Ethics Opinion 234

Defense Counsel's Duties When Client Insists On Testifying Falsely

″Rule 3.3(a) prohibits the use of false testimony at trial. Rule 3.3(b) excepts from this prohibition false testimony offered by a criminal defendant so long as defense counsel seeks first to dissuade the client from testifying falsely and, failing in this, seeks to withdraw when this can be done without harm to the client. Where a defendant has been incarcerated before trial and a continuance on the eve of trial would cause an extended delay of trial, the obligation to withdraw is removed. Instead, defense counsel may call the client to testify in narrative form, but may not assist the client in framing the client's false testimony. Nor may defense counsel argue a perjurious client's credibility in closing unless the client has given at least some truthful, relevant evidence.

Applicable Rule
″ Rule 3.3 (Candor Toward the Tribunal)

The Inquiry
A lawyer requests an opinion concerning his ethical responsibilities as defense counsel in a criminal case in which his client wants to present false testimony in support of a mistaken identity defense.

At the defendant's initial court appearance, the lawyer had taken written notes of the client's physical appearance, including a clothing description. After the hearing, the defendant was detained on bond and remained incarcerated until trial. On the eve of trial, the defendant told his attorney that he wished to present a mistaken identity defense and told him the location of the clothing worn at the time of arrest, which the jail had mailed to an address provided by the defendant. Upon examining the clothing, the lawyer became convinced that the clothing was not the same that his client had worn at the client's first appearance.

After the lawyer confronted his client with his guess that the defendant had switched clothing with someone in the jail, the defendant confirmed the attorney's suspicion but reiterated his desire to present testimony in support of a mistaken identity defense. Counsel attempted to dissuade the client from pursuing this course of action and advised him that he could not assist the defendant in presenting false testimony to the court. He also advised him that the testimony could be easily contradicted by police officers. The defendant remained set on presenting the testimony. The lawyer sought informal guidance from this Committee, but the case resolved itself before such guidance was given. Because District of Columbia Rule 3.3 differs from similar rules in most other jurisdictions, the Committee has decided to respond to the inquiry by full opinion.

This inquiry considers three related issues: (1) whether the lawyer should have moved to withdraw on the eve of trial; (2) what steps, if any, the lawyer might have taken to assist his client to prepare to testify before the jury; and (3) what could the lawyer have said in closing argument.

Discussion
The obligations of an advocate faced with a threat of perjured testimony by a criminal defendant have been hotly debated for decades. In the District of Columbia, this issue has been resolved by the promulgation of Rule 3.3 of the Rules of Professional Conduct.[1] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn1)

The District of Columbia rule evolved out of earlier ABA ethics principles. In 1969, the ABA adopted Disciplinary Rule 7-102[2] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn2) in its Model Code of Professional Responsibility ("Model Code"), which as amended in 1974, provided that a criminal defense attorney faced with the prospect of his client testifying falsely had to (1) withdraw in advance of the perjured testimony, or (2) report to the court the falsity of the testimony if the client insisted on so testifying.[3] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn3) *See generally* ABA Informal Opinion 1314 (Mar. 25, 1975).

At the time DR 7-102 was adopted, the ABA had under consideration draft Standards Relating to the Administration of Criminal Justice. In 1971 an ABA Advisory Committee on the Prosecution and Defense Functions submitted a tentative draft which offered new direction to the defense attorney faced with his client's intent to commit perjury. That solution, commonly referred to as the "narrative approach," sought to give more protection to the attorney-client privilege, while limiting the damage to the tribunal caused by perjured testimony. The narrative approach was embodied in Defense Function Standard 7.7:

> (c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, * * * the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

The narrative approach subsequently enjoyed judicial acceptance, although critics charged that this approach compromised all the important policies at issue. "The lawyer [is] sufficiently involved to be morally culpable, yet the sudden switch of tactics in mid-examination [is] tantamount to blowing the whistle on the client."[4] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn4)

In drafting Rule 3.3 of the Model Rules of Professional Responsibility,[5] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn5) however, the ABA, agreeing with the critics of the narrative approach, *see* Comment [9] to Model Rule 3.3, returned to the approach of DR7-102, requiring a lawyer to reveal the client's perjury if necessary to rectify the situation. *See id.* Comment [10]. In so holding, the ABA also rejected the "full advocacy" approach, promoted primarily by Professor Monroe Freedman,[6] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn6) under which a lawyer, to protect client confidences, may knowingly present perjured testimony if the lawyer cannot dissuade his client from committing perjury. *See id.* Comment [9].

