

MEMBER/PUBLIC COMMENT
The State Bar of California
180 Howard Street, San Francisco, CA 94105-1639
<http://www.calbar.ca.gov>

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SUBJECT: Proposed Formal Opinion Interim No. 14-0004 (Witness Perjury).

BACKGROUND: The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with Tab 5.1, Article 2, Section 6(g) of the State Bar Board Book, the Committee shall publish proposed formal opinions for public comment.

NOTICE RE NEW RULES OF PROFESSIONAL CONDUCT APPROVED BY THE SUPREME COURT: On May 10, 2018, the California Supreme Court issued [an order](#) approving 69 new Rules of Professional Conduct, which will go into effect on November 1, 2018. Information about the new rules is available at the [State Bar website](#). Proposed Formal Opinion Interim No. 14-0004 interprets the new Rules of Professional Conduct.

DISCUSSION/PROPOSAL: Proposed Formal Opinion Interim No. 14-0004 considers:

What are the attorney's duties when the attorney suspects, but does not know, a client's witness who is expected to testify at a civil trial has testified falsely, albeit favorably, for the attorney's client at deposition?

What are the attorney's duties when the attorney knows, rather than merely suspects, the same witness has committed perjury and yet the client instructs the attorney to use the witness's false testimony at the upcoming civil trial?

The facts are the same as Issue #2, except the attorney first learns of the perjury after the witness has testified at trial. Thus, what are the attorney's duties, if any, after a witness has committed perjury at trial but the client has instructed the attorney not to reveal the perjury?

The opinion interprets rules 1.6, 1.16, and 3.3 of the Rules of Professional Conduct of the State Bar of California; and Business and Professions Code sections 6068, 6106, and 6128.

The opinion digest states:

Because an attorney must represent a client zealously, the attorney may offer testimony of questionable credibility; however, because of the duty of candor to the court, an attorney must not present or use testimony known to be false even if the client has instructed them to do so. If the testimony has already been offered, the attorney must take reasonable remedial measures to correct the record without violating the duty of confidentiality. If such measures fail, the attorney may have a duty to seek to withdraw from the representation.

At its October 19, 2018 meeting and in accordance with its Rules of Procedure, the State Bar Standing Committee on Professional Responsibility and Conduct tentatively approved Proposed Formal Opinion Interim No. 14-0004 for a 90-day public comment distribution.

ANY KNOWN FISCAL/PERSONNEL IMPACT: None

ATTACHMENT: Proposed Formal Opinion Interim No. 14-0004

SOURCE: State Bar Standing Committee on Professional Responsibility and Conduct

DEADLINE: 5 p.m., February 25, 2019

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**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 14-0004**

ISSUE: Issue #1: What are the attorney's duties when the attorney suspects, but does not know, a client's witness who is expected to testify at a civil trial has testified falsely, albeit favorably, for the attorney's client at deposition?

Issue #2: What are the attorney's duties when the attorney knows, rather than merely suspects, the same witness has committed perjury and yet the client instructs the attorney to use the witness's false testimony at the upcoming civil trial?

Issue #3: The facts are the same as Issue #2, except the attorney first learns of the perjury after the witness has testified at trial. Thus, what are the attorney's duties, if any, after a witness has committed perjury at trial but the client has instructed the attorney not to reveal the perjury?

DIGEST: Because an attorney must represent a client zealously, the attorney may offer testimony of questionable credibility; however, because of the duty of candor to the court, an attorney must not present or use testimony known to be false even if the client has instructed them to do so. If the testimony has already been offered, the attorney must take reasonable remedial measures to correct the record without violating the duty of confidentiality. If such measures fail, the attorney may have a duty to seek to withdraw from the representation.

AUTHORITIES

INTERPRETED: Rules 1.6, 1.16, and 3.3 of the Rules of Professional Conduct of the State Bar of California.^{1/}

Business and Professions Code sections 6068, 6106, and 6128.

^{1/} Rule of Professional Conduct citations in this opinion are to the rules that became effective November 1, 2018. Each cited rule existed, prior to November 1, 2018, in similar or somewhat similar form, as follows: Rule 1.6 previously as Rule 3-100; Rule 1.16 as Rule 3-700; and Rule 3.3 as Rule 5-200. Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

STATEMENT OF FACTS

Attorney (“Attorney”) represents plaintiff (“Client”) in a sexual harassment case against her immediate supervisor (“Supervisor”) and her employer. Before the lawsuit is filed, Attorney interviews Client’s co-worker (“Witness”), who corroborates, as an eyewitness, evidence of Supervisor’s sexual harassment directly supporting Client’s key claims. The eyewitness testimony is crucial; without it, Client may well lose the case.

Attorney files the lawsuit and during discovery discloses Witness as a percipient witness supporting Client’s allegations. The defense deposes Witness, who testifies, under oath, consistent with the statements he earlier made to Attorney. When the case is set for trial, Attorney lists Witness as a trial witness.

