AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 87-353

Lawyer's Responsibility With Relation To Client Perjury

April 20, 1987

If, prior to the conclusion of the proceedings, a lawyer learns that 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.

If the lawyer learns that the client intends to testify falsely before a tribunal, the lawyer must advise the client against such course of action, informing the client of the consequences of giving false testimony, including the lawyer's duty of disclosure to the tribunal. Ordinarily, the lawyer can reasonably believe that such advice will dissuade the client from giving false testimony and, therefore, may examine the client in the normal manner. However, if the lawyer knows, from the client's clearly stated intention, that the client will testify falsely, and the lawyer cannot effectively withdraw from the representation, the lawyer must either limit the examination of the client to subjects on which the lawyer believes the client will testify truthfully; or, if there are none, not permit the client to testify; or, if this is not feasible, disclose the client's intention to testify falsely to the tribunal.

The professional obligations of a lawyer relating to client perjury as now defined by the Model Rules of Professional Conduct (1983), particularly in Model Rule 3.3(a) and (b), require a reconsideration of ABA Formal Opinion 287 (1953), which was based upon an interpretation of the earlier ABA Canons of Professional Ethics (1908), and Informal Opinion 1314 (1975), which interpreted the predecessor Model Code of Professional Responsibility (1969, revised 1980). ¹ Formal Opinion 287 discussed in part the lawyer's responsibility with regard to false statements the lawyer knows that the client has made to the tribunal. Informal Opinion 1314 dealt with the lawyer's duty when the lawyer knows of the client's intention to commit perjury.

Formal Opinion 287

Formal Opinion 287 addressed two situations: one, a civil divorce case; the other, the sentencing procedure in a criminal case. In the civil matter, the client informs his lawyer three months after the court has entered a decree for divorce in his favor that he had

¹ The Committee notes that other prior opinions of this Committee relating to client perjury are not consistent with Model Rule 3.3. These include Formal Opinions 341 and 216 and Informal Opinions 1318 and 869. Lawyers are cautioned to investigate the applicable local ethical rules and opinions governing a lawyer's responsibility with relation to client perjury, since local standards may differ from Rule 3.3 as adopted by the ABA House of Delegates in August, 1983.
testified falsely about the date of his wife's desertion. A truthful statement of the date would not have established under local law any ground for divorce and would have resulted in the dismissal of the action as prematurely brought. Formal Opinion 287 states that under these circumstances, the lawyer must advise the client to inform the court of his false testimony, and that if the client refuses to do so, the lawyer must cease representing the client. ² However, Formal Opinion 287 concludes that Canon 37 of the ABA Canons of Professional Ethics (dealing with the lawyer's duty to not reveal the client's confidences) prohibits the lawyer from disclosing the client's perjury to the court.

In this factual situation, Model Rule 3.3 also does not permit the lawyer to disclose the client's perjury to the court, but for a significantly different reason. Contrary to Formal Opinion 287, Rule 3.3(a) and (b) require a lawyer to disclose the client's perjury to the court if other remedial measures are ineffective, even if the information is otherwise protected under Rule 1.6, which prohibits a lawyer from revealing information relating to representation of a client. However, under Rule 3.3(b), the duty to disclose continues only "to the conclusion of the proceeding . . . ." From the Comment to Rule 3.3, it would appear that the Rule's disclosure requirement was meant to apply only in those situations where the lawyer's knowledge of the client's fraud or perjury occurs prior to final judgment and disclosure is necessary to prevent the judgment from being corrupted by the client's unlawful conduct. ³ Therefore, on the facts considered by Formal Opinion 287, where the lawyer learns of the perjury after the conclusion of the proceedings -- three months after the entry of the divorce decree ⁴ -- the mandatory disclosure requirement of Rule 3.3 does not apply and Rule 1.6, therefore, precludes disclosure.

In the criminal fact setting, Formal Opinion 287 is directly contrary to the Model Rules with regard to one part of its guidance to lawyers. Briefly, the criminal defense lawyer is presented with the following three situations prior to the sentencing of the lawyer's client: (1) the judge is told by the custodian of criminal records that the defendant has no criminal record and the lawyer knows this information is incorrect based on his own investigation or from his client's disclosure to him; (2) the judge asks the defendant whether he has a criminal record and he falsely answers that he has none; (3) the judge asks the defendant's lawyer whether his client has a criminal record.

Formal Opinion 287 concludes that in none of the above situations is the lawyer permitted to disclose to the court the information he has concerning the client's actual criminal record. The opinion states that such a disclosure would be prohibited by Canon

² This requirement of withdrawal from the representation stated in Opinion 287 is inconsistent with Model Rule 1.16, which, under the facts posited in the Opinion, provides only for discretionary withdrawal.

