

Handling the Client Who Lies

by:

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I. Introduction

Throughout the course of every lawyer's career, there will arise situations where a client's lack of truthfulness will require the lawyer to make judgment calls that expose the lawyer to criticism for violating one or more ethical principles. Since there is no specific portion of the Model Rules of Professional Conduct or the Code of Professional Responsibility dedicated to this subject, these decisions appear to require the lawyer to choose one ethical principle over another. For example, how can a lawyer fulfill the obligation to be candid with a tribunal while simultaneously protecting client confidences? The purpose of this presentation is to provide a method of analysis applicable to all instances where a lawyer learns that a client has lied or that a client intends to lie. While these materials will not provide concrete answers for what to do in every situation, following the analysis outlined below will ensure that the lawyer considers all relevant rules in making judgment calls.

II. Applicable Code Sections and Model Rules:

- A. Rule 1.6. of the Model Rules of Professional Conduct - This rule governs a lawyer's basic obligation to maintain client confidences and states:
1. A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
 2. A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
 - a. to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - b. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.
- B. Rule 3.3 of the Model Rules of Professional Conduct - Rule 3.3 obligates lawyers to be candid with tribunals and states:
1. A lawyer shall not knowingly:
 - a. make a false statement of material fact or law to a tribunal;

- b. fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in a criminal or fraudulent act by the client . . .

[or]

- c. 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.

- C. Comment to Rule 3.3. - This comment elaborates on Rule 3.3 and deals with the lawyer's duty to withdraw and make disclosures when perjured testimony has already been presented to the court and states:

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, 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. If the persuasion is ineffective, the lawyer must take remedial measures.

- D. Rule 1.2. of the Model Rules of Professional Conduct - Rule 1.2. addresses the scope of a lawyer's representation.

- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- E. Rule 1.16 of the Model Rules of Professional Conduct - Rule 1.16 governs the lawyer's decision to decline or terminate representation of a client and states in relevant part:

- (b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
 - (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (2) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (3) the client insist upon pursuing an objective that the lawyer considers repugnant or imprudent . . .

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

F. Model Rule 4.1 of the Model Rules of Professional Conduct - Rule 4.1 outlines a lawyer's obligation to be truthful in statements to third parties and states:

In the course of representing a client, a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. [client confidences]

G. ABA Formal Opinion 353 (1988) - Notwithstanding the fact that several courts have approved using a narrative approach whereby the client testifies through a narrative without any questioning by the lawyer so that the lawyer does not directly examine the client on matters where the lawyer thinks the client might commit perjury. This formal opinion provides that a lawyer may not rely on a narrative approach to protect the lawyer from being accused of assisting the client and presenting perjured testimony.

H. ABA Committee on Ethics Formal Opinion 87-353 - This opinion applies to both civil and criminal situations where a lawyer discovers that a client has lied to a court and states:

[I]f, prior to the conclusion of the proceedings, a lawyer learns the client has given testimony the lawyer knows is false, and the lawyer cannot persuade the client to rectify the perjury, the lawyer must disclose the client's perjury to the tribunal, notwithstanding the fact that the information to be disclosed is information relating to the representation.

I. ABA Committee on Ethics Formal Opinion 366 (1992) - This opinion deals with the problem of false information used and relied upon in the pretrial stages of a case. The case which provided the basis for the opinion involved a lawyer who represented a company that used the lawyer to negotiate a loan from a bank where the lawyer made representations and presented financial statements later admitted by company executives to be false. The opinion found that the lawyer was required to withdraw from the representation because ongoing representation would mean assisting the client in a course of conduct the lawyer knew to be fraudulent. The committee went further and stated that the lawyer could disaffirm the statements on which the bank relied citing Model Rule 1.6 as authority. However, the opinion cautioned that a lawyer must be careful in disaffirming statements and must only do so where the lawyer's withdrawal is required because the client intends to continue to use the lawyer's services in fraudulent conduct. If the fraud has been completed and the client will not make further fraudulent use of the lawyer's services, disaffirmance is prohibited.

J. ABA Formal Opinion 376 (1993) - This formal opinion deals with an attorney's obligation to disclose or remedy false statements made by a client during pretrial stages and reasoned that even before the false documents are filed, there is a potential ongoing reliance on the contents of the documents which could impact

the outcome of a case and deceive the other side thus subverting the truth finding process. The opinion states that the lawyer has an obligation to disclose or remedy any such false statements, but the lawyer should only make disclosures as a last resort after using every means available to remedy the situation without disclosure.