Scenario #1: Shortly before trial, Attorney reviews Witness’s deposition testimony, and, based on newly obtained and seemingly credible testimony from other sources, begins to have doubts about the truthfulness of Witness’s eyewitness testimony. Attorney forms the opinion, but does not know with certainty, that Witness may have lied about being an eyewitness and may have come forward only as a favor to help Client as a fellow employee and friend.

Scenario #2: Shortly before trial, Client tells Attorney that Witness recently admitted to fabricating his claim to having been an eyewitness to the sexual harassment. Attorney promptly contacts Witness, who admits to having given the false testimony. Attorney informs Client, who nonetheless instructs Attorney to use Witness’s perjured testimony at trial.

Scenario #3: Unlike Scenario #1 or #2, Attorney does not know before trial that Witness’s deposition testimony was perjured. At trial, during opening statements, Attorney refers to the importance of Witness’s eyewitness testimony. Witness testifies on Client’s behalf, claiming to be an eyewitness to the sexual harassment. Attorney cross-examines Supervisor, seeking to impeach him with Witness’s eyewitness account. Before trial concludes, however, Client tells Attorney that Witness has admitted to lying in his trial testimony. Attorney promptly contacts Witness, who admits that his testimony claiming to be an eyewitness to the harassment was willfully false. Client instructs Attorney not to reveal the perjury to the court.

DISCUSSION

These scenarios address progressing situations in which an attorney must balance advocacy with the duties of candor to the court and client confidentiality.

Scenario #1

This scenario poses the question regarding what an attorney is ethically obligated to do if the attorney comes to suspect, but does not know, the client’s witness may have falsely testified at deposition. The deposition testimony has not yet been presented to the court.

In evaluating their duties in this context, attorneys must keep in mind their duty to zealously represent their clients within the bounds of the law. In so doing they are entitled to resolve all

doubts about the credibility of evidence in their client's favor. *People v. McKenzie* (1983) 34 Cal.3d 616, 631 [194 Cal.Rptr. 462]; *People v. Crawford* (1968) 259 Cal.App.2d 874 [66 Cal.Rptr. 527] ("attorney should represent his client to the hilt"); *McCoy v. Court of Appeals of Wisconsin* (1988) 486 U.S. 429, 444 [108 S.Ct. 1895] ("In searching for the strongest arguments available, the attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client.").^{2/}

In this scenario Attorney lacks actual knowledge that the testimony was untruthful. Rather, Attorney is merely skeptical about Witness's veracity. A mere suspicion that the testimony could be false will not preclude Attorney from using it. "Although attorneys may not present evidence they know to be false or assist in perpetrating known frauds on the court, they may ethically present evidence that they suspect, but do not personally know, is false Presenting incredible evidence may raise difficult tactical decisions – if counsel finds evidence incredible, the fact finder may also – but, as long as counsel has no specific undisclosed factual knowledge of its falsity, it does not raise an ethical problem." (*People v. Bolton* (2008) 166 Cal.App.4th 343, 357 [82 Cal.Rptr.3d 671], citing *People v. Riel* (2000) 22 Cal.4th 1153, 1217 [96 Cal.Rptr.2d 1]).^{3/} See also, rule 3.3(a)(3) ("A lawyer shall not: . . . offer evidence the lawyer knows to be false.").^{4/}

Thus, Attorney's mere skepticism over the Witness's truthfulness, standing alone, does not ethically preclude the use of the testimony. Attorney may present this evidence and, consistent with the duty of zealous advocacy, forcefully argue Client's cause based on it. However, under rule 3.3(a)(3) in a civil case, "a lawyer *may* refuse to offer evidence . . . the lawyer reasonably believes is false." (Emphasis added).

Scenario #2

In this scenario, Attorney's state of mind as to Witness's veracity has advanced from skepticism to actual knowledge of perjury. The false testimony is perjurious because it was willfully given and meets the "materiality" element of perjury, as stated above, "The eyewitness testimony is

^{2/} See also, *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795 [16 Cal.Rptr.3d 374], as modified (Oct. 13, 2004) (counsel has "very wide" latitude to discuss the merits of a case, both as to law and facts); *Nishihama v. City & Cty. of San Francisco* (2001) 93 Cal.App.4th 298, 305 [112 Cal.Rptr.2d 861] (Counsel "is entitled to argue his or her case vigorously and to argue all reasonable inferences from the evidence"); *Risley v. Lenwell* (1954) 129 Cal.App.2d 608, 659 [277 P.2d 897] ("Counsel in summing up a case are given wide latitude and may indulge in all fair arguments in favor of their client's case.").

^{3/} See also, *Nguyen v. Knowles* (E.D. Cal. Aug. 3, 2010) 2010 WL 3057678 *12 ("Precedent in this and other circuits suggests that an attorney should have a 'firm factual basis' for believing that a client will testify falsely before acting on such a belief"); Orange County Bar Association Formal Opn. No. 2003-01 ("actual knowledge" standard should apply in criminal cases).

