



The State Bar *of California*

**OPEN SESSION
AGENDA ITEM
NOVEMBER 2019
REGULATION AND DISCIPLINE COMMITTEE II.B**

DATE: November 14, 2019

TO: Members, Regulation and Discipline Committee

FROM: Andrew Tuft, Supervising Attorney, Office of Professional Competence

SUBJECT: Formal Advisory Ethics Opinion 2019-200: Request for Approval for Publication

EXECUTIVE SUMMARY

This agenda item seeks Board Committee on Regulation and Discipline (RAD) approval for the publication of proposed Formal Ethics Advisory Opinion 2019-200 developed by the Committee on Professional Responsibility and Conduct (COPRAC or Committee).

BACKGROUND

COPRAC is charged with developing the State Bar's nonbinding, advisory ethics opinions.¹ Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar policy and procedure,² which provides that once the Committee has approved a formal opinion following consideration of public comment, the formal opinion and the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of RAD for decision.

¹ Each published opinion includes the following statement: "This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar." Although nonbinding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility. (See, e.g., *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 459.)

² See Board Resolutions, July 1979, December 2004, and November 2016.

DISCUSSION

This agenda item requests approval for the publication of Proposed Formal Advisory Ethics Opinion 2019-200. Prior to being finalized for publication, while the opinion was still in development and out for public comment, it was styled as Proposed Formal Opinion Interim No. 14-0004.

Proposed Formal Opinion Interim No. 14-0004 was drafted by COPRAC. At its October 19, 2018 meeting, in accordance with COPRAC's Rules of Procedure, the Committee approved the opinion for an initial 90-day public comment distribution. Subsequently, at its June 7, 2019 meeting, COPRAC revised the opinion in response to public comments received and approved a further 60-day public comment period.

The full text of the proposed opinion is provided as Attachment A. The questions addressed in the proposed opinion are:

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 at deposition in the case, albeit favorably, for the attorney's client?

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 known 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 attorney has gained knowledge of the witness's perjury at trial, the client nonetheless has instructed the attorney to continue to use the perjured testimony in the remainder of the trial?

The opinion digest states:

Because an attorney must vigorously represent a client, 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 perjured testimony known by the attorney to be false even if the client has instructed the attorney to do so. If the attorney offered to the tribunal testimony that is material to the proceeding and later learns that the testimony was false, 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.

Public Comment

Four public comments were received and are provided as Attachment B. Reginald Chun approved the opinion as written and three commenters suggested revisions.

Richard Zitrin suggested the analysis of the opinion should discuss the attorney-client privilege, in addition to an attorney's duty of confidentiality. This commenter is correct that there is a distinction between the attorney-client privilege and an attorney's duty of confidentiality. However, that distinction does not affect the analysis of this opinion as the attorney's prohibition on revealing the information is the same whether the attorney learned the confidential information directly from the client, or from the witness. As a result, COPRAC recommended that no change be made to the opinion in response to this comment.

The Santa Clara County Bar Association Professionalism Committee found the opinion to be mostly helpful and well-reasoned, but suggested the opinion provide a more definitive answer on whether withdrawal is required under Scenario #3. This commenter found it difficult to determine when an attorney may take remedial steps and avoid withdrawing, as opposed to being required to withdraw. In addition, they suggested the opinion analyze three additional scenarios. With respect to the first point, the opinion takes an intentionally nuanced approach as to whether withdrawal is mandatory. Such a determination requires an analysis of a variety of facts and circumstances which are discussed in detail in the opinion. No change to the opinion was recommended in response to this point. With respect to the second point, the Committee declined to add additional content to what is already a lengthy opinion. Staff, however, has added the suggested scenarios to a list of possible new opinion topics for the Committee to consider in the future.

Finally, the Los Angeles County Bar Association Professional Responsibility and Ethics Committee offered a number of suggestions which were generally stylistic and intended to help clarify the opinion. For example, they suggested the opinion's digest be revised to clarify that an attorney's obligation to take remedial measures to correct the record arises from the attorney's knowledge of the falsity. The Committee amended the opinion in response to many of these suggestions. This commenter also suggested removing the perjury label from the opinion. No change was made in response to this suggestion because the fact that perjury has occurred helps to sharpen the analysis of the opinion. In addition, the opinion is intentionally styled to present three progressive scenarios, the most difficult scenario being an attorney discovering a witness has presented perjured testimony after the witness has testified at trial.

