

Counsel May Notify Judge Of Expected Client Perjury

BY LAZAR EMANUEL

In *People v. DePallo*, 96 NY2d 437 (2001), the Court of Appeals defined the responsibility of criminal defense counsel who suspects that his client will offer perjured testimony in a jury trial. In that case, defendant DePallo had made several incriminating statements linking him to the brutal murder of a 71-year-old man. At trial, defense counsel noted at a sidebar that he had told defendant he did not have to testify and should not testify. Defendant confirmed that he had been so advised but insisted on testifying. Counsel elicited his testimony in narrative form. He testified that he had been at home throughout the evening of the murder. During the prosecutor's cross examination, defense counsel made several objections.

After both sides had rested, defense counsel met with the court in Chambers, without the presence of the prosecutor or the defendant, "...I told the defendant I cannot participate in any kind of perjury, and you really shouldn't perjure yourself...He never told me what he was going to say, but I knew it was not going to be the truth..."

During summation, defense counsel did not refer to defendant's testimony. The jury convicted defendant of second degree murder, robbery and burglary. Defendant argued on appeal that counsel should not have disclosed his perjury to the court and that the meeting in Chambers was a material stage of trial which required his presence. The Appellate Division rejected both arguments and the Court of Appeals affirmed.

When Court Sits As Fact Finder

Since 2001, the *DePallo* decision has served as a guide to defense counsel in their management of perjured testimony in a jury trial. But the decision "...left open the question of the propriety of a similar disclosure under circumstances where the court sits as the fact finder."

That question has now been answered by the Court of Appeals in *People v. Andrades*, N.Y., No. 28 (March 29, 2005). In an opinion by Judge George Bundy Smith, the Court said: "...counsel's ethical obligations do not change simply because a judge rather than a jury is sitting as the fact finder."

Defendant Andrades was arrested and charged with murder and manslaughter. After he was given his Miranda rights, defendant admitted in written and videotaped statements that he had participated in the killing of a former girl friend. He then moved to suppress his confession and the court conducted a Huntley hearing (a hearing in which the defendant asks to suppress statements made to the police or to prosecutors on the grounds that he was not read his Miranda rights or that his statement was induced by threats or coercion.)

Before the hearing, defense counsel asked to be relieved and told the court, “[T]here is an ethical conflict with my continuing to represent [defendant] and I can’t go any further than that.” The court asked counsel to state the nature of his conflict, but counsel refused to elaborate. “The court then presumed that counsel’s ethical dilemma concerned defendant’s right to testify”. The court denied counsel’s application to withdraw. After the prosecution had completed its Huntley testimony, defense counsel advised the court that defendant intended to testify. Outside defendant’s presence, counsel stated:

As part and parcel of my request to be relieved in this matter, I think I should tell the Court and place on the record that I did tell [defendant] and advise [defendant] that he should not testify at the hearing and as a result of the problem I’m having, the ethical problem I’m having. What I’m going to do is just basically direct his attention to date, time and location of the statement and let him run with the ball.

Satisfied that Counsel, anticipating that defendant “could possibly...commit perjury on the witness stand,” had complied with his ethical obligations under the disciplinary rules, the court “concluded that counsel could still afford defendant the effective assistance of counsel.” Defendant then offered his Huntley testimony “largely in narrative form,” with questioning by the court and counsel. Defense counsel offered no closing arguments. At the close of the Huntley hearing, the court denied defendant’s motion to suppress. In a written opinion the court said that it “did not find the defendant’s testimony credible or worthy of belief.”

At the subsequent trial, defendant was convicted of second degree murder. The Appellate Division affirmed. The judges found that counsel had properly disclosed his ethical dilemma when he instructed the defendant to testify in narrative form, and that defendant had not been denied a fair hearing or the effective assistance of counsel. The court also held that the colloquy between counsel and the court concerning counsel’s ethical dilemma did not constitute a material stage of the trial requiring defendant’s presence.

In a decision by Judge George Bundy Smith, the Court of Appeals affirmed the conviction. The Court said:

In *DePallo*, we recognized that a defense attorney’s duty to zealously represent a client must be circumscribed by his or her duty as an officer of the court to serve the truth seeking function of the justice system (96 NY2d at 441).