^{4/} Rule 1.0.1(f) defines "knows" as "actual knowledge of the fact in question" and adds: "A person's knowledge may be inferred from circumstances." Because witnesses rarely admit to having committed perjury, it can be difficult to determine whether perjury has occurred. The "materiality" element of the crime of perjury "may not become apparent until the close of all testimony It is not a simple matter for an attorney to conclude . . . that he/she knows [the witness] has committed perjury." Cal. State Bar Formal Opn. No. 1983-74.

crucial; without it, Client may well lose the case.”^{5/} Nonetheless, Client, has instructed Attorney to use the perjured testimony at trial.

This scenario concerns an attorney’s duty of candor to the court, found in rule 3.3 (“Candor Toward the Tribunal.”) and Business and Professions Code section 6068. The former provides, in part, “A lawyer shall not: . . . offer evidence the lawyer knows to be false.” Business and Professions Code section 6068(b) and (d) likewise provides, “It is the duty of an attorney . . . (b) To maintain the respect due to the courts of justice and judicial officers. . . . [and] (d) To employ . . . means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.”

Correspondingly, Business and Professions Code section 6106 proscribes “the commission of any act involving, moral turpitude, dishonesty or corruption.” In addition, Business and Professions Code section 6128(a) provides: “Every attorney is guilty of a misdemeanor who either: (a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.” It is well-established in case law, as well, that “[a]n attorney who attempts to benefit his client through the use of perjured testimony may be subject to criminal prosecution . . . as well as severe disciplinary action.” *In re Branch* (1969) 70 Cal.2d 200, 211 [74 Cal.Rptr. 238].

Therefore, Attorney’s ethical mandate is clear. Attorney may not solicit or otherwise seek to introduce testimony which Attorney knows to be false.

In this civil case setting, Attorney also has the authority to refuse to follow Client’s instruction to submit the perjured testimony.^{6/} The Supreme Court addressed the question of an attorney’s authority to refuse to call a particular witness in *Blanton v. Womancare* (1985) 38 Cal.3d 396 [212 Cal.Rptr. 151]: “Considerations of procedural efficiency require . . . that in the course of a trial there be but one captain per ship. An attorney must be able to make such tactical decisions whether to call a particular witness, and the court and opposing counsel must be able to rely upon

^{5/} Perjury is defined as testimony under oath which is “willfully” false on a “material” matter. California Penal Code section 118. “Materiality” means a false statement that “could probably influence the outcome of the proceeding.” *People v. Rubio* (2004) 121 Cal.App.4th 927, 933 [17 Cal.Rptr.3d 524].

^{6/} In contrast the defendant-client’s sixth amendment right to testify in their own defense in a criminal proceeding reserves to the client, not the attorney, ultimate control over whether to personally testify. *Rock v. Arkansas* (1987) 483 U.S. 44, 49-52 [107 S.Ct. 2704]. Thus, the “criminal defendant has the right to take the stand even over the objections of his trial counsel.” *People v. Johnson* (1998) 62 Cal.App.4th 608, 618 [72 Cal.Rptr.2d 805]. In that setting, the attorney’s options, even if the attorney is aware the client intends to commit perjury, include allowing the testimony to go forward in a narrative format. (*Id.* at p. 629-630.) See also, rule 3.3, Comment [4] (In criminal trials a defense lawyer may offer the defendant’s testimony “in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by rule 1.16. The obligations of a lawyer under these rules and the State Bar Act are subordinate to applicable constitutional provisions.”) (citations omitted). Use of the narrative approach in a criminal trial has been accepted where a third-party witness is committing perjury. See, *People v. Gadson* (1993) 19 Cal.App.4th 1700, 1712 [24 Cal.Rptr.2d 219].

the decisions he makes, even when the client voices opposition in open court.” (*Id.* at p. 404 [citations omitted]).^{7/} Thus, an attorney may refuse to call a witness even though the client requests that the witness testify. *Nahhas v. Pacific Greyhound Lines* (1961) 192 Cal.App.2d 145, 146 [13 Cal.Rptr. 299].^{8/}

Here, Attorney must refuse to follow Client’s instruction to offer the false testimony at the upcoming trial. Attorney must remonstrate with Client, explaining to her the illegality of perjury, the potential consequences to her sponsoring perjured testimony^{9/} and Attorney’s ethical duty to refuse to be party to any such offering. Rule 3.3, Comment [4] (“If a lawyer knows the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence.”).

If, despite remonstration, Client persists with the instruction, Attorney must still refuse to present the testimony at trial. Attorney can continue in the representation but, consistent with Attorney’s authority to control witness presentation in civil cases, can and must refuse to offer Witness’s testimony at the upcoming trial.

