Avoiding Perjury
(Or at Least Pretending to):
The Ethical Considerations in Determining What Witnesses to Call to the Stand in a Criminal Trial

by Afshin Farashahi

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For a criminal law practitioner, talking to a potential witness who is providing what appears to be helpful information is typically a positive experience that relieves some of the stress that comes with preparing for an upcoming trial. At the same time, that stress is magnified if, in your mind, there are serious questions about the truth of what the potential witness is telling you. The stress level goes up even higher if that potential witness is counsel's client. The desire to win for the client, whether it is the commonwealth or a criminal defendant, is trumped by counsel's ethical responsibilities. And those responsibilities are encapsulated in Rule 3.3 of the Rules of Professional Conduct. Specifically, Rule 3.3(a)(4) commands that "a lawyer shall not knowingly . . . offer evidence that a lawyer knows to be false." This provision can have different applications depending on the witness and, potentially, depending on the party.

This article will set out the ethical constraints on counsel in a criminal case when considering what witnesses to call to the stand. The article will be organized into three parts. First, it will discuss the ethical challenges a defense counsel faces when the client has made the decision to testify. The bulk of the article will be devoted to this topic given the relative frequency that this issue arises in representation of defendants in criminal cases. Second, again from the defense counsel's perspective, it will look at the ethical considerations when contemplating the testimony of a witness other than the client. Third, the article will examine the prosecutor's ethical duties in determining what witnesses will testify.

In discussing the defense counsel's duties, the article will explain the distinctions between calling a client to testify and calling other witnesses to testify. As the article points out, the rules and the case law applicable to client testimony are somewhat more relaxed than those that apply to other witnesses' testimony. It will also show that, while some of the constraints are the same for both defense attorneys and prosecutors, in some respects stricter guidelines apply to prosecutors.

Defense Counsel's Ethical Duties

When the Client Has Decided to Testify

In addition to considering the advisability of having the client take the stand, defense counsel has to determine the ethical ramifications once a client has decided to testify. Recall that Rule 3.3(a)(4) prohibits an attorney from "knowingly" offering false evidence. And the rules provide the following definition: "'Knowingly' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."[1] Whether to cooperate with the client's decision to testify depends on what exactly it is that defense counsel "knows." Consider several scenarios:

The easy case is where the client has indicated that he will commit perjury. The prohibition against offering false evidence under Rule 3.3 is clear here.[2] The attorney is required to take the

steps discussed below to at least attempt to avoid being a party to the perjury.

Of course, a client will rarely state that he intends to commit perjury. A more likely scenario is where the client tells his defense counsel about the details of his intended testimony and the details are inconsistent with the version that the client has given to the attorney. This would still fall under the prohibitions of Rule 3.3. Although the client is not explicit in his intent to commit perjury, the defense counsel's knowledge of the client's intent to commit perjury is "inferred from circumstances."[3]

The ethical questions become considerably more complicated with client retractions. Suppose that a client tells his lawyer that what the client previously told the attorney is not correct, and the client then proceeds to present a different version of the events to his lawyer. Some attorneys may accept this at face value and prepare the client to testify in accordance with the new version. But counsel should ask some questions of the client, including the question of why the change in the version of events. Additionally, counsel should couple this with a discussion of the rule against counsel presenting perjury. If the client advises that he has had more time to think about it and insists that this new version is the truth, then the lawyer has most likely met his ethical obligations on this issue. In this scenario, the client's right to testify trumps any personal suspicion the attorney has about his client's change in description of the events that led the charges. As Justice John Paul Stevens stated, "A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury . . . should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked."[4]

The all too common situation is, of course, where a client's version is contradicted by the commonwealth's witnesses and sometimes even by the client's statements to the police. As in the previous scenario, counsel is likely on sound ethical ground in calling the client to the stand and assisting him in presenting his version of events.[5] As the Court of Appeals for the Fourth Circuit has stated, "Defense counsel's mere belief, albeit a strong one supported by other evidence, [is] not a sufficient basis to refuse [the client's] need for assistance in presenting his own testimony."[6] When the client indicates his testimony will be consistent with what he has told the attorney, then that attorney is acting within the bounds of the ethical rules in presenting the client's testimony.[7]

Needless to say, counsel needs to discuss with the client the practical considerations in determining whether the client should take the stand. But that is a separate inquiry than the question of whether it is ethical to put the client on and elicit his testimony.

