The Lawyer's Responsibility When a Defendant Intends To Commit Perjury

Occasionally an attorney, particularly an attorney representing the defendant in a criminal action, faces the situation where his client wants to take the stand and testify falsely. There are basically three alternatives available to the attorney faced with this problem: (1) withdraw from the case; (2) allow the client to take the stand and testify falsely without assistance from the attorney, such testimony not being argued in the closing argument; or (3) present the client's testimony as if it were the truth.

The first alternative, withdrawing from the case, has support from cases, the American Bar Association (ABA), and from several commentators. In *State v. Henderson,*[1] defendant in a criminal trial asked his court-appointed attorney on Friday before trial on Tuesday to conduct the defense based on a perjured story. On Saturday, the attorney went to the judge's home and asked permission to withdraw from the case. The attorney divulged no confidential communications, but did inform the judge that his reason for his request was that defendant intended to testify falsely. On Sunday, the attorney told defendant what he had done and Defendant refused to request a new attorney because he wanted the attorney's conduct to be available as ground for appeal.

At the trial, before the jury was impaneled, the attorney recited the above facts and renewed his request for permission to withdraw. The request was denied. At the completion of the state's case the attorney renewed his request to withdraw, and the court again refused the request. The jury returned a verdict of guilty.

Defendant's primary contention on appeal was that he was denied full and fair representation because the trial court refused the attorney's request to withdraw. The Supreme Court of Kansas held that the trial judge did not abuse his discretion in requiring the attorney to remain as defense counsel. In approving the attorney's request to withdraw as proper, the court observed:

> We perceive nothing violative of the confidentiality inherent in the attorney-client relation by Mr. Anderson's making known to the court defendant's avowed intention of presenting perjured testimony. While as a general rule counsel is not allowed to

1. 205 Kan. 231, 468 P.2d 136 (1970).

> disclose information imparted to him by his client or acquired during their professional relation, . . . the announced intention of a client to commit perjury, or any other crime, is not included within the confidences which an attorney is bound to respect.[2]

In *People v. Blye*[3] the attorney did not request to withdraw from the case upon learning that his client intended to testify falsely. Instead, the attorney privately told the judge, in the presence of the Deputy District Attorney but without the presence of defendant, of defendant's intention. The attorney said he felt it would be unethical to put defendant on the witness stand and the judge agreed. Defendant appealed his conviction and was granted a new trial. The appellate court said the attorney should have requested permission to withdraw from the case if he felt defendant would commit perjury if permitted to testify. The court further stated that defendant had a right to testify if he first requested the removal of his present attorney and either the appointment of another attorney or permission to represent himself.

An informal opinion of the ABA Committee on Professional Ethics states that if an attorney knows in advance that his client intends to commit perjury, it is his duty to advise the client that he must either "(1) [w]ithdraw at that time in advance of the submission of the perjured testimony or false evidence; or (2) [r]eport to the court or tribunal the falsity of the testimony or evidence, if the client insists on so testifying."[4] Another informal opinion advises that the lawyer withdraw from the case if the client persists in his intention to commit perjury, in order to prevent the lawyer from betraying the client's confidence while seeking to avoid the perpetration of a fraud.[5] The ABA Standards Relating to the Defense Function also recommends that a lawyer, faced with a client who insists on testifying falsely, "must withdraw from the case, if that is feasible, seeking leave of the court if necessary."[6] Disciplinary Rule (hereinafter refered to as DR) 2-110(C) (1) (b) of the ABA Code of Professional Responsibility indicates that it is permissible, but not mandatory, for a lawyer to withdraw where his

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2. *Id.*, 468 P.2d at 141.

3. 233 Cal. App. 2d 143, 43 Cal. Rptr. 231 (1965).

4. ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, [hereinafter cited as INFORMAL OPINIONS] No. 1314 (1975).

5. INFORMAL OPINIONS, No. 1318 (1975).

6. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE DEFENSE FUNCTION [hereinafter cited as ABA STANDARDS] § 7.7(b) (1971).

client "[p]ersonally seeks to pursue an illegal course of conduct," which implies that a lawyer may decide for himself whether he should seek withdrawal from a case.[7]

Monroe H. Freedman points out that an attorney's withdrawal from the case does not provide a solution but merely serves to pass the problem on to a second attorney.[8] The client may not tell his second attorney the truth because he will have developed a distrust of lawyer confidentiality. As a result, the perjured testimony may ultimately be presented with the second attorney's unwitting help. Mr. Freedman also argues that disclosing the client's intentions violates the attorney-client privilege, thereby resulting in clients being discouraged from telling their attorneys the truth. Without knowing the truth, an attorney does not have an opportunity to discourage his client from committing perjury, and the attorney may not be able to adequately represent his client. Charles Wolfram argues, however, that any inadequate representation is brought on by the client's choice "to accept a crippled representation in exchange for the client's opportunity to attempt the fraud."[9] E.H. Greenbaum believes the fault with Mr. Freedman's view

> is that it does not recognize that a client's choice to be represented by counsel is a choice to be represented by counsel who has limitations. A client accused of a crime does not have the right to go free on the basis of perjured testimony. It is basically the client's decision: there are benefits to being candid with counsel; the price is legitimate.[10]

If an attorney chooses not to withdraw or if his request to withdraw is denied, he is left with the remaining two of the three alternatives stated at the outset. If a defendant does not have a right to testify falsely, then an attorney who knows his client intends to so testify has a duty to either refuse to call his client to testify or to allow his client to testify only on certain facts, not questioning him

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7. Monroe Freedman points out that the problem is even more difficult when the client is indigent, because in many jurisdictions appointed counsel may withdraw from a case only under extraordinary circumstances. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 33 (1975).