Another option for Attorney, rather than continuing to trial, is to request that Client allow Attorney to withdraw as counsel under the rule of “permissive withdrawal” in rule 1.16(b).^{10/} Attorney should also consider whether the disagreement with Client has caused a deterioration in their relationship so significant that Attorney “can no longer competently and diligently represent the client” in which case Attorney may have a mandatory duty to seek to withdraw. Rule 3.3, Comment [8]. If Client refuses, then Attorney may move the court to withdraw as counsel

^{7/} “[I]n both civil and criminal matters, a party’s attorney has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters.” *In re Horton* (1991) 54 Cal.3d 82, 95, 102 [284 Cal.Rptr. 305]. Encompassed in this is the authority to control matters of ordinary trial strategy, such as which witnesses to call, the manner of cross-examination, what evidence to introduce, and whether to object to an opponent’s evidence. *Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 138 [95 Cal.Rptr.3d 799]. However, a decision on any matter that will affect the client’s substantive rights is within the client’s sole authority. *Maddox v. City of Costa Mesa* (2011) 193 Cal.App.4th 1098, 1105 [122 Cal.Rptr.3d 629].

^{8/} In addition, if Witness’s only purpose at trial would be to testify as an alleged eyewitness on matters now known to be false, Witness should not be mentioned in pretrial disclosure documents (for example, pretrial witness lists or trial briefs).

^{9/} Penal Code section 127: “Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured.”

^{10/} Rule 1.16(b) presents several circumstances allowing for permissive withdrawal that may be implicated under these facts: Client is seeking to pursue a course of conduct the lawyer reasonably believes was a crime or fraud, the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent, the client’s conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively or the representation likely will result in a violation of the Rules of Professional Conduct or the State Bar Act. Rule 1.16(b)(2)-(4) and (b)(9).

without disclosing the perjured testimony. *People v. Brown* (1988) 203 Cal.App.3d 1335, 1339-1340, fn. 1 [250 Cal.Rptr. 762]. See also, Cal. State Bar Formal Opn. No. 2015-192 (attorneys may disclose to the court only as much as reasonably necessary to demonstrate the need to withdraw and without violating the duty of confidentiality).^{11/} Attorney, however, may only withdraw after taking reasonable steps to avoid foreseeable prejudice to Client's rights. Rule 1.16(d).

Scenario #3

In this scenario, Attorney first learns of the perjury after Witness has testified at trial. Witness has been presented to the trier of fact as possessing crucial information. Client, nonetheless, has instructed Attorney not to inform the court of the perjury. Attorney's duty of candor to the court is immediately implicated.

Attorney's statutory duties of candor are found in Business and Professions Code sections 6068(b) and (d), 6106 and 6128(a) discussed in scenario #2. Attorney's ethical duty of candor is found in rule 3.3(a)(3). Given Attorney's knowledge that Witness has given materially false testimony, this rule requires Attorney to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6."

The problem here is the collision between the duty of candor and the duty of confidentiality. This is because Attorney's knowledge of Witness's perjury constitutes a "client secret."

"'Client secrets' covers a broader category of information than do confidential attorney-client communications; confidential communications are merely a subset of what are considered client secrets. Indeed, 'client secrets' include not only confidential attorney-client communications, but also information about the client that may not have been obtained through a confidential communication." Cal. State Bar Formal Opn. No. 2016-195, p. 2-3. Thus, "'Client secrets means any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.'" *Id.* at p. 2. Further, rule 1.6(a) states, "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent...." And section 6068, subdivision (e)(1) provides that attorneys must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."^{12/}

^{11/} Additional facts, not explicitly present under this scenario, may impose a mandatory duty upon Attorney to withdraw from the employment. Rule 1.16(a)(1)-(2) (attorney "shall" withdraw if he knows or reasonably should know the client is presenting a claim or defense without probable cause and for the purpose of harassing or maliciously injuring any person or attorney knows or reasonably should know the representation will result in violation of the Rules of Professional Conduct or the State Bar Act).

^{12/} The duty of confidentiality is broader than the attorney-client privilege and precludes an attorney from disclosing facts or allegations that might cause a client or former client embarrassment. *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar. Ct. Rptr. 179, 189; Cal. State Bar Formal Opn. No. 2016-195.

Here the revelation that a key witness supposedly supporting Client's case has committed perjury is likely to be embarrassing and detrimental to Client. Attorney acquired knowledge of the perjury from Client, and confirmed by Witness, all of which occurred within the course of the representation. Thus, a "client secret" is present. Further, Client has instructed Attorney not to reveal the perjury. Rule 1.6, therefore, prohibits Attorney from disclosing Witness's perjury.^{13/}

The Rules of Professional Conduct encourage the attorney, where there are perjury concerns, to remonstrate with the client, first and foremost, rather than seeking to withdraw. See rule 3.3 in its entirety, including Comments. The policy underpinnings for the "remonstration first" preference must stem from the recognition that withdrawing from the representation may not cure the problem that the perjury may remain in the case.^{14/}

Thus, in this scenario, Attorney first should employ "reasonable remedial measures" available under the Rules of Professional Conduct and the State Bar Act "which a reasonable attorney would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal." Rule 3.3, Comment [5]. Such remonstration measures "include explaining to the client the lawyer's obligations under this rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw." *Id.* Corrective action would include striking or correcting Witness's false testimony by stipulation or motion. Cal. State Bar Formal Opn. No. 1983-74. Or, Client could testify to Witness's admission.

