

Anticipating and Responding To Client Perjury

BY ROY SIMON

What should you do if your criminal defense client intends to commit perjury, or - worse - has already committed perjury?

The New York Code of Professional Responsibility is ambiguous regarding a lawyer's duties when a client intends to testify falsely, or has already done so, but a recent opinion, *People v. Darrett*, 2003 WL 22867872 (N.Y. App. Div. 1st Dep't, Dec. 4, 2003), provides helpful guidance. This article reviews some leading past cases on client perjury in criminal cases and then discusses the *Darrett* decision.

The New York Code of Professional Responsibility

Several New York Disciplinary Rules control perjury. First, DR 7-102(A)(4) flatly bans deliberate use of false testimony by a lawyer by providing that a lawyer shall not "[k]nowingly use perjured testimony or false evidence," and DR 7-102(A)(7), for good measure, prohibits a lawyer from counseling or assisting a client in "conduct that the lawyer knows to be illegal or fraudulent." If a client nevertheless insists on committing perjury, DR 4-101(C)(3) - an exception to New York's confidentiality rule - permits a lawyer to reveal "[t]he intention of a client to commit a crime and the information necessary to prevent the crime." Since perjury is a crime, a lawyer may (but is not required to) reveal a client's intention to commit perjury. But what if the lawyer does not know that the client intends to commit perjury? Or what if the client promises to tell the truth but testifies falsely instead? Those situations bring into play complex issues of post-testimony remedies, and a complex rule, DR 7-102(B)(1), which provides as follows:

B. A lawyer who receives information clearly establishing that:

1. The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer *shall reveal* the fraud to the affected person or tribunal, *except* when the information is protected as a confidence or secret. [Emphasis added.]

The phrase "information clearly establishing," which is not used anywhere else in the Code of Professional Responsibility, means "actual knowledge." See *Doe v. Federal Grievance Committee*, 847 F.2d 57 (2d Cir. 1988) (lawyer must "clearly know, rather than suspect" fraud). The terms "confidence" and "secret" sweep in nearly everything a lawyer learns about a client, from any source, while representing a client. As defined in DR 4-101(A):

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Thus, "the exception to DR 7-102(B) prohibiting the disclosure 'when the information is protected as a confidence or secret' will in most circumstances consume the rule." See Nassau County Bar Op. 03-1 (2003). Moreover, DR 4-101(C) contains no exception permitting a lawyer to disclose a client's *past* perjury. Thus, no New York rule expressly authorizes a lawyer to reveal a client's perjury after it occurs. The most effective time to deal with client perjury, therefore, is before it happens. But exactly what may (or must) a lawyer do when perjury looms?

An early New York case on client perjury was *People v. Salquerro*, 107 Misc.2d 155, 433 N.Y.S.2d 711 (N.Y. County Supreme Ct. 1980). Defendant Salquerro was indicted for attempted murder and robbery. A lawyer was appointed to represent him. The day before trial, the defendant "unequivocally informed counsel that he intended to lie when he testified in his own behalf." Defense counsel "immediately informed both the court and the Assistant District Attorney" of his client's intention to lie, though counsel did not convey the "nature nor substance" of any anticipated testimony. Then counsel moved to withdraw, telling the court that his disclosures had "destroyed totally the necessary confidence that a client must have in his attorney in order to receive the effective assistance of counsel which the Sixth Amendment guarantees."

The court acknowledged that the question of defense counsel's obligation when faced with client perjury is "a troublesome one," but said, simplistically, that "there can never be a real conflict between the attorney's obligation to provide a zealous defense and his moral duties to himself and the court." The court then noted that DR 7-102(A)(4) forbids an attorney to use "perjured testimony" and that DR 4-101(C)(3) permits a lawyer to reveal the "intention of his client to commit a crime and the information necessary to prevent the crime." Clearly, the court said, defense counsel did not violate DR 4-101.

The court faulted defense counsel for one thing: in the first instance, defense counsel "evidently did not seek to dissuade his client from going through with his stated intention to commit perjury." Nevertheless, counsel's decision to inform the court of the defendant's plan was "highly laudable and in conformity with standards announced by bar associations, courts of sister States, and commentators."

Turning to defense counsel's motion to withdraw, the court noted that granting the motion would not resolve the problem, for at least three reasons: (1) the defendant's next attorney might have lower ethical standards and might "readily present" (or at least "not impede") his client's false story; or (2) the defendant might be "less candid with a new attorney and keep his perjurious intentions to himself"; or (3) happy that disclosing his intent to commit perjury had delayed trial, the defendant "might be equally frank with a new attorney, in order to further delay the proceedings."

But forcing defense counsel to stay in the case would also cause a problem. How could defense counsel prevent perjury and still preserve the defendant's right to testify in his own defense? The court suggested a possible solution (known today as the "narrative" method) based on a draft of the ABA Standards for Criminal Justice:

Before the defendant takes the stand ...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.

