ETHICS OPINION

RO-2009-01

Ethical Obligations of a Lawyer When His Client Has Committed or Intends to Commit Perjury

QUESTION:

What are a lawyer's ethical obligations when his client reveals his intent to commit perjury? What are a lawyer's ethical obligations when a lawyer learns that a client has committed perjury?

ANSWER:

Regardless of whether the lawyer is representing a civil client or a criminal client, the lawyer's ethical obligations remain the same. Where a client informs counsel of his intent to commit perjury, a lawyer's first duty is to attempt to dissuade the client from committing perjury. In doing so, the lawyer should advise the client that if the client insists on committing the proposed perjury then the lawyer will be forced to move to withdraw from representation. The lawyer should further explain that he may be required to disclose the specific reason for withdrawal if required to do so by the court. If the client continues to insist that they will provide false testimony, the lawyer should move to withdraw from representation.

When a lawyer has actual knowledge that a client has committed perjury or submitted false evidence, the lawyer's first duty is to remonstrate with the client in an effort to convince the client to voluntarily correct the perjured testimony or false evidence. If the client refuses to do so, the lawyer has an ethical obligation to disclose the perjured testimony and/or submission of false evidence to the court.[1]

DISCUSSION:

Having a client threaten to commit perjury or actually committing perjury is one of the most difficult ethical dilemmas a lawyer can face. The lawyer is torn between his loyalties to the client and his duties as an officer of the court. In the

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[1] This opinion is consistent with ABA Formal Opinion 87-353.

context of the civil client, however, Rule 3.3, Ala. R. Prof. C., and its Comment clearly require the lawyer to place his duties as an officer of the court above his duties of loyalty and confidentiality to the client. Rule 3.3 provides as follows:

RULE 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 a criminal or fraudulent act by the client; or

(3) 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.

(d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The Comment to Rule 3.3 provides in pertinent part as follows:

Comment

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False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

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Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done–making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed

> perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.
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> **Duration of Obligation**
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> A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

As such, a lawyer may not submit false evidence to a court or assist a client in doing so. When a lawyer learns that a client intends to commit perjury or to offer false testimony, the lawyer should counsel the client not to do so. The lawyer should inform the client that if he does testify falsely, the lawyer will have no choice but to withdraw from the matter and to inform the court of the client's misconduct. If the client insists on testifying falsely, the lawyer should refuse to offer the perjured testimony or should immediately move to withdraw from the representation.[2] In counseling the client, the lawyer should inform the client that if the client continues to insist on testifying falsely, then the lawyer will be required to withdraw. The lawyer should further explain that he may be required to disclose the client's intentions to the court, if the court requires the lawyer to disclose a specific reason for the withdrawal.

Some states, such as Florida, in Formal Opinion 04-1, require the lawyer to affirmatively disclose the client's intent to testify falsely to the court upon withdrawal. According to the opinion, "[i]f the lawyer knows that the client will testify falsely, withdrawal does not fulfill the lawyer's ethical obligations, because withdrawal alone does not prevent the client from committing perjury." However, Florida requires a lawyer to reveal any information that is necessary to prevent a client from committing a crime, including the crime of perjury.

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[2] Hazard & Hodes, The Law of Lawyering, § 29.13. 3rd Edition (2005).

Alabama has no such counterpart in the Rules of Professional Conduct. Rather, Rule 1.6, Ala. R. Prof. C., provides as follows:

1.6 CONFIDENTIALITY OF INFORMATION

> (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 stated in paragraph (b).
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> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> (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; or
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> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Under Rule 1.6, a lawyer is permissively allowed to disclose confidential information only when disclosure is required to prevent a client from committing a criminal act that is "likely to result in imminent death or substantial bodily harm . . ." The crime of perjury does not fall within this narrow exception to Rule 1.6. As such, the lawyer is not, upon withdrawal, required to disclose the client's intent to commit perjury. However, if the court requires the lawyer to disclose the specific reason for his withdrawal, the lawyer may disclose the client's intent to commit perjury.

When a lawyer learns of the client's perjury after the fact, Rule 3.3 requires the lawyer to immediately take remedial measures to correct the client's misconduct. Ordinarily, the lawyer should first remonstrate with the client in an attempt to convince the client to, of his own volition, inform the court and/or the opposing party of his misconduct. In doing so, the lawyer should explain that if

the client refuses to do so, the lawyer will have no choice but to inform the court of the client's actions. If the client refuses to disclose his misconduct, then the lawyer has a duty to inform the court and/or opposing party of the false evidence or testimony.

