

ORANGE COUNTY BAR ASSOCIATION

Formal Opinion 2003-01 (Client Perjury and the Criminal Defense Attorney)

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Introduction and Issue

What is a criminal defense attorney to do when a client indicates that he or she will commit perjury? Although an attorney clearly must not participate in the presentation of perjured testimony, at what point is perjury so certain that an attorney must act in a way that is inconsistent with the most zealous advocacy? And once perjury appears certain, what choices permit the most effective representation without attorney sponsorship or participation in the client's perjured testimony?

The applicable evidentiary standard to trigger the attorney's duty is a matter of first impression in California. In order to preserve the balance between zealous advocacy and the need for practical and clear guidance, this Opinion proposes the standard of actual knowledge. That is, the attorney must be informed by the client that the client is going to commit perjury. If the attorney merely has an articulable or reasonable suspicion that the intended testimony is perjurious, or even believes that such is likely (i.e., has probable cause or even clear and convincing evidence), but does not actually know that the client will commit perjury, then the attorney should aid the defendant in a fully professional examination and potential rehabilitation after cross-examination. In brief, the attorney is to maintain the role of a zealous advocate.

If an attorney concludes that the client actually intends to commit perjury, the attorney must first attempt to dissuade the client from so testifying. If the client refuses to follow the attorney's advice and insists on providing perjurious testimony, the attorney may seek to withdraw from representation, but this Opinion recommends that the attorney instead proceed with a "narrative" presentation of the testimony after providing a recommended set of advisements and admonishments to the client. The narrative approach permits the client to testify without the involvement of the attorney; the attorney must not make use of the perjurious testimony in any way during the trial.

The Duty Not to Participate in the Presentation of Perjured Testimony

Attorneys have long been prohibited by the rules of professional conduct from participating in the presentation of perjured testimony. See *Nix v. Whiteside*, 475 U.S. 157, 166 (1986). The California Rules of Professional Conduct require an attorney to "employ, for the purpose of maintaining the causes confided to the [attorney] such means only as are consistent with truth" and prohibits him or her from seeking "to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." California Rules of Professional Conduct, Rule 5-200. See also, California Business & Professions Code §§ 6077, 6068 ("It is the duty of an

attorney . . . [t]o employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”) (2003).

The ABA’s Model Rules of Professional Conduct¹ likewise provide:

(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 [generally preventing an attorney from disclosing confidential information from his or her client]. (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false

Id. at Rule 3.3. Similarly, the ABA’s Model Code of Professional Responsibility states, “In his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence.” *Id.* at DR 7-102(A)(4).

The Proposed Evidentiary Standard: Actual Knowledge

Although an attorney clearly must not participate in the presentation of perjured testimony, on what basis can an attorney conclude that a defendant is going to testify falsely? No controlling precedent provides guidance on this critical issue. Commentators and courts in other jurisdictions have set forth a variety of standards for determining when an attorney “knows” the client intends to testify falsely, including “good cause to believe” a client intends to testify falsely, *State v. Hischke*, 639 N.W.2d 6, 10 (Iowa 2002); “compelling support” for concluding that the client will perjure himself, *Sanborn v. State*, 474 So.2d 309, 313 n.2 (Fla. Dist. Ct. App. 1985); “knowledge beyond a reasonable doubt,” *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989); “a firm factual basis,” *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977); “a good faith determination,” *People v. Bartee*, 566 N.E.2d 855, 857 (Ill. Ct. App. 1991), and “actual knowledge,” *United States v. Del Carpio-Cotrino*, 733 F.Supp. 95, 99 (S.D.Fla. 1990). *See generally*, *Commonwealth v. Mitchell*, 781 N.E.2d 1237, 1246-47 (Mass.) (surveying the range of standards), *cert. denied*, 123 S.Ct. 2253 (2003).