If the attorney "knows" that his client intends to commit perjury, the first step is to simply attempt to talk the client out of it. Because of constitutional considerations involved in the right to testify,[8] the decision to testify is the client's.[9] Defense counsel should advise the client of the ethical constraints placed on the attorney and of the need for the attorney to move to withdraw if the client persists in this course of action. But the lawyer is not limited to a discussion of ethics when trying to dissuade a client from testifying to what is known to the lawyer to be perjury. An analysis of the dire consequences for the client may be sufficient. The lawyer may be able to successfully convince the client by pointing out that the judge or jury will have little difficulty in concluding the testimony is false. This would in turn guarantee a conviction and a stiffer sentence. (Of course, these arguments are helpful even if there are no ethical dilemmas.) This kind of discussion is going to have a greater impact on a client who most likely is not going to lose sleep over his lawyer's ethical dilemmas.

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If the client insists on testifying, and the attorney knows the expected testimony is perjury, then counsel should make a motion to withdraw.[10] If the situation arises before trial, an attorney should ordinarily be able to withdraw.[11] As the Comments to Rule 3.3 point out, this option may not be feasible for several reasons, including the possibility that the issues arise when trial is about to commence or at mid-trial.[12] In this circumstance, if the motion to withdraw is denied, then the attorney can still put the client on the stand and have him testify by narrative. Additionally, in this circumstance, the attorney

should not use the client's testimony in closing argument.

Counsel should be aware that Comments to Rule 3.3 seem to suggest that the attorney should reveal the client's perjury rather than having the client testify: "The ultimate resolution of the dilemma, however, is that the lawyer must reveal the client's perjury if necessary to rectify the situation."[13] Given the "to rectify the situation" language, this Comment to Rule 3.3 most likely is applicable to the situation where the client testifies to a version that was not expected by his counsel and that is known to counsel to be perjury. It is advisable that counsel discusses this with the client after the client has testified and before disclosure. In any event, the narrative form seems to be an accepted option as long as the attorney has attempted (but failed) in persuasion and in a withdrawal motion.[14]

When the Defense Lawyer Considers Calling Non-Client Witnesses to the Stand

A defense attorney can dispense with his ethical obligation by simply not calling a witness whom counsel knows will be providing false testimony. The obligation is very clear, no matter what difficulties it may lead to between the attorney and the client who insists on having this particular witness testify. Additionally, Rule 3.3(b) sets out an even lower threshold in this situation by providing that a lawyer "may refuse to offer evidence that the lawyer reasonably believes is false."

But what happens if the witness unexpectedly provides a different version, and the attorney knows the testimony is false? Again, the obligations are clear here, calling for prompt disclosure under Rule 3.3(d): "A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." But counsel must ensure that he is on solid ground in his "knowledge" that the change in testimony is perjury. A change in expected testimony, which is not exactly a rare occurrence at trials, does not always mean that the witness has committed perjury. For example, cross-examination may trigger new details or to re-assessment of what the witness remembers. Additionally, counsel has to determine whether the change in testimony is "material evidence" before undertaking disclosure.[15]

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Prosecutors' Ethical Duties

The proscriptions of Rule 3.3 apply to prosecutors with equal, if not greater, force. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate, [and t] his responsibility carries with it specific obligations to see that the defendant is accorded procedural justice."[16] Prosecuting attorneys have the privilege of having a whole section of the Rules of Professional Conduct devoted just to them, titled "Additional Responsibilities of a Prosecutor."[17] Whether fair or not, prosecutors need to be aware of this higher standard that has been placed on them.

Although prosecutors do not face the problem of a client who may be committing perjury, they do face unique dilemmas. For example, prosecutors at times will consider using co-defendants or inmates incarcerated with the defendant as witnesses. Disclosing any plea agreements and the criminal record is the easy part of the prosecutor's job in this regard. The harder job is to assess the credibility of these witnesses. Given the obvious motives of these types of witnesses, prosecutors need to be especially vigilant in discharging their ethical duties.

Of course, prosecutors need to be aware that it is not only co-defendants and inmates who are prone to fabricate the truth. Given the unique responsibilities of prosecutors, counsel should always be vigilant in ensuring that the witnesses the commonwealth puts on — whether law enforcement officers or apparent model citizens — will be presenting truthful testimony.