Obviously, a lawyer's ethical responsibilities do not continue *ad infinitum*. Rule 3.3(b), Ala. R. Prof. C., provides that the duties under Rule 3.3 only continue to the conclusion of the proceeding. For example, if a lawyer learns that his client testified falsely after the conclusion of the case, the lawyer would not have a duty to disclose the fraud to the court. The Disciplinary Commission has determined that a proceeding is concluded when a certificate of judgment has been issued or the time has expired for all post-trial motions or pleadings.

It is also important to distinguish between a lawyer's actual knowledge versus a reasonable belief or suspicion that the client has lied or offered false evidence. Where a lawyer has actual knowledge that a client has testified falsely, then the lawyer would be required to comply with Rule 3.3. When a lawyer does not have actual knowledge, but rather only a reasonable belief that the client has lied or offered false evidence, then lawyer would not have any obligation to disclose his suspicions to the court or the opposing party. Rather, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. . . a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client. . ." ABA Annotated Model Rules of Professional Conduct, 316-317, 6th Edition. (2007). However, Rule 3.3(c), Ala. R. Prof. C., does allow a lawyer to refuse to offer evidence on behalf of a client that the lawyer reasonably believes to be false.

While the Comment to Rule 3.3 also addresses the ethical obligations of lawyers in their representation of criminal clients, the outcome is less clear. First and foremost, "[t]he level of knowledge sufficient to trigger the prohibition against presenting a client's false testimony is high for criminal defense counsel." ABA, Annotated Model Rules of Professional Conduct, 317, 6th Edition. (2007). Ordinarily, a lawyer must abide by the client's decision to testify unless he actually knows that the testimony will be false. In regard to the representation of criminal clients, the Alabama Comment provides, in pertinent part as follows:

Comment

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Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as open the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well,

> to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Under the Comment to Rule 3.3, it is clear that a lawyer cannot actively assist a criminal client in presenting false evidence or false testimony to the court. The closer question, however, appears to be whether a criminal defense lawyer may use the narrative approach so as to not infringe upon his client's Sixth Amendment rights and still be in compliance with his ethical responsibilities under Rule 3.3.

Both the Annotated Model Rules of Professional Conduct, and The Law of Lawyering, note that the Supreme Court of the United States disapproved of the narrative approach in dictum in Nix v. Whiteside, 475 U.S. 157 (1986). [3] In Nix, the Court granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel was violated when a lawyer refused to cooperate with the defendant in presenting perjured testimony. The defendant was on trial for murder. The defendant had stabbed the victim after he believed that the victim was reaching for a gun. Throughout the representation, the defendant repeatedly told his lawyer that he had not actually seen a gun in the victim's hand. However, just prior to trial, the defendant announced to his lawyer that he would testify that he saw something "metallic" in the victim's hand.

The lawyer told the defendant that such testimony would be perjury and that he would withdraw from representation if the client insisted on testifying as such. The lawyer also told the defendant that if he did so testify, he would inform the court of the perjury. Id. at 161. After testifying truthfully at trial and being convicted of murder, the defendant moved for a new trial based on the alleged denial of his Sixth Amendment right to effective assistance of counsel because his defense counsel would not allow him to testify that he saw a gun or something "metallic". Id. at 162.

In rejecting the defendant's claims, the Court noted that "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely." Id. at 173. The Court went on to note that "the right to counsel includes no right to have a lawyer who will cooperate with

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[3] Hazard & Hodes, The Law of Lawyering, § 29.19. 3rd Edition (2005).
ABA, Annotated Model Rules of Professional Conduct, 317, Sixth Edition (2007).

planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment." Id. As such, a criminal defendant does not have a right to testify falsely on his own behalf or have the assistance of counsel in doing so.

It is the opinion of the Disciplinary Commission that a lawyer's use of the narrative approach to allow a client to testify falsely would be inconsistent with the requirements of Rule 3.3 and inconsistent with a lawyer's obligations as an officer of the court. As a result, the Disciplinary Commission has determined that under Rule 3.3, a lawyer's ethical obligations remain the same, regardless of whether the lawyer is representing a criminal client or a client in a civil matter.

The Disciplinary Commission has also determined that these obligations apply equally to prosecutors in a criminal case. Just as a defense attorney would have an obligation to disclose perjury committed by a criminal defendant, a prosecutor would have a duty to disclose perjury committed by a prosecution witness during direct examination. The duty to disclose the false testimony of the witness would apply regardless of whether the prosecutor deems the false testimony as exculpatory or material under the Brady[4] standard.

[4] See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).