In the court's view, this method would preserve the defendant's right to testify and his right to assistance of counsel, but would also protect defense counsel from participation in the fraud. Satisfied that granting the motion to withdraw could lead to various evils, whereas denying the motion to withdraw would lead to manageable problems, the court denied the motion to withdraw.

The United States Supreme Court speaks

The next great milestone in the perjury debate was *Nix v. Whiteside*, 475 U.S. 157 (1986). Whereas *Salquerro* arose from a motion to withdraw before trial, *Nix* arose from a habeas corpus petition after trial alleging ineffective assistance of counsel. The petitioner in *Nix*, Charles Whiteside, had stabbed drug dealer Calvin Love to death, but claimed self-defense. Initially, Whiteside told his lawyer, Gary Robinson, that he had stabbed Love as Love was pulling a pistol from underneath his pillow. Upon closer questioning, Whiteside indicated that he had not actually seen a gun, but was convinced that Love had a gun. Until shortly before trial, Whiteside consistently told Robinson that he had not actually seen a gun, but was convinced that Love had a gun in his hand. About a week before trial, however, Whiteside for the first time told Robinson that he had seen something "metallic" in Love's hand. When asked about this, Whiteside responded by saying, "If I don't say I saw a gun I'm dead."

Robinson responded by telling Whiteside that his testimony would be perjury, and stressed that Whiteside did not need to prove that Love had a gun but only that he (Whiteside) "reasonably believed" he was in danger. When Whiteside insisted that he would testify that he saw "something metallic" in Love's hand, Robinson firmly told Whiteside three things: (1) as an officer of the court, he could not allow Whiteside to testify falsely because that would be perjury; (2) if Whiteside insisted on committing perjury, Robinson would seek to withdraw; and (3) if the motion to withdraw were denied and Whiteside did commit perjury at trial, Robinson would have a duty to advise the court.

In the face of these threats, Whiteside relented. He testified at trial, but stuck to his earlier story that he believed Love was reaching for a gun and that he had responded swiftly in self defense. On cross examination, Whiteside admitted that he had not actually seen a gun in Love's hand. The jury did not buy Whiteside's story; it returned a verdict of second-degree murder. Whiteside then moved for a new trial, claiming that Robinson's warning not to say he saw a gun or "something metallic" had deprived him of a fair trial. The trial court held a hearing, heard testimony by Whiteside and Robinson, and denied the motion based on specific findings that the trial testimony as given was truthful and that the "something metallic" testimony that Robinson refused to allow would have been false. The Iowa Supreme Court affirmed the conviction, and eventually Whiteside filed a habeas petition that wound its way up to the United States Supreme Court.

Chief Justice Burger, writing for a unanimous Court, said the Court had granted certiorari to decide "whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial." To cut to the chase, the Supreme Court held that Whiteside's right to effective assistance of counsel had not been violated. A criminal defendant had no right to commit perjury, and Robinson's response to the threatened perjury was "wholly consistent" with the terms of DR 4-101(C)(3), DR 7-102(A)(4), and DR 7-102(B)(1). Since there had been "no breach of any recognized professional duty," it followed that there could be "no deprivation of the right to assistance of counsel."

The New York Court of Appeals decides DePallo

The New York Court of Appeals did not address client perjury issues in detail until the decision in *People v. DePallo*, 96 N.Y.2d 437 (2001). Defendant was charged with the brutal murder of a 71-year-old man. Defendant's blood was found at the scene and on the victim's clothing, his fingerprints were found in the murdered man's home, and defendant made several incriminating statements upon his arrest placing him at the scene of the crime. At a pretrial suppression hearing, against his counsel's advice, DePallo told a judge (but not the ultimate trial judge) that he and a codefendant had coerced a third man "to be a part of ... the action that night" and had threatened to kill him if he did not come along. See *Joel Cohen & James L. Bernard, What to Do When Your Client Commits Perjury*, N.Y.L.J. June 25, 2001 (quoting appellate briefs).

At trial, after the People rested but before DePallo testified in his own behalf, defense counsel approached the judge at a sidebar. He said that he had advised the defendant that he did not have to testify and should not testify, but if he did, he should do so truthfully. Defense counsel then elicited defendant's direct testimony in narrative form. Defendant testified that he was home the entire evening of the crime, and that his incriminating statements to the police had been induced by promises that he could return home if he confessed.