At its September 6, 2019 meeting, following consideration of the public comments received, COPRAC approved the opinion for submission to RAD for formal publication. The State Bar Standing Committee on Professional Responsibility and Conduct requests that RAD approve the publication of Formal Ethics Advisory Opinion No. 2019-200.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD OF TRUSTEES POLICY MANUAL AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None

RECOMMENDATIONS

It is recommended that the Regulation and Discipline Committee approve the following resolution:

RESOLVED, following the publication for public comment and consideration of the comments received, and upon the recommendation of the Standing Committee on Professional Responsibility and Conduct, the Board Committee on Regulation and Discipline approves the publication of Formal Ethics Advisory Opinion 2019-200, attached hereto as Attachment A.

ATTACHMENT(S) LIST

- A.** Formal Ethics Advisory Opinion 2019-200
- B.** Full Text of Public Comments

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 2019-200**

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 at deposition in the case, albeit favorably, for the attorney's client?

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 known 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 attorney has gained knowledge of the witness's perjury at trial, the client nonetheless has instructed the attorney to continue to use the perjured testimony in the remainder of the trial?

DIGEST: Because an attorney must vigorously represent a client, 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 perjured testimony known by the attorney to be false even if the client has instructed the attorney to do so. If the attorney offered to the tribunal testimony that is material to the proceeding and later learns that the testimony was false, 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/}

^{1/} Rules 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.

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

STATEMENT OF FACTS

Attorney (Attorney) represents plaintiff (Client) in a sexual harassment case against Client's immediate supervisor (Supervisor) and 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, 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 Witness's claim to having been an eyewitness to the sexual harassment. Attorney promptly contacts Witness, who admits to having given the false deposition testimony. Attorney informs Client, who nonetheless instructs Attorney to use Witness's false testimony at trial.

Scenario #3: Unlike Scenario #2, Attorney does not know before trial that Witness's deposition testimony was perjured. At trial, still unaware of the perjury, Attorney incorporates Witness's false eyewitness testimony into the case. Witness testifies on Client's behalf, claiming to be an eyewitness to the sexual harassment. Attorney cross-examines Supervisor, seeking to impeach Supervisor with Witness's eyewitness account. Before trial concludes, however, Client tells Attorney that Witness has admitted to lying in Witness's trial testimony. Attorney promptly contacts Witness, who admits that Witness's testimony claiming to be an eyewitness to the harassment was willfully false. Client instructs Attorney not to reveal the perjury to the court and insists that Attorney continue to use the perjured testimony in the remainder of the trial.

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 testified falsely on a material matter 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 vigorously 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

^{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 & County 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. 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.

with the duty of vigorous advocacy, forcefully argue Client's cause based on it. However, under rule 3.3(a)(3) "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 falsity. The testimony is perjured, it is willfully false and material, because, as stated above, "The eyewitness testimony is 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." Likewise, Business and Professions Code sections 6068(b) and (d) provide, "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."

Because Attorney knows the testimony is false, rule 3.3 and section 6068 would bar its presentation as would Business and Professions Code section 6106, which proscribes "the commission of any act involving, moral turpitude, dishonesty or corruption." In addition, Business and Professions Code section 6128 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].^{6/}

Therefore, Attorney's ethical mandate is clear. Attorney, knowing of the perjury, may not solicit or otherwise seek to introduce the testimony in question.

In this civil case setting, Attorney also has the authority to refuse to follow Client's instruction to submit the perjured testimony.^{7/} The Supreme Court addressed the question of an

^{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/} See also rule 8.4(c) ("It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation . . .").

^{7/} 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,

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 the decisions he makes, even when the client voices opposition in open court." (*Id.* at p. 404 [citations omitted]).^{8/} 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].^{9/}

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 Client the illegality of perjury, the potential consequences to Client of sponsoring perjured testimony^{10/} 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 again refuse to carry out the instruction. Attorney may continue in the representation but, consistent with Attorney's authority to control witness presentation in civil cases, may not offer Witness's testimony at the upcoming trial.

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].

^{8/} "[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, 94, 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].

^{9/} 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.

^{10/} 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."

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).^{11/} 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 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).^{12/} However, Attorney may only withdraw after taking reasonable steps to avoid reasonably 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 take any corrective action and insists that Attorney continue to use the perjured testimony through the remainder of the trial, including closing argument. 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 after learning that previously presented evidence is false is found in rule 3.3(a)(3), which states that “If . . . a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity the lawyer shall 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.” Because the witness’s testimony is material and known to be false, the duty to take such measures has arisen.

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.”