Moreover, as perjury is a criminal offense, defense counsel has a duty to refrain from participating in the client’s commission of it. Thus, we stated that while counsel must pursue all reasonable means to reach the objectives of the client, counsel must not in any way assist a client in presenting false evidence to the court (id.; *Nix v Whiteside*, 475 US 157, 166 [1986]).

Court relies on DR 7102 (A)

The Court relied on DR 7102 (A) of the New York Code, which reads, in part, as follows:

In the representation of a client, a lawyer shall not:

3. Conceal, or knowingly fail to disclose that which the lawyer is required by law to reveal.

4. Knowingly used perjured testimony or false evidence.
5. Knowingly make a false statement of law or fact.
6. Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.
7. Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.
8. Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

The Court issued a clear and definitive guide for New York lawyers who suspect client perjury:

In light of the ethical obligations of an attorney in this state, and in accordance with United States Supreme Court jurisprudence, an attorney faced with a client who intends to commit perjury has the initial responsibility to attempt to dissuade the client from pursuing the unlawful course of action (*see Nix v Whiteside*, 475 US at 170; *People v DePallo*, 96 NY2d at 441). Should the client insist on perjuring himself, counsel may seek to withdraw from the case. If counsel's request is denied, defense counsel, bound to honor defendant's right to testify on his own behalf, should refrain from eliciting the testimony in traditional question and answer form and permit defendant to present his testimony in narrative form. However, in accordance with DR 7102 [A][4], counsel may not use the perjured testimony in making argument to the court.

Defendant argued that counsel should not have disclosed his ethical dilemma to the court because the disclosure inevitably led the court, sitting as fact finder, to infer that defendant intended to commit perjury. He also argued that counsel should not have told the court that he intended to question defendant in the narrative before he actually did so.

Defendant's position was that counsel should have said nothing to the court and allowed him to testify in the narrative without comment. "If counsel's suspicions...ripened into reality, counsel could simply refrain from using the perjured testimony in his closing argument." The Court disagreed:

As an initial matter, we note that at no time did counsel ever disclose to the court that defendant intended to commit perjury or otherwise disclose any client secrets. Rather the court inferred defendant's perjurious intent based upon the nature of counsel's application. However, counsel could have properly made such a disclosure since a client's intent to commit a crime is not a protected confidence or secret (*see Nix v Whiteside*, 475 US at 174; *People v DePallo*, 96 NY2d at 442; DR 4101 [c][3]). Moreover, counsel's ethical obligations do not change simply because a judge rather than a jury is sitting as the fact finder. Moreover, as a practical matter, defendant's suggestion would solve nothing because counsel would likely find it difficult to allow defendant to testify in the narrative without prior explanation...Even if counsel were permitted to present defendant's testimony in narrative form without objection, the very fact of defendant testifying in such a manner would signify to the court that counsel believes that his client is perjuring himself.

The Court also rejected defendant's argument that the colloquy between defense counsel and the court was a material stage of the trial requiring defendant's presence.

As we stated in *DePallo* (96 NY2d at 443) and in *People v. Keen* (94 NY2d 533, 539 [2000]), a colloquy of this nature involves procedural matters at which a defendant can offer no meaningful input. Therefore, defendant has no right to be present.

In a footnote, the Court also expressly rejected the approach adopted by the Ninth Circuit in *Lowery v Cardwell*, 575 Fd 727 (1978). In that case, defendant's attorney was surprised when defendant committed perjury at a bench trial. After an unsuccessful attempt to withdraw, counsel made no reference to defendant's testimony during his closing arguments. The Ninth Circuit found that counsel's actions gave the court the impression that counsel believed his client had lied and denied defendant a fair trial. It suggested that counsel should have made a record for his own protection instead. The Court of Appeals in *Andrades* said this suggestion would be incompatible with counsel's obligation as an officer of the court to reveal a fraud perpetrated by the client upon the court.

Lazar Emanuel is the publisher of NYPRR. In 2004, he received the State Bar's Sheldon D. Levy award for Outstanding Contribution to Understanding and Advancement in the Field of Professional Ethics.