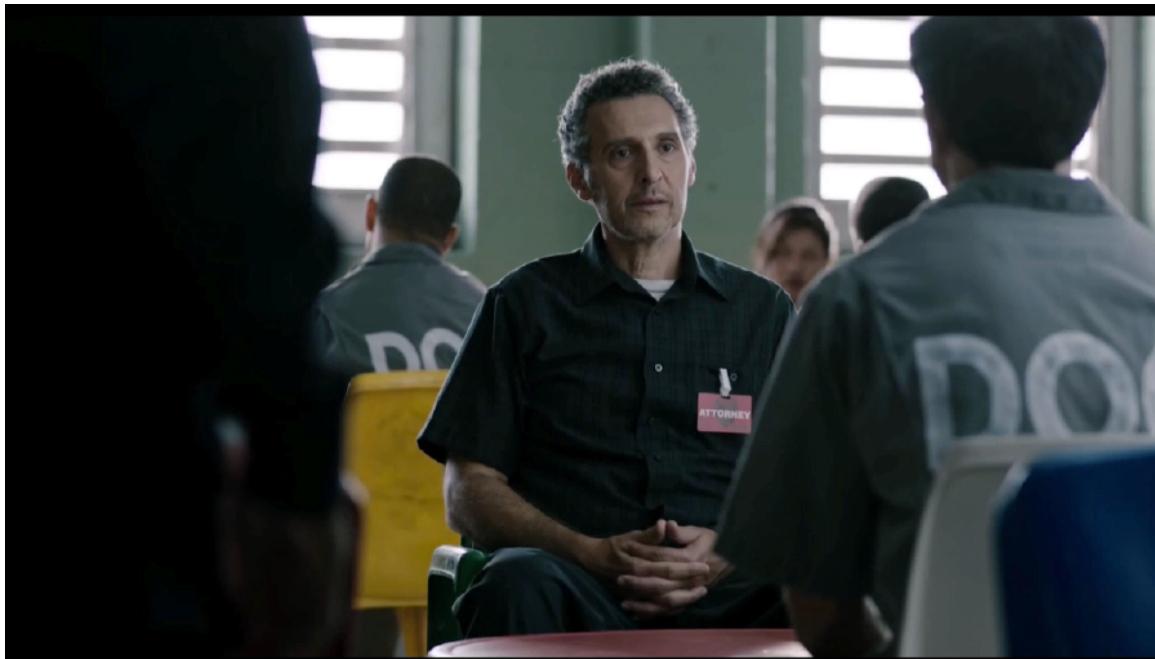
Part 2

RPC 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), 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

Chapter VI

**“You’re not my lawyer
anymore.”**



RPC 1.16

Declining or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:**
- (1) the representation will result in violation of the Rules of Professional Conduct or other law;**
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or**
- (3) the lawyer is discharged.**
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:**
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;**
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;**

- (3) the client has used the lawyer's services to perpetrate a crime or fraud;**
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;**
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;**
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or**
 - (7) other good cause for withdrawal exists.**
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.**

Chapter VII

"One of the most reviled ethnicities in America."



New Jersey Code of Judicial Conduct

Canon 3 - A judge shall perform the duties of judicial office impartially and diligently.

Rule 3.5 - A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and other with whom the judge deals in an official capacity, and shall not permit lawyers, court officials, and others subject to the judge's direction and control to display impatience or courtesy or to detract from the dignity of the court.

See Rule 1:10-1 [contempt in the face of the court.]

RPC 3.6 Trial Publicity

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.**
- (b) Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved; (2) the information contained in a public record; (3) that an investigation of the matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto;**

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Chapter VIII

"I'd kill to be 35 again."



RPC 1.4 Communication (a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer. (b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

RPC 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer (a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.

Chapter IX

"Will I have to say?"



RPC 3.8 Special Responsibilities of a Prosecutor The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

- (1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and
- (2) there is no other feasible alternative to obtain the information;

Chapter X

"Before I take you on this tour through Hell...."



State v. Williams, 113 NJ 393, 451-452 (1988)

Where, however, as in the matter before us, the victim's character has no bearing on the substantive issue of guilt or the penalty to be imposed, the prosecution may not comment on the evidence in a manner that serves only to highlight the victim's virtues in order to inflame the jury.

The passage quoted at length above contains nothing that would aid the jury in determining the defendant's guilt or innocence. Rather, the inflammatory statements could likely result not only in unduly prejudicing the jury against defendant but also in confusing it over whether its deliberations should be influenced by the sterling character of the victim.

There is no place in a capital case for such confusion and prejudice. The prosecutor's remarks were clearly improper and should have been stricken from the record and the jury properly instructed to disregard them.

Disparaging the arguments of defense counsel:
State v. Acker, 265 NJ Super. 351, 356 (App. Div. 1993)
State v. Lockett, 249 NJ Super. 428, 434 (App. Div. 1991)
State v. Frost, 158 NJ 76, 86 (1999)