^{11/} Rule 1.16(b) presents several circumstances allowing for permissive withdrawal that may be implicated under these facts: the client seeks 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, or the client’s conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively or the representation is likely to result in a violation of the Rules of Professional Conduct or the State Bar Act. Rule 1.16(b)(2)-(4) and (b)(9).

^{12/} 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) and (a)(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).

“‘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 Business and Professions Code 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.” This prohibition is reinforced by rule 1.8.2 which provides: “A lawyer shall not use a client’s information . . . protected by section 6068, subdivision (e)(1) to the disadvantage of the client unless the client gives informed consent, except as permitted by these rules or the State Bar Act.”

Here, all elements of a “client secret” are present. Revelation of the fact – a key witness proffered by Client has committed perjury on a crucial issue – 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. Further, Client has instructed Attorney not to take corrective action. Rules 1.6 and 1.8.2, therefore, prohibit Attorney from disclosing that the Witness’s testimony was false.^{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/}

^{13/} If the ABA rules were applicable, Attorney might have the option to correct the testimony over the client’s objection. Under the ABA rules, the duty of candor trumps the duty of client confidentiality. See, ABA Model 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.

^{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.”).

Thus, in this scenario, Attorney must 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 remonstrations 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.

Here, however, Attorney’s attempts at remonstrating with Client have failed. Client will not authorize Attorney to move to strike the testimony. Further, Client instructs Attorney to continue to use the perjured testimony.

Attorney may analyze whether it would be appropriate to strike the testimony over Client’s objection under the theory, as discussed in Scenario #2, 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.

Because remonstrations has failed, Attorney must consider as well whether it is appropriate, or even required, to seek to withdraw as counsel. Under rule 1.16(b), which authorizes permissive withdrawal, Attorney has valid grounds to seek to withdraw. See discussion of this rule’s pertinent subsections in footnote 10, *supra*.

However, whether seeking to withdraw has become mandatory under rule 1.16(a) requires a deeper analysis. 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 to state, “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

^{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).

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 Client on matters fundamental to our judicial system and Attorney’s ethical duties. Client insists on proceeding despite knowing the case relies on perjured testimony which will not be corrected. Client instructs Attorney to continue to use the false testimony.

But Comment [8] to rule 3.3 does not make withdrawal mandatory merely because of a deteriorating client relationship. Standing alone a substantial disagreement with a client does not require an attorney to seek to withdraw. Rule 1.16(b) (withdrawal is permissive when client “renders it unreasonably difficult for the lawyer to carry out the representation effectively”). Instead, Comment [8] mandates that the deterioration also must adversely affect Attorney’s ability to competently and diligently represent the Client or will cause the continued employment to violate the Rules.

Here, Attorney still has the option to take remedial action by refusing to refer to or rely upon the perjured testimony in all remaining aspects of the trial. As discussed in Scenario #2 above, Attorney can and must do so even despite Client’s instructions to the contrary. Under these facts, Attorney following the “never mention or use it again” approach may continue to competently and diligently represent Client.^{16/}

Never referring to or relying upon the testimony again, however, will be insufficient according to Comment [8] if the continued employment *will* cause Attorney to violate the Rules. Note well, the use of “will,” which derives from the mandatory withdrawal provision of rule 1.16(a): “the lawyer knows or reasonably should know that the representation will result in a violation of these rules or of the State Bar Act.” On the other hand, under rule 1.16(b)(9) withdrawal is permissive if continuation of the representation is only “likely” to result in a violation of the rules or State Bar Act.

The difference between what “will” cause a rule violation (mandatory withdrawal) versus what is “likely” to cause a rule violation (permissive withdrawal) is not always clear. In seeking to trace this line, Attorney must consider whether Attorney’s continued involvement in the case could be construed to be Attorney’s consent to or endorsement of the perjury. Here, although Attorney used the perjured testimony in examination and cross-examination of witnesses, Attorney did so without knowledge of the falsity and going forward will make no further

^{16/} Additional facts might cause Attorney to be concerned whether the duties of competent and diligent representation may still be satisfied. Does Client’s intransigence, including Client’s clearly improper instruction to use the perjured testimony, signal the end of further cooperation on other significant issues that might arise during the trial such that Attorney’s ability to control the representation will suffer? Is the breakdown so severe Attorney will lose the necessary motivation to appropriately represent Client’s lawful interests?

reference to it. Attorney will not be explicitly endorsing or consenting to the perjury in the remaining aspects of the trial.