III. Conflicts between Rules.

A reading of the rules set forth above leads quickly to the conclusion that maintaining client confidences in the case of a client who lies to either a court or to a third party conflicts with the lawyer's duties to be candid with tribunals and to be truthful in statements to third parties. In some states, like Pennsylvania, the duty to maintain client confidences does not supersede the lawyer's duty to be candid with a tribunal. If the Rules of Professional Conduct in a particular state provide no guidance on this point, a lawyer must still be mindful of ABA formal Opinion #353 (1987) which appears to place a lawyer's duty of candor to the tribunal before the lawyer's duty to protect the confidences of a client and states:

Without doubt, the vitality of the adversary system, certainly in criminal cases, depends upon the ability of the lawyer to give loyal and zealous service to the client. And this, in turn, requires that the lawyer have the complete confidence of the client ...

* * *

[However,] [i]mplicit in the promise of confidentiality is its non-applicability where the client seeks the unlawful end of corrupting the judicial process by false evidence.

Unfortunately, there exists no parallel provision to guide a lawyer in resolving conflicts between the duty to protect client confidences and the duty to be truthful to third parties. However, a lawyer confronted with this issue might do well to advise the client that if the client lies to a third party and the third party then presents the information to the court by questioning the client, the lawyer may not protect the client's confidence in the face of the higher obligation to be candid with the Court.

IV. Nix v. Whiteside.

In *Nix v. Whiteside*, 475 U.S. 157 (1986), the United States Supreme Court addressed the issue of how an attorney in a criminal case should handle a client's perjured testimony.

- A. **The Facts.** In *Nix*, the defendant, *Whiteside*, was accused of murder and repeatedly told his attorney, Robinson, that he only stabbed the victim because he was convinced the victim had a gun in his hand at the time of the incident. However, prior to the trial, the client admitted that he would testify that he saw "something metallic" in the victim's hand telling his lawyer "If I don't say I saw a gun, I'm dead." The lawyer told the defendant that in order to successfully show that he acted in self defense, he did not need to prove that the victim had a gun but only that he reasonably believed the victim had a gun. The lawyer also advised the defendant that testifying falsely would make him guilty of perjury and that the lawyer would have a duty to disclose perjury to the court and to withdraw as the defendant's attorney. *Id* at 160-162.

The case reached the United States Supreme Court after the Iowa Supreme Court affirmed the defendant's conviction of second degree murder and commended counsel for their high ethical standards. *Whiteside* contended that he was denied effective assistance of counsel and of his right to present a defense by Robinson's refusal to allow him to testify as he originally proposed and threat to withdraw.

B. The Holdings:

1. 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. *Id* at 157.
2. It is appropriate conduct for an attorney to seek to withdraw from representation under Model Rule 1.16 if the client insists on proffering perjured testimony. *Id* at 170. Although the court of appeals agreed with defendant that *Whiteside*'s threat to withdraw as counsel or disclose perjured testimony forced the defendant to make an impermissible choice between his right to counsel and the right to testify in addition to compromising client confidences, the Supreme Court reasoned that the scope of a constitutional right to testify does not extend to testifying falsely. *Id* at 172-173. Accordingly, an attorney's threat to withdraw and advising the client of the attorney's obligation to disclose perjured testimony does not deprive a defendant of either the right to counsel or the right to testify.
3. It is appropriate for an attorney to disclose a client's perjury to the court. *Id* at 174.

C. Applying *Nix* and the Rules.

1. Although the Supreme Court's opinion in *Nix* approves of both an attorney's withdrawal from representation of a client who would proffer perjured testimony and an attorney's duty to disclose perjured testimony to the court, the opinion alone does not provide a definitive road map for how to handle a client who lies. Reading *Nix* together with the other ethical rules and principles outlined above indicates that a lawyer can minimize the likelihood of violating ethical principles by engaging in the following actions in the order in which they appear:
 - a. **Discourage** the client from proffering perjured testimony and explaining that the lawyer has a duty to reveal the perjured testimony to the court notwithstanding the duty to keep the client's confidences.
 - b. **Withdraw** from the representation if the client will not reconsider the decision to proffer perjured testimony. If the client has already proffered false information to third parties, consider whether it is necessary to disavow the information.
 - c. **Disclose** any perjured testimony already presented to the court in a manner designed to minimize the harm to the client including the following:

- (1) Request an *ex parte* audience with the court to explain the circumstances;
- (2) Ask that a judge different from the trial judge hear the issue of the perjured testimony.

