Boston Bar ASSOCIATION

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August 17, 2022

Francis V. Kenneally, Clerk
Supreme Judicial Court of Massachusetts
John Adams Courthouse, Suite 1400
Boston, MA 02108

Re: *Commonwealth of Massachusetts v. Christian Edwards,*
No. SJC-13242
Amicus Curiae Letter

Dear Clerk Kenneally:

As an organization dedicated to advancing the highest standards of excellence for the legal profession, the Boston Bar Association ("BBA") respectfully submits this letter in response to the *amicus* solicitation issued by the Justices in the above-captioned case. The BBA focuses its letter on the question posed by the Court concerning whether "the rules of professional conduct permit, prohibit, or require a criminal defense attorney to disclose – in response to a question by the judge at a pretrial conference – the defense's intention to raise a certain issue at trial (viz., alleged failure in the service of an abuse prevention order)." The BBA submits that under the circumstances revealed by the record in this case, the rules of professional conduct prohibited defense counsel from forewarning the prosecutor about potential flaws in the Commonwealth's case-in-chief.

On this issue, the BBA joins in its entirety the position articulated in Section I of the *amicus* brief filed jointly by the Committee for Public Counsel Services ("CPCS"), the American Civil Liberties Union of Massachusetts ("ACLUM") and the Massachusetts Association of Criminal Defense

Lawyers ("MACDL").[1] The ethical duties of zealous representation, loyalty, and confidentiality prevent criminal defense attorneys from revealing issues and defenses that they intend to raise at trial except in the limited situations enumerated in Mass. R. Crim. P. 14(b) or upon stipulation with informed consent of their client (and subject to any necessary colloquy relating thereto). The BBA writes to offer additional support for the conclusion that defense counsel complied with his ethical obligations in this case.

A. In the criminal context, a lawyer's duty of candor to the tribunal is tempered by duties of zealous advocacy, loyalty, and confidentiality to a client.

The duty of zealous advocacy set forth in Mass. R. Prof. C. 1.3 is "pervasive in lawyers' professional responsibilities because it informs all of the lawyer's other ethical obligations." M. Freedman & A. Smith, *Understanding Lawyers' Ethics* 71 (5th ed. 2016). In the criminal context, the duty of zeal takes on heightened importance given defense counsel's constitutionally recognized role under the Sixth Amendment and the unique liberty interests at stake in a criminal prosecution. *See* ABA Criminal Justice Standards for the Defense Function, Standard 4-1.4 (2017) (defense attorney must act zealously within bounds of law and applicable rules to protect client confidences and liberty interests). A criminal defendant "must be able to rely on the undivided loyalty of his counsel to present the defense case with full force and zealousness," *Commonwealth v. Downey*, 65 Mass. App. Ct. 547, 552 (2006), and must not be concerned that counsel will reveal confidential information in the form of trial strategy that is likely to be detrimental to his case even when pressed by a court. *See e.g.,* Mass. R. Prof. C. 1.6, cmt 3A (defining "confidential information" to include information gained during to or related to the representation that, if disclosed, is likely to be detrimental to the client); Mass. R. Prof. 1.7 (conflict of interest exists where representation will be materially limited by personal interest of lawyer). Against this backdrop, defense

[1] The Court solicited *amicus* briefs on additional issues that this letter does not address. The BBA does not offer a position on these additional issues as they are beyond the scope of BBA policy concerning the filing of *amicus* briefs.

counsel must prioritize their ethical duties to their client when those duties conflict with a court's request to provide information that is not required by any rule or law but is merely information the court would like to have.

In the instant matter, the criminal defense attorney's ethical obligations of zeal, loyalty, and confidentiality to his client were put to the test in connection with a prosecution for violation of an abuse prevention order under G.L. c. 209A. During the pretrial conference, with counsel for the prosecution and the defense present, the trial judge inquired as to the Commonwealth's trial exhibits, asking whether the prosecution had provided defense counsel with a copy of the abuse prevention order, and defense counsel said it had. The judge then proceeded to ask, "Is there any problems with service?" Defense counsel responded, "I've been provided with discovery." The judge said, "Okay" and moved on to consideration of pending motions.[2]

The certificate of service of the order that defense counsel had been provided as part of the Commonwealth's discovery was dated *after* the date of the alleged violation of the restraining order by the defendant. Knowledge of the restraining order by the defendant at the time of the alleged violation is an essential element of the charged offense. (TR. 1/8/20 (4:1-4). *See* Model District Court Instructions, 6.720 (requiring finding that defendant knew pertinent terms of order by having received copy of order or having learned of pertinent terms some other way); *Commonwealth v. Molloy*, 44 Mass. App.