^{13/} If the ABA rules were applicable, Attorney might have the option of disclosing the perjury to the court. Under the ABA Rules the duty of candor trumps the duty of client confidentiality. See, ABA Rule 3.3(a)(3) (if lawyer has knowledge of client or client-witness perjury, the duty to take remedial measures includes, "if necessary, disclosure to the tribunal.") As discussed above, however, in California the duty of candor does not override the duty of confidentiality. Nor are ABA rules binding in California. "[T]he ABA Model Rules have no special significance for California lawyers." *In re Mortgage & Realty Trust* (Bankr. C.D. Cal.1996) 195 B.R. 740, 758 (noting Cal. State Bar Form. Opn. 1983-71). See also, *In re Wheatfield Business Park LLC* (C.D. Cal. 2002) 286 B.R. 412, 420 (ABA Model Rules are not in force in California); *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 655-56 [82 Cal.Rptr.2d 799] ("the ABA Model Rules...do not establish ethical standards in California, as they have not been adopted in California and have no legal force of their own"). The ABA rules may be considered as a "collateral source" where there is a void in the California rules and no conflict with California public policy. *State Compensation Insurance Fund, supra*, 70 Cal.App.4th at 656. Here, there is no void; in fact, the ABA rules are in direct conflict with the California rules because the latter, clearly, does not allow disclosure to the tribunal absent client consent.

^{14/} See *People v. Johnson* (1998) 62 Cal.App.4th 608, 623 [72 Cal.Rptr.2d 805] ("[W]e note that permitting defense counsel to withdraw does not necessarily resolve the problem. That approach could trigger an endless cycle of defense continuances and motions to withdraw as the accused informs each new attorney of the intent to testify falsely. Or the accused may be less candid with his new attorney by keeping his perjurious intent to himself, thereby facilitating the presentation of false testimony. Lastly, there is the unfortunate possibility that the accused may find an unethical attorney who would knowingly present and argue the false testimony. Thus, defense counsel's withdrawal from the case would not really solve the problem created by the anticipated perjury but, in fact, could create even more problems.")

Attorney may also analyze whether it would be appropriate to strike the testimony over Client's objection under the theory that Attorney, as "captain of the ship," has the ultimate control over evidentiary decisions in civil cases.

This course may be perilous because it is questionable whether the metaphorical "ship's captain" has the authority, even in a civil case, to take action, against the client's instructions, that would sink the ship. Such would be the concern here because, as the hypothetical states, "the eyewitness testimony is crucial; without it, Client may well lose the case."^{15/} In addition, depending on the circumstances, a motion to strike the testimony could effectively result in the disclosure of information protected by the duty of confidentiality.

If remonstrance has failed, Attorney must consider as well whether it is appropriate, or even required, to seek to withdraw as counsel. Rule 3.3, Comment [8] provides: "A lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation." However, the Comment goes on: "The lawyer, may, however, be required by rule 1.16 to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these rules."

The facts in this scenario strongly suggest a deteriorating lawyer-client relationship. This is not a disagreement over a minor strategy decision. Client disagrees with Attorney's remonstrance to her on matters fundamental to our judicial system and Attorney's ethical duties. Client insists on proceeding despite knowing her case relies on perjured testimony which will not be corrected. That favorable, yet false, testimony is firmly embedded in Client's case. Client may end up winning the case because of the perjury.

Attorney's continued involvement without corrective action presents a risk to Attorney of an ethical violation. Rule 1.16(a)(2) (mandatory duty to seek to withdraw if "lawyer knows or reasonably should know that the representation will result in violation of these rules or of the State Bar Act). At trial, Attorney, without knowledge of the perjury, advocated Client's case relying upon and emphasizing Witness's testimony. That crucial testimony is now known to be perjured. Attorney's silence could be construed to be an "implicit consent to the deception." Attorney has good reason to believe that continuing to act as counsel in the trial will lead to a violation of Business and Professions Code sections 6068(b) and (d), 6106, or 6128(a). See Cal. State Bar Formal Opn. No. 1983-74 (Discussing duties where attorney acquires knowledge of client perjury during trial: "attorney may not remain silent and is required to take action to ensure

^{15/} *Blanton v. Womancare, Inc.*, *supra*, 38 Cal.3d at 404-405 ("An attorney is not authorized, however, merely by virtue of his retention in litigation, to 'impair the client's substantial rights or the cause of action itself.' ... [A]n attorney may not stipulate to a matter which would eliminate an essential defense. . . . Such decisions differ from the routine and tactical decisions which have been called 'procedural' both in the degree to which they affect the client's interest, and in the degree to which they involve matters of judgment which extend beyond technical competence so that any client would be expected to share in the making of them.") (internal citations omitted).

that he/she does not give his/her implicit consent to the deception. Silence and inaction would not be consistent with truth and would constitute, albeit indirectly, an attempt to mislead the judge by an artifice, to wit, the client's false testimony of a material fact."'). Attorney, under the circumstances, must seek to withdraw from the representation.