V. Conclusion.

Although no one authority contains a definitive statement on dealing with clients who lie, an attorney confronted with the situation who analyzes the facts of his or her case in light of the authorities discussed above is far less likely to run the risk of a conviction for the subornation of perjury or of being disciplined. In addition to analyzing the authorities above, every practitioner should be familiar with the rules applicable to his or her particular state since the Model Rules which provide the lion's share of the authority underlying *Nix v. Whiteside* are not binding upon individual states unless specifically adopted and, even if adopted, may vary in language and interpretation.

Hypothetical Number 1

You represent Jane Doe, a 45-year old woman married to John Doe with whom she has two children, Dick who is 5 years old and Sally who is 3 years old. At the outset of your representation of Jane, she tells you that she saw her husband, John, fondling their daughter in what she considered to be an inappropriate manner while John bathed the child. During the course of custody evaluations, Jane told experts for both parties that she had seen John molesting Sally, allegations which John steadfastly denies. In addition to the allegations of molestation, Jane has always maintained that she served as the children's primary caretaker while John pursued his career as an accountant and that John has a limited capacity to deal with the children, frequently disciplining them with inappropriate corporal punishment, using profanity and otherwise overreacting.

As you begin final preparations for trial, you work with Jane in your office. During one of your sessions, Jane asks you your opinion of her chances for winning sole custody of the two children and imposing supervised visitation on John if the Court fails to find that John has molested Sally as Jane alleges. You explain to Jane that you believe she has a better than 50/50 chance at winning custody of the children without proving molestation, you also point out that the molestation is the only basis for imposing supervised visitation.

As you begin to rehearse Jane's testimony, you notice that in telling the story of her observations of John molesting Sally, Jane mistakenly refers to the adult molester as "Daddy" and to the molested child as "baby Sarah." After correcting Jane several times, you suspect that she is not telling you the truth regarding John's molestation of Sally. In the face of your questioning, Jane breaks down and admits that she never actually saw John touch Sally in any inappropriate manner. She goes on to tell you that the inappropriate behavior she witnessed was that of her own father abusing her younger sister. Jane rapidly tells you that she is convinced that John has the same tendencies as her own father and that John would abuse Sally if he were to have unsupervised visitation.

In the face of Jane's revelation, you and Jane discuss the fact that even if you do not question Jane regarding the allegations of molestation at the trial, opposing counsel is likely to do so, and the facts are liable to be mentioned by expert witnesses at the time of trial. You explain to Jane your obligation to be candid with the Court and the penalties for perjury. When Jane asks you if there is any way to avoid this type of outcome, you advise her that the only way to guarantee that her earlier lie will not be revealed at the trial would be if the custody issue were resolved in a settlement. Jane authorizes you to contact John's attorney to discuss a child custody and visitation settlement but insists that you not correct the false molestation allegation. However, when you contact John's attorney, he tells you that John will not consider settling the custody and visitation issues because Jane lies about his molesting Sally have convinced him that the children's interests would best be served if John is awarded custody since Jane is obviously

emotionally unstable and so overprotective of the children that she would prevent him from having a meaningful relationship with them.

On the day of the trial, you put on your direct examination of Jane but omit eliciting any testimony regarding the molestation. However, the Judge, having been alerted to this issue in John's attorney's opening statement asks to hear Jane's testimony regarding the incident. You then ask Jane if there are any other reasons why she believes John should only be awarded supervised visitation with the children. Instead of talking about fears of molestation, Jane reverts to her false story about observing John touching Sally inappropriately.

Question: How should you handle Jane's perjured testimony?

Hypothetical Number 2:

While Jane Doe's attorney grapples with her lies about your client, John Doe's, child molestation, you must also work with John on preparing the financial aspects of the case dealing with John's income from his employment as an accountant in the accounting practice in which he is also a partner.

At John's deposition, he produces documents showing his ownership of a 10% interest in the partnership and an employment contract showing that he earns a base salary of \$100,000 in addition to a 10% share of year end profits over and above operating expenses. Following John's deposition and the depositions of several of his partners, you and opposing counsel reach stipulations regarding John's ownership interest in the accounting practice and his income.

During your meetings with John, he casually mentions to you that it's a good thing you were able to work out a stipulation with the other attorney regarding his partnership and income since he later learned that his base salary would be raised by an additional \$25,000 per year beginning January 1st of the year following the trial. Notwithstanding your explanation to John that you would be breaching your duty as cantor to the tribunal by presenting the stipulation, John refuses to allow you to disclose this new information to Jane's attorney and tells you that he expects you to keep this information confidential.

Question: How do you handle John's prohibition against your disclosure of this new salary information?