In the District of Columbia, however, the Jordan Committee and the Board of Governors of the Bar rejected the ABA approach, opting instead for a rule similar to that advocated by Professor Freedman:

> If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may, among other things, go forward with the examination of the client and closing argument in the ordinary manner.
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> Submission of the Board of Governors of the District of Columbia Bar to the District of Columbia Court of Appeals 138 (November 19, 1986). Comment [9] to the proposed draft made it clear, however, that withdrawal was the preferred course and that only truly exigent circumstances would warrant the presentation of perjured testimony. *Id.* at 141. The Bar opted for this position because it felt that the ABA approach put too much strain on the attorney-client relationship in the criminal setting and would be detrimental to the effective representation of criminal defendants in the long run. *Id.* at 142-143. It rejected the narrative approach because the use of narrative had long been seen to be tantamount to disclosure. *Id.* at 142.

The recommendation of the Bar on this point was not, however, accepted by the Court of Appeals. Instead, the Court rejected both the ABA approach and the Jordan Committee approach, and opted instead for the present language of Rule 3.3, which implements the "narrative approach." *See* Proposed Rules of Professional Conduct and Related Comments 33 (September 1, 1988);[7] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn7) D.C. Rule 3.3(b). In addition, the Court struck comments 12 through 15A, which had explained the approach of the Jordan Committee, and amended comment 8 to make it clear that false testimony would seldom be condoned and, equally important, that the manner of its presentation would be solely by the narrative approach:

> [8] Paragraph (b) allows the lawyer to ~~offer the false testimony of~~ permit a client who is accused in a criminal case to present false testimony in very narrowly circumscribed circumstances and in a very limited manner.
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> *Id.*, at 34 (underlining shows Court's additions).

In response to the Proposed Rule, the Litigation Section of the Bar endorsed the position taken by the Court, but the majority of the Courts/Lawyers Section urged a return to the approach recommended by the Board of Governors. See generally Robert E. Jordan, III, Analysis of Comments Submitted to the District of Columbia Court of Appeals in Response to the Court's Order of September 1, 1988, at 59-60 (May 3, 1989). The final version of Rule 3.3 was not changed in response to these comments.

Application of the Rule to the Present Inquiry

With the history of D.C. Rule 3.3 in mind, its application to the inquiry at hand is not in doubt.

First, Rule 3.3(b) comes into play when a lawyer "knows" that his client, the accused in a criminal case, intends to testify falsely. That requirement is met here, as the attorney's own investigation was confirmed by his client's

admission.[8] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn8)

Second, once the Rule comes into play, the lawyer must make a good-faith effort to dissuade the client from testifying falsely. This was done here, but to no avail.

Third, if the lawyer is unable to dissuade the client from giving false testimony, he must seek leave of the tribunal to withdraw unless withdrawal would seriously harm the client. Comment [8] to D.C. Rule 3.3 makes clear that withdrawal is strongly preferred to the presentation of false testimony, and must be attempted absent serious prejudice to the client. Here, the case settled prior to the filing of a motion to withdraw. We are asked, however, to render an opinion on whether such a motion should have been filed.