After both sides rested, defense counsel held a secret ex parte chambers conference with the trial judge, with neither the defendant nor the prosecutor present. Counsel told the judge:

[P]rior to the [defendant's] testimony, I informed the Court that ...the defendant was going to take the witness stand, and that he had previously told me he was involved in this homicide. Although I did not get into details with him, I don't know exactly what his involvement was, but he had stated to me that he was there that night, he had gotten at least that far. Knowing that, I told the defendant I cannot participate in any kind of perjury, and you really shouldn't perjure yourself. But, he, you know, dealing with him is kind of difficult and he was insistent upon taking the stand. He never told me what he was going to say, but I knew it was not going to be the truth, at least to the extent of him denying participation.

The trial court responded that defense counsel had complied with the procedures outlined in *People v. Salquerro*. Later, in his closing argument, defense counsel did not refer to defendant's trial testimony. The jury convicted defendant of two counts of second degree murder, plus other crimes. Defendant appealed, claiming ineffective assistance of counsel.

The Court of Appeals, in a unanimous opinion written by Judge Wesley (now on the U.S. Court of Appeals for the Second Circuit), said that defense counsel's actions were "consistent with the ethical

obligations of attorneys under New York's Code of Professional Responsibility." Specifically, "defense counsel first sought to dissuade defendant from testifying falsely" When defendant insisted on giving the perjured testimony, "counsel properly notified the court" as permitted by DR 4-101(C)(3). Moreover, "defense counsel did not reveal the substance of any client confidence as defendant had already admitted at a pre-trial hearing that he had forced one of his accomplices to participate in the crime under threat of death." Nor was defense counsel required to move to withdraw. Substitution of counsel would have done "little to resolve the problem" and might have facilitated defendant's fraud or further delayed the proceedings.

In addition, the court approved of defense counsel's decision to present defendant's testimony to the jury in narrative form. Thus, the lawyer 's actions "properly balanced the duties he owed to his client and to the court and criminal justice system," and - quoting *Nix v. Whiteside* - the court said that "since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel."

Finally, despite the seeming prohibition in DR 7-102(B)(1) on revealing a client's fraud upon the court if the information is protected as a confidence or secret, the court approved defense counsel's ex parte communication with the court after defendant testified because the purpose of the conference was "simply to place on the record matters which had already occurred regarding defendant's perjury and his attorney's response. The conference memorialized counsel's dilemma for appellate review and possible analysis of counsel's professional ethical obligations."

Thus, the *DePallo* court expressly approved both advance warning to the court that a defendant intends to commit perjury and presentation of the defendant's false testimony using the narrative method. But the case should not be read as giving blanket approval to disclosure of client perjury after a client testifies because the Court of Appeals viewed the ex parte conference as simply confirming what counsel had already properly told the court *before* the client testified. Thus, as Professor Steven Wechsler has written: "Nothing in *DePallo* ... changes the result when the perjury is discovered after the fact: under DR 7-102(B)(1), the exception - that the lawyer shall reveal the fraud to the court 'except when the information is protected as a confidence or secret' - still swallows up the rule." Steven Wechsler, *Professional Responsibility*, 52 *Syr. L. Rev.* 563, 623 (2002).

Since deciding *DePallo*, the Court of Appeals has cited *DePallo* for the proposition that "counsel has a duty to disclose witness perjury to the Court," see *People v. Berroa*, 99 N.Y.2d 134, 142 (2002) (emphasis added). The *Berroa* opinion, however, concerned past perjury by two witnesses *other than the client*, and thus fell under DR 7-102(B)(2), which provides that a "lawyer who receives information clearly establishing that ... [a] person other than the client has perpetrated a fraud upon a tribunal *shall reveal* the fraud to the tribunal." (Emphasis added.) This provision, unlike DR 7-102(B)(1), has no exception for confidences or secrets. The *Berroa* opinion should be read as referring only to a duty to reveal past perjury by witnesses other than clients. Even after *DePallo*, there is still no "duty" to reveal past perjury by clients.

The First Department decides *People v. Darrett*

Building on *DePallo*, the First Department's recent decision in *People v. Darrett*, 2003 WL 22867872 (N.Y. App. Div. 1st Dep't, Dec. 4, 2003), provides the most useful guidance to date for New York lawyers. *Darrett* was a murder-for-hire case. For \$2,000, defendant killed a man, and was caught and charged with

murder one. When first arrested, defendant denied his guilt. He later confessed to the killing, but eventually he demanded a *Huntley* hearing to challenge his confession. At the *Huntley* hearing, defendant truthfully answered questions from his own lawyer, but when the People's cross-examination of defendant was well underway, defense counsel approached the court for an ex parte, off-the-record conference. There counsel expressed "concern that defendant might commit perjury." Specifically, defense counsel advised the court that she expected defendant to claim either self-defense or an alibi, and that based on her earlier conversations with defendant she believed both claims to be untrue.

