MASSACHUSETTS LAWYERS WEEKLY

The four horsemen of the lying witness apocalypse

By: Daniel I. Small December 11, 2014

The classic — and extreme — problem in ethical witness preparation is the one we discussed in the last column. Perjury: The client who intends to lie, or has done so. It's a dilemma caused by the conflict that situation creates between a lawyer's obligations to represent the client zealously and preserve client confidences (e.g., DR 4-101), and the obligation to preserve the court's integrity (e.g., DR 7-102).

Like any serious dilemma, the response is neither simple nor easy. However, understanding the extreme case helps us to understand the murkier — and in some ways more difficult — challenges.

The search for a way out of this dilemma has, over time, involved what I call the "Four Horsemen of the Lying Witness Apocalypse": persuasion, narrative, withdrawal and disclosure.

My next column will delve into the tortured path that Massachusetts and other states have tried to get through this jungle. For now, let's just look at each of the Horsemen and the pros and cons of each option.

1) Persuasion

Without question, counsel has an obligation to try vigorously to persuade the client to tell the truth. One of the most instructive cases on this point remains the U.S. Supreme Court's opinion in Nix v. Whiteside, 457 US 157 (1986).

In summary, Whiteside, a defendant in a criminal trial, told his lawyers that he wanted to take the stand and tell a false story. His lawyer told him that would be perjury and that the lawyer would have to advise the court and seek to withdraw. Whiteside heeded the warning, testified truthfully, but was convicted.

Surprisingly, the 8th U.S. Circuit Court of Appeals reversed the conviction, agreeing with the defendant that he had been denied effective assistance of counsel under the Sixth Amendment by the lawyer's action.

The Supreme Court — wisely, I think — reversed, reinstating the conviction. The court held that "the attorney's first duty when confronted with a proposal for perjurous testimony, is to attempt to dissuade the client … ." (Id., at 995). More fundamentally, "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury." (Id., at 997).

The justices found that the attorney's persuasion efforts were appropriate. The efforts worked in that instance, but what happens when they do not?

2) Narrative

The idea of a narrative was to try to take the attorney, as an officer of the court, out of the picture: to allow the client to take the stand, but stand mute while the defendant tells his false story in a narrative without assistance from counsel. It seems, superficially, like an easy way out. The defendant gets his "day in court," and the attorney does not actively assist in perjury.

In reality, though, it's an endless minefield: Counsel is still an officer of the court, offering a client to the jury and having to continue to present evidence, argue the case, and work with the client.

The Supreme Court in Nix discussed the "narrative" approach in a footnote: "Most courts treating the subject rejected this approach and insisted on a more rigorous standard." (Id., at FN6). For good reason.

3) Withdrawal

For many, the last, best resort for counsel faced with a lying client is to withdraw from the case. One strong response was articulated well by an attendee at one of the CLE programs I routinely give around the country on witness issues: "Only attorneys would think that perjured testimony is an attorney problem!" She's right; it's not. Perjured testimony is a problem for the courts and our system of justice. The attorney's ethical dilemma is minor compared to the damage to the system and the public.

A 2010 New York Ethics Committee opinion agreed, finding that counsel's withdrawal may not lessen the risk and damage of perjured testimony — in fact, it may increase it. NYCLA, F.O. 741 (2010).

If ethical counsel withdraws, the client who intends to lie will presumably either not be as open with new counsel, so they don't "know" about the perjury, or find more willing counsel — like the lawyer cited in my previous article, who was recorded telling the client: "You better deny this … ."

Counsel may have helped himself out of a dilemma, but not the courts. The result is perjured testimony, with even less hope of remedy. Thus, the New York Ethics Committee concluded "that withdrawal from representation is not a sufficient method of handling false testimony by a client … ." (Id., at p.4).

4) Disclosure

We try to protect the attorney-client privilege fiercely, as we should for such an important protection. Even with such a difficult issue as perjured testimony, the power of the privilege has been so strong that disclosure to the tribunal was once a "Thou Shalt Not."

That conventional wisdom is reflected in a 1996 New York ethics opinion, which held that a "lawyer may not use the admitted false (deposition) testimony, but also may not reveal it." NYCLA Ethics Opinion 712 (1996).

However, that can leave a serious threat to our system of justice with no adequate remedy, and an officer of the court with no meaningful recourse. Movies and TV regularly portray lawyers putting on perjured testimony, but is that how we wish to act? Sooner or later the protections of the attorney-client privilege may have to yield to the dangers of perjured testimony.

In New York, as in other states, both the rules and the perspective have evolved rapidly, and by 2010, the 1996 opinion was superseded by the opinion cited above. That opinion dramatically shifts the balance between the competing concerns: "the lawyer's duty to remedy … known client false testimony … supersedes the lawyer's duty to maintain a client's confidential information." (Id., at p. 2).

The result is a shift from the traditional abhorrence for the idea of disclosure. The 2010 opinion holds: "A lawyer who comes to know that a client has lied about a material fact in a deposition … must … if necessary, disclose to the tribunal." (Id., at p.6).

Nor is "you never really know" necessarily an easy out. The New York Ethics Committee held that "[a]ctual knowledge … may be inferred substantially." (Id., at p.1).

There are no easy answers to the perjury dilemma, which is all the more reason not to underestimate the power of persuasion. However, persuasion for most clients has to be both ethical ("It's the right thing to do") and practical ("It's the smart thing to do"), including:

• You're not as good a liar as you think you are. We're not dealing with "little white lies" in casual conversation. This is lying under oath, under the harsh glare of the court reporter taking down every word and the cross-examiner picking every word apart.

• There are endless examples of people — some of them very articulate and successful — getting into more trouble for the "cover-up" than for the underlying conduct. Just a few examples: Presidents Nixon and Clinton, Martha Stewart, "Scooter" Libby and many more. Don't join them.

Most lawyers never have to encounter the perjury dilemma up close and personal. All lawyers hope they never will. But we are, to some extent, swimming against the current: against a media culture that too often revels in scandal and the scandalous, and too easily forgives or forgets the liar and his lies.

Just because it hasn't happened to you doesn't mean it won't. Hope for the best, but plan — and study — for the worst. None of the Four Horsemen provide an easy ride.

Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of the American Bar Association's "Preparing Witnesses" (4th Edition, 2014). He can be contacted at dan.small@hklaw.com.

Issue: DEC. 15 2014 ISSUE

10 Milk Street, Suite 1000,

Boston, MA 02108

(800) 451-9998