On the other hand, the perjured testimony is, as stated above, “crucial,” and Client likely will lose the trial without it. Attorney should evaluate whether the perjury will continue to materially influence the outcome and benefit Client, despite that Attorney will make no further explicit use of it. The central question for Attorney is whether the representation of Client may continue through the rest of the trial without putting Attorney in the position of having impliedly endorsed or consented to the perjury.

In this regard, Attorney should examine several questions, such as: Is Attorney able to effectively argue and present other aspects of the case which are untainted by the perjury? For example, did Witness provide other testimony not known to be perjured which is a benefit to Client? How can Attorney vouch for any aspect of Witness’s testimony knowing of the perjury? Did other witnesses, including experts, rely upon the perjured testimony in some way and refer to it favorably? To effectively represent Client must Attorney continue to vouch for those witnesses in some way? Is the perjured testimony embedded in exhibits which have been admitted into evidence? Did the court make, or will it make, rulings (for example, on motions in limine, to dismiss or for nonsuit) relying upon the perjured testimony which may affect the outcome?

The analysis of these and other factors may lead Attorney to conclude that, remaining on the case, without mentioning or relying upon the perjured testimony again, nonetheless “will” constitute implied consent to or endorsement of the perjury and “will” cause a rule violation. See again the citations to rule 3.3, Business and Professions Code sections 6068(b) and (d), 6106, and 6128(a), and *In re Branch* discussed under Scenario #1 above.^{17/} If an attorney of reasonable prudence and competence would reach such a conclusion, then Attorney’s mandatory duty to seek to withdraw from the representation will have been triggered.^{18/}

If the decision is to withdraw, Attorney should forewarn Client that withdrawal may negatively impact Client’s credibility. 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

^{17/} See also Cal. State Bar Formal Opn. No. 1983-74 (“Attorney may not remain silent and is required to take action to ensure 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.”).

^{18/} Under rule 1.16(a)(1) and (2) the duty to withdraw is mandatory where the lawyer “knows or reasonably should know” of the required facts. To “know” means actual knowledge of the fact in question although knowledge may be inferred from circumstances. “Reasonably should know” means that “a lawyer of reasonable prudence and competence would ascertain the matter in question.” Rule 1.01(f) and (j).

1.16, Cmt. [4]) and shall not withdraw from employment until Attorney has “taken reasonable steps to avoid reasonably foreseeable prejudice.” *Id.* at 1.16(d).^{19/}

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.).^{20/}

CONCLUSION

An attorney should be an assertive 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.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.

^{19/} The rule 3.3 duties of candor to a tribunal “continue to the conclusion of the proceeding.” Rule 3.3(c). Under the facts presented here Attorney cannot violate the duty of confidentiality by revealing the perjury to the court, even if Attorney has successfully withdrawn from the representation. See Cal. State Bar Formal Opn. 2012-183 (“The duty of confidentiality continues even after termination of the attorney-client relationship.”) Accordingly, under these facts nothing further is required of the attorney. However, under other facts the continued duty may require further action.

^{20/} 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].

Marlaud, Angela

From: Reginald Chun <reginald.chun@lacity.org>
Sent: Friday, August 30, 2019 12:25 PM
To: Marlaud, Angela
Subject: I support wording and import of the witness perjury opinion

My Individual opinion:

**I support wording and import of Proposed Revised Formal Opinion Interim No.14-0004
(Witness Perjury)**

especially this conclusion:

"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."

My individual opinion is that This obligation is sorely needed in criminal defense cases.

Thank you.

--

Deputy City Attorney Reginald Chun
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Angela Marlaud
Office of Professional Competence,
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Interim Opinion 14-0004

Dear Angela:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to submit the following comments on proposed Interim Opinion No. 14-0004. While our Committee agrees with many of the points made in the draft opinion, we have some concerns and suggestions, as set forth below. For ease of reference, these comments are generally provided in the order in which the points arise in the draft opinion rather than in order of importance:

- 1) Issue #1 in the Issue Section should be changed to be consistent with the Statement of Facts and to clarify that the witness testified falsely during the same proceeding. This could be accomplished by changing the question to read: "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, at the witness's deposition in the case, testified falsely, albeit favorably for the attorney's client?" A lawyer's knowledge that a witness testified falsely in a different proceeding would raise issues not pertinent to this opinion, and those issues could not be addressed without substantially enlarging what already is an extremely long opinion.
- 2) Issue #3 in the Issue Section should be changed to confirm that the attorney has knowledge of the falsity. This could be accomplished by changing "after gaining knowledge of the witness's perjury at trial, the client nonetheless has instructed" to "if after the Attorney knows of the witness's perjury at trial, the client nonetheless instructs". The current sentence structure makes it unclear who has this knowledge.

