MASSACHUSETTS LAWYERS WEEKLY

A tortured journey with the lying witness

By: Daniel I. Small December 24, 2014

Any analysis of the ethics of witness preparation must really begin with the extreme case: the client who has committed — or intends to commit — perjury. In my two prior columns, I looked at the realities of the situation and the four challenging choices for addressing it — what I called the "Four Horsemen of the Lying Witness Apocalypse."

It is a real, and a difficult, dilemma: to balance our obligation as advocates to zealously represent our clients, and our obligation as officers of the court to preserve the system's integrity.

There are no easy answers. Many states have rules on the issue. Supreme Judicial Court Rule 3.3, "Candor Toward the Tribunal," as an example, reflects the complexity of the problem. One needs a GPS and a tour guide to navigate through it, and perhaps a strong amber liquid to smooth the twists and turns of such a journey.

Nor is the result a satisfying one. But it is an instructive and interesting pursuit. Tally ho!

The first and most significant fork in the road is between civil and criminal matters. In a civil case, Rule 3.3(a)(4) states that a lawyer "shall not knowingly … offer evidence that the lawyer knows to be false … ." As an initial step, a lawyer "may refuse to offer evidence that the lawyer reasonably believes is false." SJC Rule 3.3(c).

Next, according to the rule's comment, "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."

Barring that, if the lawyer discovers that a client has offered material false evidence, "the lawyer shall take reasonable remedial measures." SJC Rule 3.3(a)(4).

That phrase, "reasonable remedial measures," is not defined anywhere. However, the comment does go on to require disclosure in some situations. Specifically, "an advocate must disclose, if necessary to rectify the situation, the existence of the client's deception to the Court or to the other party."

The comment recognizes the potentially "grave consequences" of such disclosure on the client, but determines that, on balance, it is necessary to protect the integrity of the system and the search for truth. In the end, in civil cases, the resolution of that balancing is fairly clear.

There is much less clarity in what the rule views as the very different situation of perjury by a criminal defendant. The bases for this distinction are the "special constitutional concerns" such a situation triggers in a criminal case.

There is good reason to wonder whether such concerns are really that strong. After all, the U.S. Supreme Court made clear years ago that "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury." Nix v. Whiteside, 479 U.S. 197 (1986). However, the rule makes that distinction clearly, and we must follow along.

In the criminal case, persuasion is the starting point. The lawyer "has a duty to strongly discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed." Rule 3.3(e).

While it is hard to imagine a criminal defendant who does not know that perjury is unlawful, the duty to persuade is real and can have a real impact in some cases. Few of us — and few defendants — are as good at lying as we think we are, because our casual lies have never been exposed to the harsh glare of the courtroom under cross-examination.

Clients need to understand that difference. If persuasion is unsuccessful, withdrawal comes next.

First, if the client's intent to commit perjury is discovered, "before accepting the representation of the client, the

lawyer shall not accept the representation." Rule 3.3(e).

If it is discovered before trial, "the lawyer shall seek to withdraw from the representation." Rule 3.3(e). The rule discusses briefly the process of withdrawing, including possibly making an application "ex parte to a judge other than the judge who will preside at the trial."

However, that reliance on withdrawal raises some real questions, as discussed in the last column. Sure, it's an easy way out for the lawyer. But perjury is not primarily a lawyer problem; it's a problem for the system. If an honest lawyer withdraws because the client intends to commit perjury, that does little or nothing to prevent the perjury. Presumably, the client will just do a better job of hiding the intent from the next lawyer up — or find a lawyer who doesn't care.

That leaves two situations in which the lawyer may end up staying on through trial.

The first is if the lawyer is unable to obtain permission to withdraw. The rule provides no guidance — to lawyer or judge — on what the standards might be for such a motion, but contemplates its rejection.

The second scenario is if trial has already started and "seeking to withdraw will prejudice the client." Rule 3.3(c). A lawyer withdrawing in the middle of criminal trial will arguably prejudice the client. So the rule contemplates a lawyer, in trial, with a client who intends to commit perjury. What then?

The answer, somewhat surprisingly, is little or nothing. First, "the lawyer may not prevent the client from testifying." Rule 3.3(c). In other words, the lawyer may not prevent the client from committing perjury. Second, "the lawyer shall not reveal the false testimony to the tribunal." Rule 3.3(c).

Ultimately, in looking at the balance between client confidences and the integrity of the courts in a criminal case, the SJC rule comes down in favor of client confidentiality, and damn the torpedoes. The result, unfortunately, is perjury.

Once in trial, the rule's only answer to known perjured testimony is for the lawyer to limit his or her involvement. It's the old idea of a narrative: Don't participate or actively assist in the testimony, just let it happen. Let the client tell his (false) narrative, without questions or other guidance.

The rule states: "In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony … ." Rule 3.3(c).

It is a strange and disturbing scene to contemplate: an officer of the court and an advocate for a client putting the client on the stand to commit perjury, then just standing back and letting it fly.

Certainly, the attorney-client privilege is an important part of our system of justice. However, the system is first and foremost meant to be a search for truth, and allowing the privilege to shield perjury is twisting the concept to a troubling extreme. Is there really nothing more an attorney can do than stand by and watch the show?

In criminal cases, apparently not.

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Issue: DEC. 29 2014 ISSUE

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