³ This explanation, at least, is consistent with the distinction between information relating to continuing crime, which is not protected by the attorney-client privilege, and information relating to past crime, which is protected. See, e.g., In re Grand Jury Proceeding, 680 F.2d 1026 (5th Cir. 1982) (discussing crime/fraud exception to attorney-client privilege).

⁴ The Committee assumes that there were no further proceedings and that this was a final decree. This is not to say, however, that the judgment could not be set aside by the court if the court subsequently learns of the fraudulent representations of the client.
37, which imposed a paramount duty on the lawyer to preserve the client's confidences. In situations (1) and (3) Opinion 287 is still valid under the Model Rules, since there has been no client fraud or perjury, and, therefore, the lawyer is prohibited, under Rule 1.6, from disclosing information relating to the representation. 5 However, in situation (2), where the client has lied to the court about the client's criminal record, the conclusion of Opinion 287 that the lawyer is prohibited from disclosing the client's false statement to the court is contrary to the requirement of Model Rule 3.3. 6 This rule imposes a duty on the lawyer, when the lawyer cannot persuade the client to rectify the perjury, to disclose the client's false statement to the tribunal for the reasons stated in the discussion of Rule 3.3 below. 7

**Change in Policy in Model Rule 3.3**

Model Rule 3.3(a) and (b) represent a major policy change with regard to the lawyer's duty as stated in Formal Opinions 287 and 341 when the client testifies falsely. It is now mandatory, under these Model Rule provisions, for a lawyer, who knows the client has committed perjury, to disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury.

The relevant provisions of Rule 3.3(a) are:

(a) A lawyer shall not knowingly:

(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.

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5 Although in situation (3), where the court puts a direct question to the lawyer, the lawyer may not reveal the client's confidences, the lawyer, also, must not make any false statements of fact to the court. Formal Opinion 287 advised lawyers facing this dilemma to ask the court to excuse the lawyer from answering the question. The Committee can offer no better guidance under the Model Rules, despite the fact that such a request by the lawyer most likely will put the court on further inquiry, as Opinion 287 recognized.

6 The validity of Formal Opinion 287 in this regard was initially put in question in 1969 when the ABA adopted DR 7-102(B)(1). This provision required a lawyer to reveal to an affected person or tribunal any fraud perpetrated by the client in the course of the representation discovered by the lawyer. Because of its apparent inconsistency with DR 4-101, prohibiting a lawyer from revealing a confidence or secret of the client, DR 7-102(B)(1) was amended in 1974 to provide an exception to the duty to reveal the client's fraud when the information is protected as a privileged communication. Formal Opinion 341 (1975) interpreted the words "privileged communication" to encompass confidences and secrets under DR 4-101, thereby making the amendment consistent with Formal Opinion 287.

7 The Comment to Rule 3.3 suggests that the lawyer may be able to avoid disclosure to the court if the lawyer can effectively withdraw. But the Committee concludes that withdrawal can rarely serve as a remedy for the client's perjury.
Rule 3.3(a)(2) and (4) complement each other. While (a)(4), itself, does not expressly require disclosure by the lawyer to the tribunal of the client's false testimony after the lawyer has offered it and learns of its falsity, such disclosure will be the only "reasonable remedial [measure]" the lawyer will be able to take if the client is unwilling to rectify the perjury. The Comment to Rule 3.3 states that disclosure of the client's perjury to the tribunal would be required of the lawyer by (a)(4) in this situation.

Although Rule 3.3(a)(2), unlike 3.3(a)(4), does not specifically refer to perjury or false evidence, it would require an irrational reading of the language: "a criminal or fraudulent act by the client," to exclude false testimony by the client. While broadly written to cover all crimes or frauds a client may commit during the course of the proceeding, Rule 3.3(a)(2), in the context of the whole of Rule 3.3, certainly includes perjury.

Since 3.3(a)(2) requires disclosure to the tribunal only when it is necessary to "avoid assisting" client perjury, the important question is what conduct of the lawyer would constitute such assistance. Certainly, the conduct proscribed in Rule 3.3(a)(4) -- offering evidence the lawyer knows to be false -- is included. Also, a lawyer's failure to take remedial measures, including disclosure to the court, when the lawyer knows the client has given false testimony, is included. It is apparent to the Committee that as used in Rule 3.3(a)(2), the language "assisting a criminal or fraudulent act by the client," is not limited to the criminal law concepts of aiding and abetting or subornation. Rather, it seems clear that this language is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against client perjury contaminating the judicial process. Thus, when the lawyer knows the client has committed perjury, disclosure to the tribunal is necessary under Rule 3.3(a)(2) to avoid assisting the client's criminal act.