Before seeking withdrawal, Attorney should forewarn Client that withdrawal may cast an adverse inference upon Client's credibility. Then, in seeking to withdraw, Attorney cannot disclose the specific reasons due to the duty of confidentiality still owed to Client (Cal. State Bar Formal Opn. 2015-192; rule 1.16, Cmt. [4]), and shall not withdraw from employment until he has "taken reasonable steps to avoid reasonably foreseeable prejudice" *Id.* at 1.16(d). If a withdrawal motion is unsuccessful then Attorney must not refer to or rely upon the perjured testimony throughout the rest of the case. See Cal. State Bar Formal Opn. No. 1983-74 ("[T]he attorney may not thereafter rely upon or refer to any of the perjured testimony. To do so would constitute a willful misrepresentation by the attorney of matters that he/she knows to be untrue, which could subject the attorney to discipline. . . . The attorney must conduct the balance of the trial as if such testimony had been stricken from the record.") (Citations omitted.)^{16/}

CONCLUSION

An attorney should be a zealous advocate and may ethically argue that evidence with questionable credibility should be considered. Yet, an attorney may not use, and must refuse to submit, evidence known to be false. When the attorney has actual knowledge during a trial that a witness has committed perjury, the duty of candor to the tribunal requires the attorney to take reasonable remedial measures consistent with the duty of confidentiality. Those measures include remonstrating with the client to take corrective action. If the client refuses, the attorney may be required to seek to withdraw from the representation. Under the circumstances outlined in Scenario 3, the attorney is required to seek to withdraw.

^{16/} An attorney violates the duty of candor, even where the fabrications are the work of another, if the attorney, after learning of their falsity, continues to assert their authenticity. *In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321; *Olguin v. State Bar* (1980) 28 Cal.3d 195, 198-200 [167 Cal.Rptr. 876].

From: [Bill Hargreaves](#)
To: [Marlaud, Angela](#)
Subject: Proposed Formal Opinion Interim No. 14-0004
Date: Thursday, December 06, 2018 10:17:06 AM

Hello Angela.

I reviewed the opinion and would like to comment –

The opinion contains this language: “If the testimony has already been offered, the attorney must take reasonable remedial measures to correct the record without violating the duty of confidentiality.”

As a lawyer who has been practicing for over 40 years, I would have no clue what constitutes “reasonable remedial measures”. I would suggest that there be a clear definition of what is expected, or at least an example of a “remedial measure”.

Thank you for the opportunity to provide comment. Happy Holidays.

Bill Hargreaves

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Lee, Mimi

From: McCurdy, Lauren
Sent: Tuesday, November 20, 2018 5:19 PM
To: Marlaud, Angela
Cc: Lee, Mimi; Tuft, Andrew
Subject: FW: Public Comment Sought on Draft Ethics Opinion 14-0004 re Witness Purjury

Angela, Here's a comment on the new opinion circulating for public comment. Angela, please save a copy in the appropriate folders. Thank you! Lauren

From: Zitrin, Richard A. [mailto:zitrinr@uchastings.edu]
Sent: Tuesday, November 20, 2018 5:16 PM
To: McCurdy, Lauren; Ethics Information Group
Subject: RE: Public Comment Sought on Draft Ethics Opinion 14-0004 re Witness Purjury

Hi, Lauren. I hope that you'll consider this a comment on this proposed rule.

Generally speaking, I agree with the opinion's ultimate conclusions on all three scenarios. However, I have two principal concerns.

First, please suggest to the committee that they avoid the word "zealous," a word that grows in disrepute, even more so in these difficult times. Note that our rules and the ABA rules generally avoid this term, except in the context of not having to be too zealous. I use and strongly suggest the word "vigorous."

Second, I believe that the committee should back off in its strong language about withdrawal. In scenario #2, the opinion notes permissive withdrawal, and then states:

"Attorney should also consider whether the disagreement with Client has caused a deterioration in their relationship so significant that Attorney "can no longer competently and diligently represent the client in which case Attorney may have a mandatory duty" to withdraw.

But in actual law practice, the "deterioration" rarely rises to that level. Withdrawal often has the collateral effect of resulting in a new lawyer and a more sophisticated lie told by the witness and/or client. Encouraging it too easily can be encouraging passing the buck.

Similarly, it goes somewhat too far in scenario #3 to say *"The facts in this scenario strongly suggest a deteriorating lawyer-client relationship."* There's no rule of thumb here. For some lawyers this is true. For many lawyers, it's not. I don't think it's appropriate for the committee to imply that the usual case is a strongly deteriorated L/C relationship. Again, that just encourages withdrawal and possible skullduggery with the next lawyer.