8. *Id.*; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

9. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 857 (1977).

10. Greenbaum, *Attorneys' Problems in Making Ethical Decisions*, 52 IND. L. J. 627, 634 (1977).

on the facts he intends to lie about.[11] If the defendant must be allowed to testify,[12] then the attorney must decide how to conduct the examination.

The second alternative is that espoused by David G. Bress, to "permit the defendant to make a statement to the jury and not examine him and not argue the truth of that statement in final argument."[13] A similar view, expressed by Mr. Chief Justice Burger, is that the lawyer should allow his client to testify, but that he may not engage in direct examination of his client.[14]

In *State v. Lowery,*[15] the attorney, during examination of the defendant on the witness stand, realized that defendant was testifying falsely. He immediately moved for a recess and requested permission to withdraw. The request was denied. Defendant appealed his conviction claiming that by moving to withdraw at that time, the attorney was indicating to the court that the defendant was lying.

The appellate court upheld the defendant's conviction but said that the attorney, instead of asking to withdraw at this late date, should have refrained from further questioning in the areas of possible perjury and then made a record of his actions in an appropriate manner (the court's example was to have defendant subscribe to a file notation witnessed by another lawyer) rather than making a record with the court. The court based its opinion on the ABA Project on Standards for Criminal Justice which recommends that if withdrawal from a case is not feasible or is not allowed, then before the defendant testifies falsely, the attorney should make a record that the defendant is testifying against the advice of the attorney without revealing anything to the court. The attorney may not engage in direct examination of the defendant; he must confine his questions to identifying the defendant and permitting him to

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11. This behavior appears to be sanctioned by ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A)(1) which forbids a lawyer to "knowingly use perjured testimony or false evidence."

12. The court in *Blye* said that to prevent defendant from testifying at his own trial would be to deny him "a right that every defendant should have in a criminal case." 233 Cal. App. 2d 143, 149, 43 Cal Rptr. 231, 236 (1965).

13. Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 AM. CRIM. L.Q. 23, 27 (1966).

14. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 13 (1966).

15. 111 Ariz. 26, 523 P.2d 54 (1974).

16. ABA STANDARDS § 7.7(c).

make his statement to the court and jury. Also, the attorney may not argue the defendant's perjured testimony in the closing argument.[16]

Monroe Freedman points out two flaws in this approach.[17] The first is that the prosecutor may object to the narrative form of the testimony. Second, if the defendant's own lawyer does not use his client's testimony, the jury might realize that the lawyer does not believe the testimony and might thereby be influenced to return a verdict against the defendant.[18] Professor Freedman, therefore, supports the third alternative—that the attorney for a criminal defendant should present his client's perjured testimony as the truth.[19]

Mr. Freedman argues that the exception to the obligation of confidentiality which permits a lawyer to reveal his client's intention to commit a crime is permissive, not mandatory, and in any event "cannot logically be understood to include the crime of perjury committed during the specific case in which the lawyer is serving."[20] After a discussion of the cases cited in support of the relevant ABA Code sections, Freedman concludes that the Code provides little practical guidance in this matter for the criminal defense practitioner.[21]

An attorney faced with a client who wants to take the stand to testify falsely must try to discourage his client from doing so. If the client insists on testifying falsely and this occurs in advance of trial, most courts and the ABA advise the attorney to withdraw from the case. This, however, is not an adequate solution because it merely passes the problem on to the next attorney. Perhaps under such circumstances the withdrawing attorney should be required to testify at the trial as to his former client's illegal conduct.[22]

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17. Freedman, *supra* note 7, at 37-38.

18. Freedman's reasoning is based upon the need for upholding the attorney-client privilege and is supported by a survey conducted among lawyers in the District of Columbia in which ninety percent of the lawyers who responded said they would question a client on his false testimony "in the normal fashion." *Id.* at 38.

19. Freedman, *Where the Bodies Are Buried: The Adversary System and the Obligation of Confidentiality*, 10 CRIM. L. BULL. 979 (1974).

20. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1478 (1966).

21. Freedman, *supra* note 7, at 40.

22. In Gebhardt v. United Railways Co. of St. Louis, 220 S.W. 677 (Mo. 1920), the original attorney was allowed to testify against his former client who had committed perjury. The court held that the client's communication to her original attorney concerning the future crime of perjury was not privileged.

If it is too late to withdraw or if withdrawal is denied, the attorney must decide how to present the client's testimony. Commentators are in disagreement with some favoring no assistance from the attorney and others favoring the attorney presenting the testimony as if it were the truth. The ABA Code of Professional Responsibility, which is subject to interpretation, allows attorneys great latitude in deciding their course of action. This may mean that a client with perjured testimony will receive better representation if his attorney agrees with Professor Freedman's view, while a client of more conservative lawyers with strict ethical views may have his perjured story made less effective.

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