Furthermore, as previously indicated, contrary to Formal Opinions 287 and 341 and the exception provided in DR 7-102(B)(1) of the Model Code, the disclosure requirement of Model Rule 3.3(a)(2) and (4) is not excused because of client confidences. Rule 3.3(b) provides in pertinent part: "The duties stated in paragraph (a) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." Thus, the lawyer's responsibility to disclose client perjury to the tribunal under Rule 3.3(a)(2) and (4) supersedes the lawyer's responsibility to the client under Rule 1.6.

**Application To Criminal Cases -- Effect of Nix v. Whiteside**

The Comment to Rule 3.3 makes it clear that this disclosure requirement applies in both civil and criminal cases. However, the Comment states that if such disclosure by a lawyer would constitute a violation of a criminal defendant's constitutional rights to due process and effective assistance of counsel, "[t]he obligation of the advocate under these Rules is subordinate to such a constitutional requirement." Subsequent to the publishing of this Comment, however, the Supreme Court of the United States held in *Nix v. Whiteside*, U.S., 106 S. Ct. 988, 994-997, 89 L.Ed.2d 123, (1986) that a criminal defendant is not entitled to the assistance of counsel in giving false testimony and that a lawyer who refuses such assistance, and who even threatens the client with disclosure of the perjury to the court if the client does testify falsely, has not deprived the client of effective
assistance of counsel. Some states, nevertheless, may rely on their own applicable constitutional provisions and may interpret them to prohibit such a disclosure to the tribunal by defense counsel. In a jurisdiction where this kind of ruling is made, the lawyer is obligated, of course, to comply with the constitutional requirement rather than the ethical one.

As stated earlier, the obligation of a lawyer to disclose to the tribunal client perjury committed during the proceeding, which the lawyer learns about prior to the conclusion of the proceeding, represents a reversal of prior opinions of this Committee given under earlier rules of professional conduct. However, the Committee has done nothing more in this opinion than apply the ethical rule approved by the American Bar Association when it adopted Rule 3.3(a) and (b) of the Model Rules of Professional Conduct. Even so, a question may be raised whether this application is incompatible with the adversary system and the development of effective attorney-client relationships. 8

The Committee believes it is not. 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 and be able to assure the client that the confidence will be protected and honored. However, the ethical rules of the bar which have supported these basic requirements of the adversary system have emphasized from the time they were first reduced to written form that the lawyer's duties to the client in this regard must be performed within the bounds of law.

For example, these ethical rules clearly recognize that a lawyer representing a client who admits guilt in fact, but wants to plead not guilty and put the state to its proof, may assist the client in entering such a plea and vigorously challenge the state's case at trial through cross-examination, legal motions and argument to the jury. However, neither the adversary system nor the ethical rules permit the lawyer to participate in the corruption of the judicial process by assisting the client in the introduction of evidence the lawyer knows is false. A defendant does not have the right, as part of the right to a fair trial and zealous representation by counsel, to commit perjury. And the lawyer owes no duty to the client, in providing the representation to which the client is entitled, to assist the client's perjury.

On the contrary, the lawyer, as an officer of the court, has a duty to prevent the perjury, and if the perjury has already been committed, to prevent its playing any part in the judgment of the court. This duty the lawyer owes the court is not inconsistent with any duty owed to the client. More particularly, it is not inconsistent with the lawyer's duty to preserve the client's confidences. For that duty is based on the lawyer's need for information from the client to obtain for the client all that the law and lawful process provide. Implicit in the promise of confidentiality is its nonapplicability where the client seeks the unlawful end of corrupting the judicial process by false evidence.

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It must be emphasized that this opinion does not change the professional relationship the lawyer has with the client and require the lawyer now to judge, rather than represent, the client. The lawyer's obligation to disclose client perjury to the tribunal, discussed in this opinion, is strictly limited by Rule 3.3 to the situation where the lawyer knows that the client has committed perjury, ordinarily based on admissions the client has made to the lawyer. The lawyer's suspicions are not enough. *U.S. ex. rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977).

**Informal Opinion 1314 -- Client's Stated Intention To Commit Perjury**

So far, this opinion has discussed the duty of the lawyer when the lawyer learns that the client has committed perjury. The lawyer is presented with a different dilemma when, prior to trial, the client states an intention to commit perjury at trial. This was the situation addressed in ABA Informal Opinion 1314 (1975). The Committee, in that opinion, stated that the lawyer in that situation must advise the client that the lawyer must take one of two courses of action: withdraw prior to the submission of the false testimony, or, if the client insists on testifying falsely, report to the tribunal the falsity of the testimony.

The Committee distinguished, in Informal Opinion 1314, the situation where the lawyer does not know in advance that the client intends to commit perjury. In that case, the Committee stated that when the client does commit perjury, and the lawyer later learns of it, the lawyer may not disclose the perjury to the tribunal because of the lawyer's primary duty to protect the client's confidential communications. The Committee believes that Model Rule 3.3 calls for a different course of action by the lawyer.