The facts here are close, but are sufficient to discharge a lawyer from attempting to withdraw. At the time the perjury issue surfaced, it was only a few days before trial, the client was incarcerated, unable to make bail, and had been incarcerated for some time. It was clear that withdrawal would have caused a delay and during the delay the continued incarceration of the client. While pretrial incarceration in and of itself is a hardship, it is not clear that it amounts to the sort of legal prejudice whose existence would excuse the obligation to withdraw.[9] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn9) Nonetheless, Comment [8] to Rule 3.3 does appear to contemplate that counsel need not move to withdraw on the eve of trial.[10] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn10)

Fourth, where counsel remains in the case, Rule 3.3(b) permits counsel to call the client to testify but such testimony must be solely in a narrative fashion with respect to any testimony that is false. Counsel may not examine his client in such a way as to elicit testimony the lawyer knows to be false, nor may he argue the probative value of the client's false testimony in closing argument. However, Rule 3.3(b) does not prevent the lawyer from engaging in normal examination -question and answer style -- on subjects where the lawyer believes the client will testify truthfully.[11] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn11)

The inquirer asks whether he could assist the client in preparing the narrative statement he would make to the jury containing the perjurious testimony. The inquirer fears that refusal to assist defendant's preparation of the statement would impair the attorney-client relationship. Rules 3.3(a)(2) and 1.2(e) clearly prohibit such assistance, however. Both rules forbid a lawyer from assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. To aid the defendant in preparing a statement containing false testimony would be assisting him to do just that. Indeed, we reached the same result under the Code of Professional Conduct. Our Opinion No. 79 (Dec. 18, 1979), which was based on DR 7-102(4),(6), and (7), held:

> a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may - indeed, - should do whatever is feasible to prepare his or witnesses for examination.

The prohibition on assisting a client to commit perjury does not, of course, prevent counsel from discussing the legal consequences of the client's proposed course of action. *See* Rule 3.3(a)(2). Moreover, the lawyer can ask the client a general question on direct examination which would elicit the perjurious narrative statement.

Finally, the inquirer asks about the scope of restrictions on his ability to argue his client's case to the jury. Rule 3.3(b) states that the attorney shall not argue the probative value of the client's testimony in closing argument. From the context of this provision, it is apparent that the attorney is prohibited only from arguing the *false* testimony to the jury.[12] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftn12) Since, according to the inquirer, the false testimony would have constituted only a small portion of the defense, the attorney could argue the weight of the non-perjurious portion of the testimony to the jury. In addition, defense counsel can always argue that the government has not sustained its burden of proving the defendant guilty beyond a reasonable doubt.

The inquirer also asks whether it would be appropriate to say in closing argument: "You heard him [the defendant] say the police arrested the wrong man" or "If you believe the defendant you should vote not guilty." Whether such statements are permissible depends upon the remainder of the defendant's testimony, information this Committee lacks. If the defendant's testimony would have consisted *solely* of false statements regarding his clothing, then for counsel to argue for the client's credibility would be tantamount to an impermissible argument for the truth of the perjured testimony. If, on the other hand, the defendant offers some truthful testimony in his or her defense, counsel could argue the credibility of that testimony in closing even

though to urge the defendant's credibility when some testimony is false is to some extent to further the client's perjury.