This Opinion adopts the most stringent standard: “before defense attorneys can refuse to assist a client in testifying, they must know that the client will testify falsely based on the client’s

¹The ABA has issued both a Model Code of Professional Responsibility and Model Rules of Professional Conduct. The older Model Code of Professional Responsibility was adopted by the American Bar Association in 1969. The Model Rules of Professional Conduct was adopted in 1983 (and recently amended in other areas). *See* Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 *Vand. L. Rev.* 339, 343-50 (1994) (tracing the development of the Model Code of Professional Responsibility and the Model Rules of Professional Conduct). Other than California, all states have substantially adopted either the Model Code of Professional Responsibility or the Model Rules of Professional Conduct.

affirmative statement of intent to lie.” Wisconsin v. McDowell, 669 N.W. 2d 204, 223 (Wis. Ct. App. 2003). A lesser standard fails to provide bright-line guidance, or else imposes the ill-fitting duty of investigator upon the defense attorney: “Except in the rarest of cases, attorneys who adopt ‘the role of the judge or jury to determine the facts’ pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.” Nix, 475 U.S. at 189 (citation and footnote omitted). As explained recently by a Wisconsin appellate court: “With a lesser standard, on what would counsel base a ‘reasonable belief’? How, really, would counsel ‘know,’ absent an admission from defendant? . . . [F]ar more realistic for counsel to maintain the unique humility of ‘not knowing,’ absent an admission by the client.” Wisconsin v. McDowell, 669 N.W. at 223.

Absent an admission by the client of an intent to testify falsely, a defense attorney must protect the defendant’s right to testify and assist in the presentation of the defendant’s testimony. Regardless of counsel’s suspicion of the client’s intentions, absent an admission, the attorney must proceed as a zealous advocate.

Choices When the Client Intends to Commit Perjury

What should a criminal defense attorney do when a client informs him of an intent to commit perjury at trial? As set forth below, this Opinion recommends that the attorney first attempt to dissuade the client from committing perjury, and if unsuccessful, then to provide the client with advisements before presenting the perjurious testimony in narrative form.

Clearly an attorney’s initial obligation is to attempt to dissuade the client from testifying falsely. Nix, 475 U.S. at 169, (“at a 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”). At the very least, pragmatic reasons would include the evidentiary weakness of the false testimony, a likely longer sentence if convicted, and a possible perjury prosecution. Thus, counsel’s efforts to dissuade the client from testifying falsely is wholly consistent with zealous representation. See id. at 168-71.

If the client remains undeterred, the attorney’s choices include cooperation with the defendant in presenting the perjured testimony, refusing to allow the defendant to testify, withdrawing from the representation, reporting the planned perjury to the court, and presenting the perjury passively through the narrative form.

Either cooperating with the defendant in presenting his testimony or preventing the defendant from testifying is an extreme measure that protects only one of two conflicting interests: the former approach fails to respect the attorney’s ethical obligations and the latter provides no consideration for the defendant’s right to testify. See People v. Johnson, 62 Cal. App. 4th 608, 72 Cal. Rptr. 2d 805, 811-18 (1998).

California caselaw and the California Rules of Professional Conduct each sanction withdrawal from representation once the client signals his intention to proceed with perjured testimony. In People v. Brown, 203 Cal. App. 3d 1335, 250 Cal. Rptr. 762, 764 fn. 1 (1988), in reliance on the California ethical rules for attorneys, the court stated that if an attorney is unable to dissuade his or her client from committing perjury, “the attorney must make a motion to withdraw so as to not give implied consent to the use of perjurious testimony.” The court further stated, “[w]hen faced with a criminal defendant who insists on testifying perjurally, it is clearly appropriate under California law, even necessary, for counsel to present a request to withdraw to the court.” Id. at 1339, fn. omitted; California Rules of Professional Conduct, Rule 3-700(B)(2),

(C)(1)(b) & (c); see also Model Rules of Professional Conduct, Rule 1.16(a)(1); Model Code of Professional Responsibility, DR 2-110(B)(2) (attorney should make a motion to withdraw from representation when the representation will result in a violation of law or rules of professional conduct).

This approach does not solve the problem, however, because while it affords a possibility for the attorney to avoid eliciting perjurious testimony, it is also possible that the court will deny the motion to withdraw. See Brown, 203 Cal. App. 3d at 1340-42. Even if the motion for attorney withdrawal is granted, a dishonest client remains. The court in People v. Gadson, 19 Cal. App. 4th 1700, 24 Cal. Rptr. 2d 219 (1993) best explained this problem by stating: “[W]e note that permitting defense counsel to withdraw does not necessarily resolve the problem. That approach could trigger an endless cycle of defense continuances and motions to withdraw as the accused informs each new attorney of the intent to testify falsely. Or the accused may be less candid with his new attorney by keeping his perjurious intent to himself, thereby facilitating the presentation of false testimony. Lastly, there is the unfortunate possibility that the accused may find an unethical attorney who would knowingly present and argue the false testimony. Thus, defense counsel’s withdrawal from the case would not really solve the problem created by the anticipated perjury but, in fact, could create even more problems.” Id. at 1710, fn. 5. For these reasons, this Opinion acknowledges the propriety of withdrawal but disfavors this course of action.