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[2] The relevant exchange was as follows:

> THE COURT: Commonwealth, for your exhibits, it's the restraining order?
> MS. SULLIVAN: Yes, your Honor.
> THE COURT: And you've been provided that?
> MR. MALONEY: Yes.
> THE COURT: Is there any problems with service?
> MR. MALONEY: I've been provided discovery.
> THE COURT: Okay.

TR.1-8-20 (3:22-4:6).

Ct. 306, 308-9 (1998) (finding trial court's denial of motion for required finding in error as prosecution offered no evidence that defendant was served copy of order or had actual knowledge of its existence and terms; knowledge of the 209A process is not the equivalent of knowledge of the existence and terms of a specific order).

Recognizing the tension between his duties of zeal, loyalty, and confidentiality to his client and a possible competing duty of candor to the court, defense counsel simply informed the court that he had received discovery from the Commonwealth. Defense counsel did not make any representations – let alone any misrepresentations – concerning any "problems" with service of the abuse prevention order. By responding to the district court's inquiry in the way he did, defense counsel fulfilled both his constitutional and ethical duties to his client.

The American Bar Association recognizes that the duty of candor that a criminal defense attorney owes to a tribunal may be tempered by the attorney's competing ethical and constitutional obligations to his or her client. *See* ABA Criminal Justice Standards for the Defense Function, Standard 4-1.4 (2017) ("In light of criminal defense counsel's constitutionally recognized role in the criminal process, defense counsel's duty of candor may be tempered by competing ethical and constitutional obligations"). Criminal defense attorneys, like other lawyers, must make all disclosures obligated by law and procedure. However, "as long as they do not mislead the court, defense attorneys need not correct judicial misunderstandings or false assumptions regarding evidentiary facts or make evidentiary disclosures needed to promote fair or reliable outcomes," especially where doing so would be detrimental to their client's case; they must only refrain from actively misleading the court into making such assumptions. *See* Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105, 112-15 (2016).

B. Mass. R. Crim. P. 14(b) limits the obligation of criminal defense attorneys to provide pretrial notice of issues or defenses they intend to raise at trial in specifically enumerated circumstances.

Under the Massachusetts Rules of Criminal Procedure, a defense attorney's obligation to provide pretrial notice of defenses or trial strategy is limited to only those defenses and issues that are specifically enumerated in Mass. R. Crim. P. 14(b): defenses of alibi, license, claim of authority, ownership or exemption, self-defense claims involving *Adjutant* evidence, or mental health issues. *See* Mass. R. Crim. P. 14(b). The notice obligation does not extend to forewarning the prosecution about weaknesses in their anticipated case-in-chief that might form the basis for a defense verdict at trial.

The history of Mass. R. Crim. P. 14 is instructive here. Prior to September 7, 2004, Mass. R. Crim. P. 11(a)(1)(C) imposed an obligation on the prosecuting attorney and defense counsel to consider at the pretrial conference such matters as would promote a fair and expeditious disposition of a case including *"the nature of the defense*, including whether the defendant intends to rely upon a defense of alibi; a defense of lack of criminal responsibility because of mental disease or defect; or a defense based upon a license, claim of authority, ownership, or exemption." Mass. R. Crim. P. 11a) (1)(C) (insert date). Effective September 7, 2004, Rule 11 was revised to eliminate the broad requirement that defense counsel reveal "the nature of the defense" at the pretrial conference. Instead, Mass. R. Crim. P. 14(b) was modified to require pretrial discovery of specifically enumerated special defenses and issues, including those specific issues and defenses that previously appeared in Rule 11(a)(1)(C). Notably, unlike the earlier version of Rule 11, Rule 14(b) did *not* require defense counsel to disclose to the prosecution "the nature of the defense" beyond those defenses and issues specifically enumerated.