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1. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref1) Rule 3.3 provides in relevant part:
   (a) A lawyer shall not knowingly:
   (2) counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent,***.
   ****
   (4) offer evidence that the lawyer knows to be false, except as provided in paragraph (b).
   (b) When the witness who intends to give evidence that the lawyer knows to be false is the lawyer's client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.
2. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref2) DR 7-102(A) provided that "a lawyer shall not ... (4) Knowingly use perjured testimony or false evidence.... (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.... (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent...."
   After a 1974 amendment, DR 7-102(B) provided that "a lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.... "
3. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref3) For a full discussion of the evolution of the ABA's position, see 1 G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §§ 3.3:100-3.3:220 (2d ed. 1991 Supp.).
4. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref4) G. Hazard & W. Hodes, *supra*, § 3.3:215, at 602; *see also* Charles W. Wolfram, *Modern Legal Ethics* § 12.5.4 (1986) (criticizing the narrative approach).
5. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref5) Model Rule 3.3 provides in relevant part:
   (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.* (Emphasis added).
6. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref6) *See* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).
7. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref7) Proposed Rule 3.3 showed the following changes to the draft submitted by the Bar:
   (b) WHEN THE WITNESS WHO INTENDSTO GIVE EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE IS THE LAWYER'S CLIENT AND IS THE ACCUSED IN A CRIMINAL CASE, THE LAWYER SHALL FIRST MAKE GOOD EFFORT TO DISSUADE THE CLIENT FROM PRESENTING THE FALSE EVIDENCE; IF THE LAWYER IS UNABLE TO DISSUADE THE CLIENT, THE LAWYER SHALL SEEK LEAVE OF THE TRIBUNAL TO WITHDRAW~~,. IF WITHDRAWL CAN BE ACCOMPLISHED WITHOUT SERIOUS HARM TO THE CLIENT.~~ IF THE LAWYER IS UNABLE TO DISSUADE THE CLIENT OR TO WITHDRAW WITHOUT SERIOUSLY HARMING THE CLIENT, ~~THE LAWYER MAY, AMONG OTHER THINGS, GO FORWARD WITH THE EXAMINATION IN THE ORDINARY MANNER.~~ THE LAWYER MAY PUT THE CLIENT ON THE STAND TO TESTIFY IN A NARRATIVE FASHION, BUT THE LAWYER SHALL NOT EXAMINE THE CLIENT IN SUCH A MANNER AS TO ELICIT TESTIMONY WHICH THE LAWYER KNOWS TO BE FALSE, AND SHALL NOT ARGUE THE PROBATIVE VALUE OF THE CLIENT'S TESTIMONY IN CLOSING ARGUMENT.
   (Additions are underscored).
8. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref8) Courts have required a substantial level of knowledge before the attorney may take steps to avoid or remedy the purportedly false testimony. *See,*

e.g., United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3rd Cir. 1977) (requiring a "firm factual basis"); *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989) (requiring knowledge "beyond a reasonable doubt" that client will commit or has committed perjury).

9. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref9) In this regard, Comment [8] states:
Serious harm to the client sufficient to prevent the lawyer's withdrawal entails more than the usual inconveniences that necessarily result from withdrawal, such as delay in concluding the client's case or an increase in the costs of concluding the case. The term should be construed narrowly to preclude withdrawal only where the special circumstances of the case are such that the client would be significantly prejudiced, *such as by express or implied divulgence of information otherwise protected by Rule 1.6*. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. * * * In those rare circumstances in which withdrawal without such serious harm to the client is impossible, the lawyer may go forward with the examination of the client and closing argument subject to the limitations of paragraph (b).
(emphasis added).
10. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref10) Comment [8] provides in this respect:
Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.It is unclear whether the Comment simply makes the factual statement that many courts will not let counsel withdraw on the eve of trial or whether delay on the eve of trial is a harm sufficient to excuse a request to withdraw. If there is such harm, it is perhaps caused by the need for counsel seeking to withdraw on the eve of trial to give justification for such a motion, since justification sufficient to obtain a continuance from judges not prone to grant motions causing last minute trial delays, may itself risk improper disclosure of confidential information. *See* Rules 1.6 and 3.3(d). Indeed, a last minute motion accompanied by silence might well be tantamount to a statement that the client wishes to put on perjured testimony.
11. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref11) ABA Proposed Standard 4-7.7(c) permitted the lawyer to identify his client as the defendant and to ask appropriate questions when counsel believed that the defendant's answers would not be perjurious. From an advocacy standpoint, the attorney may wish to ask specific questions on safe subjects both at the outset and conclusion of the testimony, sandwiching the narrative testimony in between, so as to avoid calling undue attention to the change in style. *See generally People v. Lowery*, 366 N.E. 2d 155, 158 (I11. App. 1977) (holding that the defendant was not prejudiced by giving narrative testimony where counsel asked specific preliminary and concluding questions.)
12. [Return to text] (/bar-resources/legal-ethics/opinions/opinion234.cfm#ftnref12) Proposed ABA Standard 4-7.7(c) provided that a lawyer may not "argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument."

March 1993