Disclosure to the court regarding the client’s intention to testify is another disfavored option. See People v. Johnson, 62 Cal. App. 4th 68, 72 Cal. Rptr. 2d 805, 813 (1998). Disclosure has been criticized because it compromises the attorney’s ethical duty to keep client communications confidential. Id.; See also Model Code of Professional Responsibility, Canon 4; Model Rules of Professional Conduct, Rule 1.6; Business & Professions Code, §6068, subdivision (e). This solution would also cause a significant conflict of interest between the attorney and his or her client if the attorney discloses to the court that the defendant has committed perjury. Id.; See also Silver, Truth, Justice, and the American Way: The Case Against Client Perjury Rules, 47 Vand. L. Rev. 339, 415-18 (1994), supra. In addition, such a disclosure would require some additional court action such as a decision as to whether the defendant’s statement is, in fact, false and a further decision whether the defendant will be permitted to testify and in what form and manner. Thus defense counsel would likely become enmeshed in a mini-trial on the perjury issue while struggling to remain a zealous advocate for the remainder of trial. People v. Johnson, 72 Cal. Rptr. 2d at 813.

The Narrative Approach

The best accommodation between the defendant’s right to testify and the attorney’s right to not participate in the presentation of perjured testimony is found in the narrative approach. With the narrative approach, an attorney calls the defendant to the stand, the attorney does not engage in the usual question and answer approach, but permits the defendant to testify in a free narrative. In closing arguments, the attorney does not rely on the perjured testimony of the defendant.

First suggested by the ABA in the early 1970’s, see Project on Standards for Criminal

Justice, Standards Relating to the Defense Function,² the narrative approach has been criticized on the basis that the attorney would participate in committing a fraud on the court. See Stephenson v. State, 424 S.E.2d 816, 818 (Ga. Ct. App. 1993) (appellant's "suggestion he should have been permitted to testify in narrative form would constitute the attorney's participation in fraud, and thus is no answer"). The narrative approach has also been criticized as communicating to the jury that the defendant is committing perjury. One court has stated, "[t]his procedure could hardly have failed to convey to the jury the impression that the defendant's counsel attached little significance or credibility to the testimony of the witness, or that the defendant and his counsel were at odds. Prejudice to the defendant's case by this trial tactic was inevitable." State v. Robinson, 224 S.E.2d 174, 180 (N.C. 1976).

Three California cases to date have recognized that the narrative approach, though imperfect, represents the best accommodation of the competing interests of the defendant's right to testify and the attorney's right not to participate in the presentation of perjured testimony. People v. Johnson, 72 Cal. Rptr. 2d at 811-18; People v. Guzman, 45 Cal. 3d 915, 248 Cal. Rptr. 467 (1988); People v. Gadson, 19 Cal. App. 4th 1700, 24 Cal. Rptr. 2d 219 (1993). "The standard recognizes that, although counsel need not elicit what he or she thinks will be perjured testimony, an accused has an absolute right to testify over counsel's objection." People v. Guzman, 45 Cal. 3d at 944. The Guzman court noted that the approach taken "was counsel's best effort to reconcile their duty of representation with their ethical obligations as officers of the court." Id. at 945. The Gadson court, after reviewing the Guzman case, likewise concluded, "[t]he solution [employing the narrative approach] properly reconciled the competing interests which intersected in this situation. Defendant was able to testify on his own behalf; trial counsel refrained from actively participating in the presentation of false testimony; defendant was still afforded the assistance of trial counsel; and the integrity of the adversarial system of justice was not compromised." Gadson, 19 Cal. App. 4th at 1711.