Warm regards,
Richard

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LECTURER IN LAW
UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW
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SAN FRANCISCO, CA 94133

From: [Mark Baer](#)
To: [Marlaud, Angela](#)
Subject: Proposed Formal Opinion Interim No. 14-0004
Date: Friday, December 07, 2018 5:11:18 PM
Attachments: [image003.png](#)
[image006.png](#)

Dear Angela:

I take very serious issue with one aspect of the proposed formal opinion - the use of the term "zealously."

The following is an excerpt is from an article by David M. Majchrzak and Heather L. Rosing titled "Be civil, for client's sake" that was published in the October 28, 2016 edition of the Los Angeles Daily Journal:

"It might be unusual to sit through a single day's law-and-motion calendar without seeing one lawyer accuse another of some misconduct or character flaw. This could take the form of attributing unresponsiveness, unreasonableness, or some other uncouth quality to an adversary. Often that may be in response to some form of courtesy withheld, perhaps in regard to a request for a short extension of time. But regardless of the reason for resorting to such tactics, lawyers should reconsider such an approach to litigation. Ethical reasons could require some restraint....

Clients primarily come to lawyers for one reason: They have problems they cannot solve themselves. ... Generally, it is in the clients' best interest that those problems are resolved as efficiently and expediently as possible. And that is where civility plays a part....

Boorish and uncooperative tactics are much more likely to escalate an already sensitive situation than they are to move it toward resolution....

Sometimes, lawyers may attempt to justify such conduct in the name of zealous advocacy. But such an argument is usually unavailing. Whereas lawyers are advocates, they cannot be true 'zealots.' Keep in mind that a zealot is a person who is fanatical and uncompromising in pursuit of that goal....

Indeed, lawyers are not required to be 'zealots.' The Rules of Professional Conduct do not contain any express duty to zealously advocate. Even the former Model Rule addressing zealous advocacy was replaced with Rule 1.3, which instead requires representation of a client with 'reasonable diligence.'

The duty of loyalty requires that attorneys be strong advocates for their clients. But distinguishing that from being a zealous advocate - one who acts fanatically and without compromise - is not merely an exercise in semantics. Clients have an interest in their lawyers recognizing this so that they can conclude, rather than continue disputes."

Consistent with and related thereto, several years ago the Bar began requiring a civility oath of new California lawyers.

I recently shared this information with an attorney colleague who was about to participate on a panel and discuss zealous advocacy, among other things. After our conversation, she replaced her PowerPoint slides with the following:

No Zealots



- ▶ "Zealous" was removed from the ABA Model Rules in 1983. (Previously used in a Comment to the ABA Model Rules.)
- ▶ California's Rules never referred to "zealous" advocacy.
- ▶ NEW California Rules of Professional Conduct Rule 1.3 provides:
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15

Civility

- ▶ In 2014, the CA Supreme Court adopted Rule 9.4 of the CA Rules of Court to supplement the attorney oath for new lawyers to conclude with:
 - ▶ *"As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."*
- ▶ "This revision to the oath is an historic moment for the legal community. This change in the oath should remind us of our obligations beyond that of zealous advocacy on behalf of our clients. As professionals, we have an obligation to conduct ourselves with dignity, courtesy, and integrity. Many have forgotten these very principles to which we, as professionals, should always adhere."

– California Courts, Press Release, dated May 1, 2014
(www.courts.ca.gov/25857.htm) (quoting Douglas DeGrave, former CAL-ABOTA President and proponent of adding pledge of civility to the attorney oath)

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I don't think it's helpful to include language that is known to cause lawyers to behave badly and which isn't even part of their legal or ethical responsibilities.

Thank you for your consideration.

Sincerely,

Mark

Mark B. Baer, Esq.

Mediator / Mediation-Minded Attorney / Consulting Attorney / Collaborative Law Practitioner / Conflict Resolution Consultant

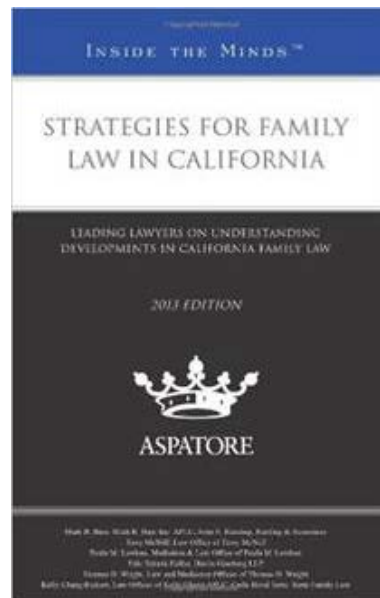
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From: [Mark Baer](#)
To: [Marlaud, Angela](#)
Subject: RE: Proposed Formal Opinion Interim No. 14-0004
Date: Saturday, December 08, 2018 12:45:07 PM
Attachments: [image003.png](#)
[image023.png](#)
[image007.png](#)

Dear Angela:

I shared my commentary on my local family law listserv and I would like to share my additional thoughts based upon the responses I've received.

There are reasons why the word "zealous" and variations of that word have been removed from the ethical obligations of attorneys in various states in recent years.