Attorneys for the commonwealth should also be mindful of their duties when their witnesses have testified untruthfully. Rule 3.3(d) states: "A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." The "clearly establishing" language may set a relatively high bar for disclosure. But a prosecutor's other ethical obligations (namely, the duty to provide exculpatory information to defense counsel) may in some circumstances significantly lower the bar for disclosure.[18]

Conclusion

Some of the ethical duties discussed in this article are certainly applicable to counsel in all cases and

not just in criminal matters. But the criminal case brings these issues to the forefront and poses very complex ethical dilemmas for both criminal defense attorneys and prosecutors. The large volume of criminal cases on the courts' dockets throughout the commonwealth increases the likelihood of ethical traps for counsel engaged in the practice of criminal law on either side of the aisle. Prosecutors and defense counsel, in addition to zealously representing their respective clients, need to ensure, above all, that they meet their obligations as officers of the court when determining who will testify at trial.

Endnotes:

1 Virginia State Bar Rules of Professional Conduct terminology.

2 Virginia State Bar Rules of Professional Conduct R. 3.3(a)(4); *see also* R. 1.2(c) (prohibiting assisting a client "in conduct that the lawyer knows is criminal or fraudulent.")

3 Virginia State Bar Rules of Professional Conduct terminology.

4 *Nix v. Whiteside*, 475 U.S. 157, 190-191 (1986) (Stevens, J., concurring).

5 *See United States v. Midgett*, 342 F.3d 321, 326 (4th Cir. 2003) ("Defense counsel's responsibility to his client was not dependent on whether he personally believed [the client], nor did it depend on the amount of proof supporting or contradicting [the client's] anticipated testimony regarding how the incident happened. . . . In this situation, . . . his lawyer had a duty to assist [the client] in putting his testimony before the jury.")

6 *Midgett*, 342 F.3d at 326.

7 Counsel should also be aware of Rule 3.3(b), which states: "A lawyer may refuse to offer evidence that the lawyer reasonably believes is false." The applicability of this provision to the client in a criminal case is questionable. It is doubtful that an attorney can actually prevent a criminal defendant from taking the stand. The U.S. Supreme Court has held that a criminal defendant has a constitutional right to testify based on the protections of the due process clauses, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment privilege against compelled testimony. *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987). Although the Court later on went to say that the right does not extend to the right to testify falsely, *Nix*, 475 U.S. at 173, the Court has not stated that a defendant can be prevented from testifying. *Accord* Nathan M. Crystal, *False Testimony By Criminal Defendants: Still Unanswered Ethical And Constitutional Questions*, 5 UNIVERSITY OF ILLINOS LAW REVIEW 1529, 1544 (2003) (citations omitted).

8 As noted already, *supra* note 3, the U.S. Supreme Court has held the criminal defendant's right to testify on his own behalf falls under the protections of due process. *Rock*, 483 U.S. at 51-52. Although the Court later on went to say that the right does not extend to the right to testify falsely, *Nix*, 475 U.S. at 173, the Court has not stated that a defendant can be prevented from testifying. *Accord* Crystal, *supra* note 3.

9 *See also,* Virginia State Bar Rules of Professional Conduct R. 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

10 As to how to make a motion to withdraw and what to say, counsel should be careful to make sure confidences and privileges are not unnecessarily disclosed. Counsel may simply make a statement that confidentiality precludes citing specific reason for withdrawal and ask the judge to accept counsel's representations, as an officer of the court, that withdrawal has become necessary.

11 Virginia State Bar Rules of Professional Conduct R. 3.3 cmt. 12.

12 *Id.*

13 Virginia State Bar Rules of Professional Conduct R. 3.3 cmt. 13.

14 *Accord* Crystal, *supra* note 3, at 1548.

15 Virginia State Bar Rules of Professional Conduct R. 3.3(a)(4) ("If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.")

16 Virginia State Bar Rules of Professional Conduct R. 3.8 cmt. 1.

17 Virginia State Bar Rules of Professional Conduct R. 3.8

18 *See, e.g., Lemons v. Commonwealth*, 18 Va. App. 617, 621, 446 S.E.2d 158, 161 (1994):

> A prosecutor does not meet his or her ethical and constitutional duty simply by making a pretrial determination that the information, if disclosed, would not likely change the outcome of the trial. A prosecutor is unable to determine the ultimate "materiality" of evidence in a trial which has not yet occurred. If in doubt about the exculpatory nature of the material, a prosecutor should submit it to the trial court for an *in camera* review to determine if it is exculpatory and should be disclosed.

(citations omitted).