DEALING WITH CLIENT PERJURY

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What should a lawyer do when…?

• Before trial, the client's version of the facts continually changes.

• The client testifies in a deposition to something the lawyer never heard before.

• The client tells the lawyer her answers in a deposition were "based on what I understood to be best for me at the time."

• The client tells the lawyer he lied on the witness stand about an immaterial matter.

• The client tells the lawyer he lied on the witness stand about a material matter.

Responding to client perjury, or the prospect that a client intends to commit perjury, is one of the most difficult ethical dilemmas a lawyer can face. NC Rule 3.3, the key rule on client perjury, provides some guidance, but not definitive instructions for professional conduct. Monroe Freedman,1 a law professor and nationally recognized scholar on professional responsibility, describes it as a "trilemma." Freedman observes that there are three conflicting obligations of a lawyer in the adversary system. First, there is the duty to represent the client competently which requires thorough investigation including learning everything the client knows about the case. Second, there is the duty to hold in confidence what the client reveals which, coupled with assurances to the client that the lawyer will do so, encourages the client to trust the lawyer and be forthcoming with the information needed to represent the client. And third, there is the duty to act with candor toward the tribunal so that the lawyer does not participate in a judicial system that makes decisions on the basis of false testimony.

[a]s soon as one begins to think about these responsibilities, it becomes apparent that the conscientious attorney is faced with what we may call a trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court.

Monroe H. Freedman, *Perjury: The Lawyer's Trilemma*, 1 Litigation 26 (No. 1, Winter 1975).

Professor Freedman answers "yes" to the "trilemma" question of whether it is proper for a criminal defense lawyer to put a witness on the stand who the lawyer knows will commit perjury because the duty of confidentiality

does not permit him to disclose the facts he has learned from his client which form the basis for his conclusion that the client intends to perjure himself. What that means—necessarily, it seems to me—is that, at least the criminal defense attorney, however unwillingly in terms of

personal morality, has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant.

Id.

Although there is a continuing academic debate on whether a lawyer—and specifically a criminal defense lawyer—may offer perjured testimony, the NC Rules, the ABA Model Rules, and the rules of most jurisdictions have resolved the issue in favor of prohibiting a lawyer from offering perjured testimony and, upon learning that perjured testimony has been offered, requiring the lawyer to take reasonable remedial measures including, if necessary, disclosure to the court.

NC Rule 3.3(a)(3) and ABA Model Rule 3.3(a)(3) provide one of the few instances in the Rules of Professional Conduct that is "anti-client" in the sense that the duty of confidentiality to the client is trumped by the duty of candor to the court. As stated in the comment to NC Rule 3.3 and ABA Model Rule 3.3,

[t]his Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

NC Rule 3.3, cmt. [2]; ABA Model Rule 3.3, cmt. [2].

North Carolina Rule 3.3(a)(3)

NC Rule 3.3(a)(3) states that:

[a] lawyer shall not knowingly…offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

First, note that the provision contains distinct professional obligations that take place at different junctures in litigation.

Before testimony is offered, the lawyer is admonished not to offer evidence that the lawyer knows to be false, and is advised that he may refuse to offer evidence that he reasonably believes is false other than the testimony of a criminal defendant. After testimony is offered, upon learning that the lawyer offered false evidence (presumably "unknowingly" at the time), the lawyer is required to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

Second, note that the meanings of terms in the rule are critical to its interpretation and application.

The rule governs the conduct of a lawyer who is representing a client in the proceedings of a "tribunal." NC Rule 1.0(n) defines "tribunal" as

a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party's interests in a particular matter.

If the body does not have the authority to "render a binding legal judgment" affecting a party's interests, it is not a "tribunal" and NC Rule 3.3 would be inapplicable.

The prohibition on offering false evidence in NC Rule 3.3(a)(3) hinges on a double knowledge requirement. The lawyer is prohibited from "knowingly" offering evidence that he "knows to be false." The duty to take remedial measures only arises if the lawyer "comes to know" that the offered evidence was false. NC Rule 1.0(g) defines "knowingly," "known," and "knows" as denoting "actual knowledge of the fact in question," but that "a person's knowledge may be inferred from the circumstances." The obligation to protect confidential client information remains unless the lawyer "knows" the testimony is false.