As it turned out, defendant did not commit perjury, but after his testimony was over, defense counsel approached the judge for another ex parte conference and "spoke in detail about the substance of her presumably privileged conversations with defendant regarding their strategy, and even informed the court that she believed defendant had been at the scene and had shot the victim." Ultimately, the judge did not suppress defendant's confession, and at trial defendant was convicted of first degree murder. At sentencing, the same judge who had presided over the *Huntley* hearing accused defendant of committing perjury, saying to him: "[Y]our own attorney had to come to me in camera and inform me that she didn't want to stay on your case anymore as a matter of ethics because you perjured yourself and she knew you were perjuring yourself." The judge then sentenced defendant to life without parole.

The First Department criticized counsel's disclosures and remanded for a new *Huntley* hearing. The court agreed that counsel was "duty-bound" not to present a false defense. But the sole issue at the *Huntley* hearing was whether defendant was coerced into giving statements to the police, and defense counsel did not claim the defendant had lied about that issue (or any other issue). Thus: "While counsel's concerns were legitimate, her ultimate disclosures to the court were unnecessary because, when she made them, defendant had just testified in a manner which, at that point, counsel had no reason to believe was perjurious."

Even if defendant had intended to commit perjury at the *Huntley* hearing, "counsel revealed to the court more than was necessary" Specifically:

[C]ounsel, after defendant had already concluded his hearing testimony, spoke in detail about the substance of her presumably privileged conversations with defendant regarding their strategy, and even informed the court that she believed defendant had been at the scene and had shot the victim. This lapse in preserving client confidentiality, in light of what later occurred at defendant's sentencing proceeding, cannot be reconciled with notions of effective assistance of counsel and due process. This is especially so where, as in this portion of the case, the court is the finder of fact and the attorney made the disclosure before the justice had rendered a decision on the hearing....

Viewing everything together - counsel's excessive disclosures to the court, the lack of any actual perjury, and the judge's erroneous comments about perjury at sentencing - the First Department held that defendant's right to a fair *Huntley* hearing had been compromised.

That was enough to decide the case before it, but the First Department did not stop there. Recognizing "the profound dilemma a defense lawyer faces when he or she must choose between making statements to a judge which might disclose confidences - or perceived confidences - on the one hand, and the lawyer's obligations as an officer of the court, on the other," the court decided to provide further guidance.

[W]hen confronted with this type of ethical dilemma, an attorney must first try to persuade the client to testify truthfully. Failing that, and to the extent possible under our state's professional ethics guidelines, counsel should make every reasonable effort to limit the amount of information he or she conveys to a judge who is acting as a fact-finder....

For example, when faced with a client's intended perjury, counsel would (1) "alert the fact-finding court to the existence of a disagreement between lawyer and client about the client's imminent testimony," (2) "request the court's permission to allow the defendant-client to testify in narrative form," (3) elicit the narrative testimony, (4) "avoid questioning the defendant about any such matters," and (5) "avoid all references in summation or otherwise to any portion of defendant's testimony which counsel believes to be false."

Here, defense counsel went too far. She initially approached the court out of concern over false answers that her client *might* give in response to questions which the prosecutor might not even pose. "At that juncture," the court said, "the counsel's professional obligation was primarily to avoid references to those answers in her own questions and in her closing remarks." In addition, on a practical level, the court suggested that defense counsel might want to make a record, privately, summarizing the actions he or she has taken, or is about to take to resolve the ethical dilemma, the reasons for those actions, and the related advice he or she has given to the defendant.

Counsel should take these measures out of the justice's presence and in ways that would not place a fact-finding court in the difficult position of learning damaging factual matters that might raise questions about its impartiality. For example, the attorney can create a file memorandum, subscribed by defendant, and/or witnessed by a colleague. ... [A]s another alternative, the attorney may, in the defendant's presence and with the aid of the attorney's own stenographer, memorialize his or her legal advice to defendant together with an explanation of how the lawyer proposes to deal with the problem in an ethically appropriate way when defendant next appears before the judge....

The court expressed hope that "these simple measures, in some circumstances at least, may cause a defendant to realize the implications of what is about to happen, and thus may dissuade defendant from committing any contemplated perjury."

Conclusion

Lawyers handling criminal matters in New York now have a pretty good road map for dealing with client perjury before it occurs: (1) alert the court without revealing any details, (2) ask permission to present the defendant's false testimony using the "narrative" method, and (3) do not argue the truth of the false testimony.

But it remains unclear what a criminal defense lawyer should do after the client commits perjury. Until the Court of Appeals issues definitive guidance, my best advice is that when surprise perjury occurs, the lawyer should (1) ask a few innocuous questions that will elicit truthful answers, then ask for a recess, (2) seek to persuade the client to correct the false testimony and testify truthfully, (3) if the client will not correct the false testimony, ask the court's permission to continue examining the defendant using a

narrative method, and (4) do not argue the truth of the false testimony. This should signal the court sufficiently to avoid getting counsel into disciplinary trouble without denying the client's right to testify. In a no-win situation, that may be the best we can do.

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