

ETHICS ADVISORY COMMITTEE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

FORMAL OPINION 90-3

QUESTION

What is a criminal defense lawyer's duty when representing a client before a grand jury when the client informs the lawyer he or she will commit perjury to protect a friend or associate?

DIGEST

A criminal defense lawyer's duty when representing a client who intends to commit perjury before a grand jury is the same as the lawyer who represents a client who proposes to perjure himself or herself before trial: the lawyer must first try to dissuade the client from committing perjury. If the client refuses to abide by the lawyer's advice, the lawyer may withdraw if it is feasible, but withdrawal is not required. The lawyer may assist the client in preparing for his or her testimony, but the lawyer cannot, without risk of prosecution or discipline, assist the client in preparing any false testimony.

OPINION

A member of the National Association of Criminal Defense Lawyers (NACDL) has requested an opinion concerning the criminal defense lawyer's duty when confronted with the question of potential client perjury before a grand jury.

The member advises that the client has been subpoenaed before a grand jury and has been granted immunity from prosecution. The client has been advised that refusal to testify will constitute contempt. The lawyer has already repeatedly tried to persuade the client to be truthful, but the client insists on testifying falsely.¹

The member's questions are as follows:

(1) what is the lawyer's role when a grand

jury is involved; (2) must the lawyer withdraw; (3) may the lawyer prepare the client to testify, knowing that the client will lie?

I. ETHICAL RULES INVOLVED

A. Model Rules of Professional Conduct
Rules 3.3 and 1.6 of the Model Rules of Professional Conduct (RPC) apply. Rule 3.3 provides, in pertinent part, as follows:

(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 a criminal or fraudulent act by the client;

...

(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.

(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 Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 1.6 provides, in pertinent part, as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as authorized in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer

believes is likely to result in imminent death or substantial bodily harm;

...

There are significant variations in Rule 1.6(b)(1) from state to state. Members are advised to consult their state rules and law to determine what their duty is.

B. Model Code of Professional Responsibility

DR 4-101 of the Model Code of Professional Responsibility (CPR) discusses client perjury, and it provides as follows:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

...

(C) A lawyer may reveal:

...

(3) the intention of his client to commit a crime and the information necessary to prevent the crime.

...

C. ABA Standards, The Defense Function

The ABA Standards, The Defense Function Proposed, Standard 4-7.7 (2d ed. 1980), deals with the question of client perjury at trial.²

Proposed Standard 4-7.7 provides as follows:

(a) If the defendant has admitted to defense counsel facts which establish guilt and the counsel's independent investigation established that the admissions are true but the defendant insists on the right to trial, the counsel must strongly

discourage the defendant against taking the witness stand to testify perjuriously.

(b) If, in advance of trial, the defendant insists that he or she will take the stand to testify perjuriously, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of facts. A lawyer may not later argue the defendant's known false version of the facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

II. DISCUSSION

The problem of how criminal defense lawyers deal with client perjury is one that has confounded lawyers, judges, courts, and commentators alike.³ Some general principles can be stated, but each situation will ultimately turn on its unique facts.

The question of client perjury is where the right to effective assistance of counsel, the principles of confidentiality and the attorney-client privilege, the lawyer's duties of zeal and candor and fairness, and the law of subornation of perjury all collide. In this area, these factors sometimes will conflict with each other.

In a criminal trial, the accused has a right to testify or refuse to testify in his or her own defense.⁴ If the accused chooses to testify, however, he or she has a duty to testify truthfully.⁵ If the accused testifies

falsely, he or she can be impeached with evidence illegally seized⁶ or an illegally obtained confession.⁷ Thus, there is no constitutional right for the accused in a criminal case to commit perjury in his own defense⁸ for, "when defendants testify, they must testify truthfully or suffer the consequences."⁹ In addition, "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury."¹⁰

There are various ways of dealing with intended client perjury. But, "[i]t is universally agreed that at the minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."¹¹ The authorities disagree as to whether a lawyer must seek to be relieved if the client cannot be dissuaded from committing perjury. Nevertheless, if the lawyer continues with the case voluntarily or over objection, the lawyer must face the question of whether the client can be called as a witness without promoting any false testimony by the client. If the witness testifies, the lawyer must take care to avoid client perjury. Lawyers that participate in promoting client perjury¹² risk prosecution for perjury or obstruction of justice¹³ and professional discipline.¹⁴

Reasonable lawyers can disagree as to how a criminal defense lawyer should handle intended client perjury and whether the client's testimony is really perjurious, notwithstanding what ethical rules state.¹⁵ A lawyer may legitimately believe, on the facts known to him or her at the time, that the client's constitutional right to counsel will be unconstitutionally frustrated by following some ethical rules. In that case, the constitutional concerns of the lawyer may control.¹⁶ The question of how to handle client perjury as a part of the duty of confidentiality may thus be a matter of personal choice for the lawyer based on the lawyer's own moral and ethical beliefs.¹⁷

1. What is the lawyer's role when a grand jury is involved?

While the case law all deals with trial testimony, the Committee believes it all applies as well to the grand jury setting. Furthermore, the ethical rules clearly apply to grand jury situations — there are no limitations as to when ethical rules apply to the proposed use of false evidence.