The Johnson court specifically rejected the criticism that the use of the narrative approach necessarily conveyed to the jury that the defense attorney had concluded that the client was lying. The court reasoned that the jury might surmise that the defendant had opted to testify "unhampered by the traditional question and answer format." Johnson, 72 Cal. Rptr. 2d at 817 (quoting Guzman, 45 Cal.3d at 946). Because the defendant is a unique witness, the jury might assume that special rules permit the defendant to testify in a narrative fashion. Johnson, 72 Cal. Rptr. 2d at 817. The court concluded that in any event, the possibility of a negative inference by the jury should not "preclude the use of the narrative approach since the alternative would be worse, i.e., the attorney's active participation in presenting the perjured testimony or exclusion of the defendant's testimony, neither of which strikes a balance between the competing interests involved." Id.

In addition, the Johnson court reasoned that the use of the narrative approach avoided a "mini-trial" to determine whether the client in fact would commit perjury if called as a witness. Id. at 817-18. Such a hearing could require the attorney to testify against the client and the court to determine whether a defendant who stated an intention to testify falsely would, in fact testify falsely when called to the stand. Id. The court thus concluded that the "narrative approach represents the best accommodation of the competing interests of the defendant's right to testify

²The narrative approach was not included in the 1980 second edition of the ABA Standards for Criminal Justice.

and the attorney's obligation not to participate in the presentation of perjured testimony since it allows the defendant to tell the jury, in his own words, his version of what occurred, a right which has been described as fundamental, and allows the attorney to play a passive role." Id. at 817.

Many other jurisdictions have also concluded that the narrative approach is the best option for addressing client perjury. See, e.g., Wisconsin v. McDowell, 669 N.W.2d at 225; Commonwealth v. Mitchell, 781 N.E.2d 1237, 1249 (Mass. 2003); Lowery v. Cardwell, 575 F.2d 727, 731 (9th Cir. 1978); Coleman v. State 621 P.2d 869, 881 (Alaska 1980); State v. Waggoner, 864 P.2d 162, 167-168 (Idaho 1993); People v. Taggart 599 N.E.2d 501, 521 (Ill. 1992); Matter of Goodwin, 305 S.E.2d 578, 580 (S.C. 1983); State v. Layton, 432 S.E.2d 740, 754-755 (W.Va. 1993) ["the trial court appropriately weighed the conflicting interests involved and, in this Court's opinion, adopted a procedure which allowed the defendant to testify, which shielded the attorney from unethical and illegal conduct, and which advanced the societal interest in the administration of justice"]; People v. Bartee, 566 N.E.2d 855, 858 (Ill. Ct. App. 1991); Shockley v. State, 565 A.2d 1373, 1380 (Del. 1989); Butler v. United States, 414 A.2d 844, 850 (D.C. 1980); Sanborn v. State, 474 So.2d 309, 313 & n.3 (Fla. Dist. Ct. App. 1985).

Prior to proceeding with the narrative approach, the attorney should advise the client of the possible adverse consequences of so testifying, including the signal to the court and to the prosecution that the defendant is likely lying, and the risk that the jury might draw the same inference. The defendant should be advised, as in Guzman, that:

- (i) if he had any prior felonies bearing on his credibility, the prosecution could use them to impeach him, (ii) the court would instruct the jury on how to weigh the credibility of a witness, (iii) the court would be inclined to instruct the jury that an adverse inference can be drawn against a defendant if he fails to explain or deny any evidence against him introduced by the prosecution that he can reasonably be expected to deny or explain (CALJIC No. 2.62), and (iv) defendant's attorney would have an ethical obligation not to argue to the jury anything in defendant's testimony that the attorney believed was untrue.

Guzman, 45 Cal. 3d at 941-42. In addition, the attorney should expressly advise the client that the jury might draw an adverse inference the use of the narrative form of testimony. See Gadson, 19 Cal. App. 4th at 1715.

Conclusion

The California criminal defense attorney must maintain the role of zealous advocate if the attorney merely has an articulable or reasonable suspicion that the intended testimony is perjurious, or even believes that such is likely, but does not actually know that the client will commit perjury. In such instances, the attorney should aid the defendant in a fully professional examination and potential rehabilitation after cross-examination.

If, however, the attorney has actual knowledge, by virtue of the client's admission, that the client will commit perjury, the attorney first must attempt to dissuade the client from committing perjury. If the attorney fails to deter the client from intended perjury, the attorney may, but is not encouraged to seek to withdraw from representation. Rather, the attorney should advise the client of the risks of perjury and the narrative form of testimony before proceeding with the narrative approach.

[This Opinion reflects research and repeated drafting efforts of the Professionalism and Ethics Committee since 2001].