Third, note that the duty applies not only in litigation, but also in other matters under the jurisdiction of a tribunal, including ancillary proceedings conducted pursuant to the tribunal's authority, such as a deposition. Comment [1] specifies

[this rule] applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

NC Rule 3.3, cmt. [1]

The Knowledge Requirement

As noted above, "knowingly" means that the lawyer "actually knows" that the offered evidence is false, but knowledge can be inferred from the circumstances. Comment [8] states that

[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact...[but] although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

NC Rule 3.3, cmt. [8]. One standard for evaluating whether knowledge can be inferred from the circumstances is to ask whether a reasonable lawyer would believe the evidence in light of the other evidence known to the lawyer. *See, e.g., Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 98 CIV 10175 (JSM) 202 WL 59434 (S.D.N.Y. Jan. 16, 2002)(law firm sanctioned by court for permitting client to submit false affidavit).

Actual knowledge is not required, however, for a lawyer to refuse to offer testimony if the lawyer reasonably believes the testimony will be false. However, this discretion does not allow a lawyer to decline to offer the testimony of a criminal defendant because of the defendant's due process right to testify in his own behalf. *See Nix v. Whitesides*, 474 U.S. 157 (1986). Even if a criminal defense lawyer reasonably believes that the client's testimony will be false, the lawyer must allow the defendant to testify unless the lawyer "knows" that the testimony will be false. NC Rule 3.3, cmt. [9].

What to Do Before and During Client Testimony

NC Rule 3.3(a)(3) prohibits a lawyer from knowingly offering any false evidence regardless of its materiality. If a lawyer knows that the client intends to testify falsely, the comment to NC Rule 3.3 provides the following guidance:

the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

NC Rule 3.3, cmt. [6].

In seeking to persuade the client not to offer false evidence, the lawyer may advise the client that he will seek to withdraw from the representation if the client persists. If the lawyer concludes that the client will persist in a course of action that the lawyer believes is criminal or fraudulent, the lawyer may seek permission of the court to withdraw. NC Rule 1.16(b)(3).

If the lawyer must call the client as a witness, as in the case of a criminal defendant who insists upon testifying, the lawyer should structure the examination to elicit as little false testimony as possible. Note that the comment does not recommend the use of the "narrative approach" to testimony by a client that may be perjured. The narrative approach allows the client to testify in a narrative fashion without benefit of direct examination questions from the lawyer, but the lawyer is prohibited from using the testimony in closing argument. *Annotated Model Rules of Professional Conduct* (Sixth Ed.), p. 317. The narrative approach is rejected by the Model Rules and in ABA Formal Ethics Opinion 87-353 (1987) (since *Nix v. Whitesides*, lawyer can no longer use narrative approach to insulate himself from charge of assisting a client's perjury). *Id*. Nevertheless, the narrative approach is not specifically prohibited by the North Carolina Rules or formal ethics opinions and it may be "one of the imperfect options available in the client perjury dilemma." *Id*.

After the Client Testifies: Reasonable Remedial Measures

Rule 3.3(a)(3) requires a lawyer to take remedial measures upon discovering that materially false evidence has been offered by the lawyer, by the client, or by a witness called by the lawyer during either direct examination or cross examination by opposing counsel. If the false evidence is immaterial, the lawyer is not required to take action.

Reasonable remedial measures do not have to be taken as soon as the lawyer learns that the offered evidence was false, but they must be taken before a third party relies upon the false evidence to his detriment. As explained in comment [10] to NC Rule 3.3,

[t]he lawyer's action must also be seasonable: depending upon the circumstances, reasonable remedial measures do not have to be undertaken immediately; however, the lawyer must act before a third party relies to his or her detriment upon the false testimony or evidence.

NC Rule 3.3, cmt. [10]. Note that the comment to ABA Model Rule 3.3 does not include this statement and, presumably, the duty under the Model Rule is to take remedial action as soon as the lawyer knows that material false evidence has been offered.

Reasonable remedial measures include remonstrating with client privately and seeking client's cooperation regarding the correction of the false evidence. NC Rule 3.3, cmt. [10]. The lawyer may threaten to withdraw if the client will not cooperate. Withdrawing from the representation may be the next logical remedial measure, but only if withdrawal will undo the effect of the false evidence and is permitted by the tribunal.

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