The lawyer confronted with proposed client perjury must unequivocally advise the client of the following: (1) to tell the

truth before the grand jury; (2) that perjury is a crime punishable by imprisonment and fine; (3) that the lawyer will not be a party to perjury; and (4) that suborning perjury is also a criminal offense that the lawyer will not expose him or herself to.

The differences between the normal situation of proposed perjury at trial and before a grand jury are: (1) the lawyer does not have the option of whether or not to call the client before the grand jury to prevent client perjury; see also question 3, *infra*; and (2) the lawyer has no role in questioning the client to try to prevent the perjury.¹⁸

2. Must the lawyer withdraw?

RPC Rule 1.16(a)(1) dictates that a lawyer should withdraw if "the representation will result in violation of the rules of professional conduct or other law." But, if the lawyer is not a party to the perjury and continues to represent the client, will the representation "result in violation of the rules of professional conduct or other law"? This rule is vague, and perhaps intentionally so.

The Committee believes that a lawyer who acts properly and refuses to participate in or aid perjury while representing a client who may or will commit perjury is not providing "representation [that] will result in violation of the rules of professional conduct or other law." The Committee reads this provision as applying to lawyers who knowingly advance perjury or otherwise become accessories to perjury.

CPR DR 2-110(B)(1) provides for mandatory withdrawal if the client is taking a position that merely is to harass or maliciously injure any person. CPR DR 2-110(C)(1)(b) provides for permissive withdrawal where the client intends to pursue an illegal course of conduct or cause the lawyer to violate a disciplinary rule. Cases have held that the lawyer should withdraw¹⁹, but there is authority to the contrary.²⁰

The Committee believes that withdrawal usually is an unrealistic ethical ideal. The Committee believes that knowledgeable criminal defense lawyers can ethically represent clients who intend to commit perjury (and perhaps prevent it, or at least substantially limit it), without being pawns of the client in promoting the client's perjury. The Committee believes that the administration of justice and the promotion of the truth and the fact-finding process can be advanced by lawyers who continue to represent their clients and try to control and

limit their perjury rather than simply withdrawing to send the client elsewhere to try it again and maybe even succeed.²¹ Such a result clearly is inimical to the goal of our system of justice to seek the truth. The Committee, therefore, believes that the ABA Standards, The Defense Function, Proposed Standard 4-7.7 (2d ed. 1980), quoted *supra*, should be followed because withdrawal usually will not be feasible.²²

The Committee believes that effective and conscientious criminal defense lawyers can deal with the question of client perjury without withdrawing from the case. The Committee believes that whether the lawyer should withdraw is discretionary with the lawyer, depending on all the facts and circumstances known to the lawyer at the time.

3. May the lawyer prepare the client to testify, knowing the client will lie?

The lawyer may prepare the client to testify, but the lawyer ABSOLUTELY CANNOT assist the client in developing any perjured testimony. To do so would be unethical and potentially criminal, and it must be avoided at all costs. The lawyer should repeatedly warn the client not to lie and should attempt to distance him or herself from the potential perjury as much as possible.

The criminal defense lawyer is also cautioned that a client who is accused of perjury may try to claim, in his or her effort to keep out of prison, that the lawyer suborned the perjury.²³ This risk should suggest how a lawyer will act when facing potential client perjury. ■

Notes

1. The question assumes that the lawyer has full knowledge of the intended perjury, so the question of what degree of knowledge of potential perjury the lawyer must have does not matter in the situation presented. See *Nix v. Whiteside*, 475 U.S. 157 (1986) (lawyer had direct knowledge that client would testify falsely); CPR EC 7-26 (lawyer knows or should know from facts that client is lying); NACDL Formal Opinion 91-1 (to be published in early 1991).

It should be noted that this situation, where the client is involuntarily required to testify, differs from the situation in which a defendant or target voluntarily decides to testify before the grand jury in his or her own behalf.