Words have meaning and the research is very clear that people act in accordance with their interpretation of that meaning. And, not everyone interprets the meaning of the same words the same way. However, the belief by lawyers that they are obligated to "zealously advocate" has been shown to lead to bad behavior.

The California case law which states that lawyers have an obligation to zealously advocate on behalf of their clients is all from the field of criminal law. Do you think it matters that those cases are all criminal in nature and that the job of a criminal defense attorney is to create reasonable doubt, even where none might otherwise exist and that we are dealing with families?

Over the years, I have asked employment law attorneys if they have ever handled an employment law case involving a family business. When they've indicated that they have handled such cases, I've asked them whether they handle them in the same manner as they do their cases in which families aren't involved. On each and every occasion, the answer has been that they put on a different hat when their case involves a family business.

So, why is it that in the field of family law -- a field in which families are always going to be involved, that we should be wearing the hat similar to the one that employment lawyers wear when they are handling cases that don't involve family businesses? Why aren't we always wearing the hat that employment lawyers tend to wear when handling family businesses? It's not the same hat. And, if it's not the same hat, then I'm afraid that it's not the same type of advocacy.

I very seriously doubt that the employment law attorneys who wear different hats when handling employment cases involving family members will say that they are not complying with their legal and ethical responsibilities. In fact, I would say that they believe that they are fulfilling that obligation in a moral manner.

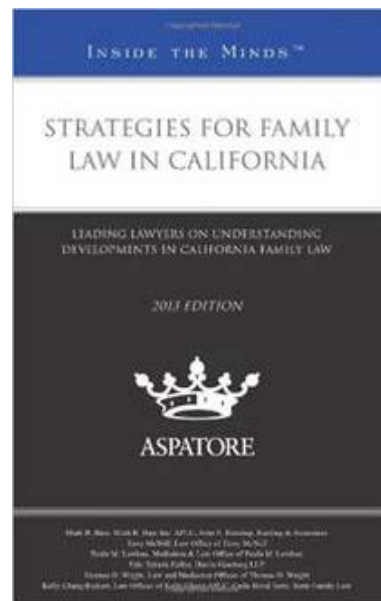
Context matters :-). The real world isn't black and white. The word zealous does not belong in any rules or laws pertaining to the manner in which lawyers should be representing clients in family related matters.

Sincerely,

Mark
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From: Mark Baer

Sent: Friday, December 07, 2018 5:11 PM

To: 'angela.marlaud@calbar.ca.gov' <angela.marlaud@calbar.ca.gov>

Subject: Proposed Formal Opinion Interim No. 14-0004

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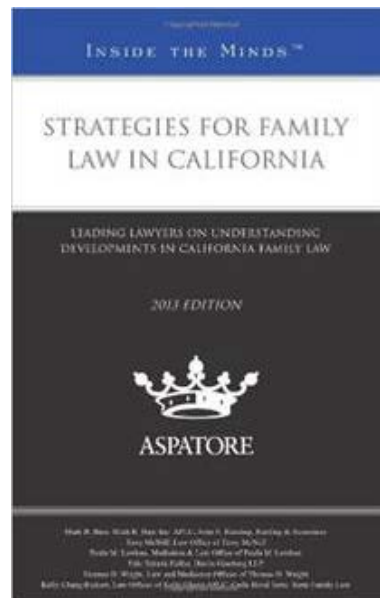
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Marlaud, Angela

From: Alison Bernstein <abernstein@hcrc.ca.gov>
Sent: Wednesday, December 19, 2018 1:21 PM
To: Marlaud, Angela
Subject: comments to proposed opinion 14.004

Dear Ms. Marlaud,

I stumbled over this opinion in the course of looking for something quite different, but wanted to offer one small observation. It seems to me that this opinion may be missing a step in its analysis. The three scenarios in the opinion all, understandably, address the knowledge of the attorney. However, in jumping from scenario one to scenario two, in which the attorney moves from *suspecting* the proffered testimony is false to *knowing* the proffered testimony is false, the opinion also shifts from “false” to “perjury”. However, the attorney’s knowledge that the testimony is false does not necessarily impute to the witness the knowledge that the testimony is false. And without this knowledge, the witness is not committing perjury.

An example: The witness wants to testify that an accident happened at 2:00 PM, because he looked at the clock on his car immediately prior to the accident and it read 1:58 PM. The attorney has a mechanic examine the vehicle, and learns that the settings on the clock are off by ten minutes. The attorney now knows that the witness’s testimony as to the time is false, but the witness may not have that same knowledge. I think the attorney still probably has an obligation to inform the witness, and perhaps the court if the witness insists on sticking to his testimony, but it is not perjury as the witness does not believe it to be false.

If the knowledge of the witness is not necessary to your analysis, which I do not think it is, I would not use the term perjury. If it is important to your analysis that the false information be perjurious, then I think you need to address the witness’s knowledge.

Best,

AB

ALISON BERNSTEIN | Attorney
Habeas Corpus Resource Center | 303 Second Street, Suite 400 South | San Francisco, CA 94107
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