Criminal defense attorneys need not furnish any information that will aid the prosecution's case. *United States v. Wade*, 388 U.S. 218, 257 (1967) (White, J., dissenting in part and concurring in part). They ethically may defend the proceeding so as to require that every element of the charge be established, *see* Mass. R. Prof C. 3.1, or stipulate to elements of the offense with the informed consent of their client. In the instant case, the trial readiness conference report executed by both the prosecuting attorney and defense counsel is clear that defense counsel declined to stipulate to any element of the offense. Specifically, in response to the question appearing on the court

trial readiness form, "Does the defendant intend to stipulate to an element of an offense?", the written answer was "No." (R.A.14).

Defense counsel's conclusion that there was a potential flaw in the Commonwealth's anticipated case-in-chief on an essential element of the crime was not something required to be disclosed by Rule 14(b) and defense counsel did not stipulate to any elements of the Commonwealth's case. In those circumstances, the trial court should not have inquired of defense counsel whether there was an issue with service of the order on the defendant.

C. The BBA urges the Court to provide additional guidance to trial judges about inquiring of criminal defense counsel concerning their intentions to raise issues and defenses at trial not specifically enumerated in Mass. R. Crim. P 14(b).

This case raises the question of whether the trial judge should have asked defense counsel whether there were issues with service of the abuse prevention order given the limited disclosure required by Mass. R. Crim. P. 14(b) and the trial readiness conference report. While a trial court is obligated to "consider such matters as will promote a fair and expeditious disposition of the case," and has considerable latitude to consider discovery-related matters at the pretrial conference, *see* Mass. R. Crim. P. 11(a), (b), the boundaries of acceptable inquiry should be defined and circumscribed in order to avoid situations that place criminal defense attorneys in the difficult position of having to satisfy ethical obligations to their clients and any perceived obligations to the tribunal. [3]

[3] Simply because a criminal defense attorney is not required to disclose trial strategy in response to an inquiry from the court does not mean that the attorney has license to make false statements of fact or law to the tribunal during the pretrial conference. An attorney remains subject to professional disciplinary proceedings for misrepresentations made to a court, and if found to have done so faces a presumptive sanction of suspension from the practice of law for a period of one year. *See Bassichis et al. v. Flores,* 490 Mass. 143, 160 (2022) (fact that litigation privilege barred plaintiff creditors' claim that attorney was engaged in tortious conduct with his clients to shield assets does not preclude court imposed sanctions or disciplinary proceedings against

The Court's decision in this matter will likely have repercussions for how trial judges conduct pretrial conferences in criminal proceedings. The BBA urges the Court, therefore, to provide, by decision or rule, clarification and additional guidance to trial judges concerning the scope of inquires related to issues and defenses that defense counsel intends to raise at criminal trials. Where defense counsel is not obligated by the Massachusetts Rules of Criminal Procedure to notify the prosecution of an issue or defense and where defense counsel has expressly informed the prosecution and court that the defendant will not stipulate to material facts or elements of the charged offense, judges should refrain from inquiring whether defense counsel sees any problems in the Commonwealth's case. Such an inquiry intrudes too deeply into the defense function and unjustifiably places the criminal defense attorney in the challenging position of having to weigh potentially competing ethical obligations at the risk of serious adverse consequences.

DECLARATION PURSUANT TO MASS. R. APP. P. 17(c)(5)

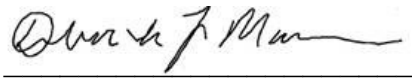
No party or a party's counsel authored this letter in whole or in part. No party, party's counsel, or a person or entity, other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the letter. Neither *amicus curiae* nor its counsel has either represented any of the parties to this appeal in another proceeding involving similar issues, or been or represented a party in a proceeding or legal transaction at issue in the present appeal.

Deborah J. Manus

lawyer); *see also Matter of Neitlich*, 413 Mass. 416, 420, 425 (1992) (one year suspension for attorney's knowing and deliberate misrepresentations made to opposing counsel and the court to conceal the full terms of a sale). Given these very serious disciplinary consequences, the Court should not lightly impute ethical violations to criminal defense counsel seeking in good faith to navigate the perceived competing ethical duties to their client and the court as the defense attorney in this matter did.

CERTIFICATE OF SERVICE

I, Deborah J. Manus, certify that on August 17, 2022, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.



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