2. This standard has never been formally adopted by the American Bar Association (ABA), but it has been cited with approval by several courts. See

note 20, *infra*. It was originally proposed in 1971 but withdrawn to determine whether it should be made a part of the CPR. ABA Standards, The Defense Function Proposed, Standard 4-7.7 (2d ed. 1980), *editorial note*. The second edition of the Standards also included this proposed standard, and it was also withdrawn for consideration of whether it should be included in the RPC. *Id.* *editorial note* at 4.235-4.265 (Supp. 1986). RPC Rule 3.3 seemingly rejects this approach. See discussion in NACDL Formal Opinion 91-1 (to be released in early 1991).

3. There are at least twenty-five significant law review articles on the issue, and four ethical treatises discuss the issue at length.

4. *Harris v. New York*, 401 U.S. 222, 225 (1971); *Nix v. Whiteside*, 475 U.S. 157, 173 (1986); *Rock v. Arkansas*, 403 U.S. 44, 49-53 (1987).

5. *Harris v. New York*, *supra*; *Nix v. Whiteside*, *supra*.

6. *United States v. Havens*, 446 U.S. 620, 626-27 (1980).

7. *Harris v. New York*, *supra*. But see *New Jersey v. Portash*, 440 U.S. 450 (1979) (coerced testimony under grant of immunity could not be used to impeach at trial).

8. *United States v. Havens*, *supra*; *Nix v. Whiteside*, *supra*.

9. *United States v. Havens*, *supra*. The defendant who is found to be lying can constitutionally even have his sentence increased as a result of it. *United States v. Grayson*, 438 U.S. 41, 52 (1978). See U.S. Sentencing Guidelines § 3C1.1, *Application Note 3(b)*.

10. *Nix v. Whiteside*, *supra*, at 173. Further, "[a] lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings including suspension or disbarment." *Id.*

11. *Id.* at 169.

12. *Id.*

13. See, e.g., *United States v. Perlstein*, 126 F.2d 789 (3d Cir. 1942), *cert. den.* 316 U.S. 678.

14. See cases cited in Annot., Fabrication or suppression of evidence as ground for disciplinary action against attorney, 40 A.L.R.3d 169, §§ 3[a], 4[a].

15. Wolfram, *Client Perjury*, 50 So. Cal. L. Rev. 809, 842-45 (1977).

See note 2, *supra*.

16. RPC Rule 3.3, *Comment*.

17. See *id.* at 866-67; RPC Scope Note ¶ 6-7.

18. Indeed, in federal grand juries and most state grand juries, the attorney may not be present while the client is testifying.

19. See, e.g., *Newcomb v. State*, 651 P.2d 1176 (Alaska App. 1982); *People v. Blye*, 233 Cal.App.2d 143, 43 Cal.Rptr. 231 (5th Dist. 1965); *Re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979); *State v. Trapp*, 52 Ohio App.2d 189, 6 Ohio Ops.3d 175, 368 N.E.2d 1278 (1977).

20. *State v. Crenshaw*, 210 Conn. 304, 554 A.1d 1074 (1989).

21. If the lawyer and client get into a disagreement over the client's proposed perjury and the lawyer withdraws, any client intent on committing perjury has only been educated as to how to more effectively commit perjury with his or her next lawyer.

22. The use of Proposed Standard 4-7.7 is discussed at length in NACDL Formal Opinion 91-1 (to be released in early 1991).

23. See Hall, *Defensive Defense Lawyering or Defending the Criminal Defense Lawyer from the Client*, 11 UALR L. J. 329 (1988).

Federal Sentencing and Forfeiture Guide

by Roger W. Haines, Jr.
Kevin Cole,
Associate Professor of Law,
University of San Diego
and Jennifer Woll.

Covers every point of law of every federal Sentencing Guideline and forfeiture case decided between 1987 and February, 1991.

Includes the Sentencing Commission's Answers to 100 Most Frequently Asked Questions About the Sentencing Guidelines.

Second Edition 1990 (320 pp.) and Feb. 8, 1991, Supplement (330 pp.); both for \$75.

"An invaluable research tool."
- Roger J. Schwarz, Esq.,
New York.

"Excellent, indispensable."
- John J. Cleary, Esq.,
Cleary & Sevilla, San Diego.

Please send me the **Federal Sentencing and Forfeiture Guide** (2d Ed. and February 8, 1991, Supplement) for \$75.

- My check is enclosed.
 Send on 30-day approval.

Name: _____

Firm: _____

Address: _____

City: _____

State: _____ Zip: _____

Telephone: _____

Send to: DEL MAR LEGAL PUBLICATIONS,
2670 Del Mar Heights Rd., Suite 247,
Del Mar, CA 92014. Tel:(619) 755-8538.