- 3) The second sentence in the Digest section should be changed as follows to confirm that the attorney's obligation arises from the attorney's knowledge of the falsity: "If the attorney offered to the tribunal testimony that is material to the proceeding and later learns that the testimony was false, the attorney must take reasonable remedial measures to correct the record without violating the duty of confidentiality."
- 4) The draft opinion recognizes that Attorney might need to request withdrawal from the representation. See, e.g., the last sentence of the Digest, the last paragraph of the discussion of Scenario #2, and page 8-9 of the discussion of Scenario #3. However, the draft opinion fails to address the language contained in paragraph (c) of rule 3.3 and implies that Attorney is relieved from the duties under rule 3.3 upon withdrawal. Paragraph (c) provides that the duties of candor set forth in paragraphs (a) and (b) of rule 3.3 "continue to the conclusion of the proceeding." As a result, withdrawal does NOT relieve the attorney from the obligations set forth in rule 3.3, including the obligation to take remedial measures as stated therein, as long as the proceeding continues post-withdrawal. This result is not only supported by the clear language of paragraph (c), but also by the actions of the California Supreme Court in approving that language. Paragraph (c), as proposed by the Commission for the Revision of the Rules of Professional Conduct and approved by the California State Bar, provided that the obligations set forth in paragraphs (a) and (b) "continue to the conclusion of the proceeding *or the representation, whichever comes first.*" The California Supreme Court, in approving rule 3.3, deleted the last six words of paragraph (c), thereby making clear that withdrawal does not relieve the attorney from these obligations. As a result, we believe the opinion must reference paragraph (c) of rule 3.3, even if only to expressly acknowledge that the opinion is not addressing the attorney's obligations under paragraph (c) following withdrawal but prior to the conclusion of the proceeding.
- 5) The Authorities Interpreted includes B&P Code section 6106, which is cited in the discussion of Scenario #2. We would suggest citing to rule 8.4(c) for the same point.
- 6) In the Statement of Facts' description of Scenario #3, the first sentence (which begins "Unlike Scenario #1 or #2,") should remove Scenario #1 from its comparison. Attorney in Scenario 1 does not "know" of the falsity of the testimony before trial.
- 7) To avoid confusion about the knowledge definition in the rules, we suggest the term "knows" and "knowledge" be used consistently in the opinion. Rule 1.0.1(f) defines "knows" as actual knowledge, which may be inferred. The draft opinion appropriately sets out this definition in footnote 4 (and footnote 17, although we would suggest removing this duplication). The description of Scenario #1 in the Statement of Facts uses the phrase "know with certainty". The third paragraph in Scenario #1, the first paragraph of Scenario #2, and the Conclusion describe the

attorney as having “actual knowledge”. We suggest removing these modifiers to the terms “know” and “knowledge” so it is clear the opinion is applying the defined term from the rule.

- 8) The materiality of the testimony comes into issue in analyzing Attorney’s duties in Scenario #3, but not Scenarios #1 and #2, although some of the factual statements about Scenarios #1 and #2 might confuse readers about materiality. In the first sentence in Scenario #1, the attorney learns that deposition testimony might include false testimony on a “material” matter. In Scenario #2, the evidence is described as perjured testimony, which by definition is material. In both Scenarios #1 and #2, the materiality wouldn’t affect the lawyer’s duty not to use the false testimony in a tribunal under rule 3.3(a)(3), but we are concerned that readers might be confused because the facts indicate materiality.
- 9) In the discussion of Issue #1, there is a citation to rule 3.3(a)(3) that a lawyer may refuse to offer evidence the lawyer reasonable believes is false in a civil case. The language in the draft opinion is narrower than the rule, which permits the lawyer to refuse to offer evidence in a criminal case as well, except for the testimony of a defendant in a criminal matter. We are concerned the draft opinion’s language could make readers believe the limitation on criminal matters is broader than it is in the rule.
- 10) Beginning with Scenario #2, the testimony is described as perjury. We do not believe describing the testimony as perjury enhances or changes this opinion and suggest the committee consider removing this label. The opinion could continue from Scenario #1 to describe the testimony as false as that is the rule 3.3 standard. We believe this would make it easier to maintain the materiality distinction throughout the Scenarios (see #7, above). Labeling the testimony perjury also by definition makes the falsity “willful”, which also is irrelevant to the analysis. See the description of Scenario #3 in the Statement of Facts and the first paragraph of Scenario #2. Removing the perjury label might allow the committee to shorten the draft opinion to make it more digestible to readers.
 - a. We would suggest removing the additional sentences in footnote 4 regarding perjury to be consistent with our recommendation to remove perjury from the example, but also because we believe the second sentence of footnote 4 could be taken out of context to suggest a lawyer only knows of perjury if there is an admission.
- 11) In Scenario #2, there is a citation to *Nahhas v. Pacific Greyhound Lines* for the proposition that an attorney may refuse to call a witness even though the client *requests* that the witness testify. The facts being discussed in Scenario #2 is that the client *instructs* the attorney to use the witness testimony. We would caution against