The duty imposed on the lawyer by Informal Opinion 1314, when the lawyer knows in advance that the client intends to commit perjury, to advise the client that if the client insisted on testifying falsely, the lawyer must disclose the client's intended perjury to the tribunal, was based on the Committee's reading of DR 7-102(A)(4), (6) and (7). These provisions prohibit a lawyer from: (1) knowingly using perjured testimony or false evidence; (2) participating in the creation or preservation of evidence the lawyer knows to be false, and (3) counseling or assisting the client in conduct the lawyer knows to be illegal or fraudulent. However, none of these prohibitions requires disclosure to the tribunal of any information otherwise protected by DR 4-101. Although DR 4-101(C)(3) permits a lawyer to reveal a client's stated intention to commit perjury, this exception to the lawyer's duty to preserve the client's confidences and secrets is only discretionary on the part of the lawyer.

Informal Opinion 1314 in this regard is more consistent with Model Rule 3.3(a)(2) than

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9 The Committee notes that some trial lawyers report that they have avoided the ethical dilemma posed by Rule 3.3 because they follow a practice of not questioning the client about the facts in the case and, therefore, never "know" that a client has given false testimony. Lawyers who engage in such practice may be violating their duties under Rule 3.3 and their obligation to provide competent representation under Rule 1.1. ABA Defense Function Standards 4-3.2(a) and (b) are also applicable.
with any provision of the Model Code, upon which the opinion was based. However, the Committee does not believe that the mandatory disclosure requirement of this Model Rule provision is necessarily triggered when a client states an intention to testify falsely, but has not yet done so. Ordinarily, after warning the client of the consequences of the client's perjury, including the lawyer's duty to disclose it to the court, the lawyer can reasonably believe that the client will be persuaded not to testify falsely at trial. That is exactly what happened in Nix v. Whiteside. Under these circumstances, the lawyer may permit the client to testify and may examine the client in the normal manner. If the client does in fact testify falsely, the lawyer's obligation to make disclosure to the court is covered by Rule 3.3(a)(2) and (4).

In the unusual case, where the lawyer does know, on the basis of the client's clearly stated intention, that the client will testify falsely at trial, and the lawyer is unable to effectively withdraw from the representation, the lawyer may not examine the client in the usual manner. Under these circumstances, when the client has not yet committed perjury, the Committee believes that the lawyer's conduct should be guided in a way that is consistent, as much as possible, with the confidentiality protections provided in Rule 1.6, and yet not violative of Rule 3.3. This may be accomplished by the lawyer's refraining from calling the client as a witness when the lawyer knows that the only testimony the client would offer is false; or, where there is some testimony, other than the false testimony, the client can offer in the client's defense, by the lawyer's examining the client on only those matters and not on the subject matter which would produce the false testimony. Such conduct on the part of the lawyer would serve as a way for the lawyer to avoid assisting the fraudulent or criminal act of the client without having to disclose the client's confidences to the court. However, if the lawyer does not offer the client's testimony, and, on inquiry by the court into whether the client has been fully advised as to the client's right to testify, the client states a desire to testify, but is being prevented by the lawyer from testifying, the lawyer may have no other choice than to disclose to the court the client's intention to testify falsely.

This approach must be distinguished from the solution offered in the initially ABA-approved Defense Function Standard 7.7 (1971). This proposal, no longer applicable, 10 permitted a lawyer, who could not dissuade the client from committing perjury and who could not withdraw, to call the client solely to give the client's own statement, without being questioned by the lawyer and without the lawyer's arguing to the jury any false testimony presented by the client. This "narrative" solution was offered as a model by the ABA and supported by a number of courts 11 on the assumption that a defense lawyer constitutionally could not prevent the client from testifying falsely on the client's own behalf and, therefore, would not be assisting the perjury if the lawyer did not directly elicit the false testimony and did not use it in argument to the jury.

10 This particular Standard was not approved by the ABA House of Delegates during the February, 1979 meeting when the Standards were reconsidered and otherwise approved.

The Committee believes that under Model Rule 3.3(a)(2) and the recent Supreme Court decision of *Nix v. Whiteside*, U.S., 106 S. Ct. 988, 89 L.Ed.2d 123 (1986), the lawyer can no longer rely on the narrative approach to insulate the lawyer from a charge of assisting the client's perjury. Despite differences on other issues in *Nix v. Whiteside*, the Justices were unanimous in concluding that a criminal defendant does not have the constitutional right to testify falsely. More recently, this ruling was made the basis of the holding by the Seventh Circuit in *U.S. v. Henkel*, 799 F.2d 369 (7th Cir. 1986) that the defendant "had no right to lie" and, therefore, was not deprived of the right to counsel when the defense lawyer refused to present the defendant's testimony which he knew was false.