confusing the facts by referencing a request. In the *Nahhas* case, the client had requested the court to be permitted to testify, and the issue was whether the court erred in not granting the request despite the lawyer's determination that the client not testify. We believe the citation to *Nahhas* should be removed.

- 12) We suggest the committee reconsider the wording of footnote 10 in light of the captain of the ship discussion on page 4-5 of the draft opinion. If it is correct the attorney is the captain of the ship and has authority to disregard a client's instruction on a witness's testimony, the attorney's concern about the client's attempted improper conduct might be resolved through the attorney acting as captain of the ship in the trial.
- 13) On page 10 of the draft opinion, in the discussion of Scenario #3, it is suggested Attorney may analyze whether Attorney could strike the false testimony without the Client's approval. Although this is described as perilous for other reasons, we think that discussion is misleading because a lawyer wouldn't be able to strike the testimony without the Client's approval because of the section 6068(e) standard of secrecy, which is mentioned only at the end of the paragraph. We would re-word this paragraph to state Attorney could not strike the record without Client's approval because of the secrecy obligation.
- 14) In the discussion of Scenario #3, on page 10, there is a statement that the Attorney used the perjured testimony "in opening statement". This is consistent with the Statement of Facts about Scenario #3. Under rule 3.3(a)(1), a lawyer must "correct a false statement of material fact or law previously made to the tribunal* by the lawyer." This would apply if the lawyer made a statement of fact in the opening statement that he later learns is false. We would suggest removing that Attorney uses the testimony and only have the Attorney offering the testimony into evidence. This avoids a discussion of rule 3.3(a)(1), which would only add to the length and complexity of this draft opinion.
- 15) We believe the discussion in Scenario #3 about Attorney's possible rule violation because of "implied consent to or endorsement of the perjury" is misguided. Rule 3.3(a) and (c) prohibit a lawyer from making a false statement or offering evidence the lawyer knows is false. If the lawyer offered false testimony before the lawyer knew it was false, but after learning of its falsity does not use the testimony, then the rule has been satisfied. The draft opinion's conclusion that Attorney's conduct other than using the false testimony or making false statements "will" violate rule 3.3 and require withdrawal erodes the clear standards in rule 3.3.

- 16) The fourth paragraph on page 9 in Scenario #3 states that "Attorney still has the option to take remedial action by refusing to refer to or rely upon the perjured testimony...." Although this might be the preferred or only option available to an attorney, we would hesitate to describe that option as a remedial action because it doesn't remedy the falsity in the proceeding's record.
- 17) Gender pronouns are used in this draft opinion. The defined terms of Witness, Client and Attorney could be used to avoid having to use gender pronouns.

Thank you for the opportunity to comment on the Proposed Formal Opinion.

Sincerely,

A handwritten signature in black ink, consisting of a stylized capital 'B' followed by a long, horizontal, slightly wavy line extending to the right.

Brandon Niles Krueger
Chair
Professional Responsibility and Ethics Committee,
Los Angeles County Bar Association



30 August 2019

The Professionalism Committee of the Santa Clara County Bar Association (the “Committee”) submits the following comments regarding Formal Opinion Interim No. 14-0004 (the “Opinion”). The Committee found the Opinion to be mostly helpful and well-reasoned, but believes it can be improved in two respects.

First, the Committee believes the Opinion would be strengthened by clarifying the discussion of Scenario #3. The Opinion appropriately identifies the competing concerns presented by the duties of zealous advocacy, candor, and confidentiality. However, it would be helpful to provide a clearer roadmap for how to resolve those concerns once an attorney’s efforts to remonstrate with the client have failed. The Committee found it difficult to follow, in particular, when an attorney may (and should) take remedial steps short of withdrawal, when withdrawal is permissible, and when withdrawal is mandatory. For example, the Opinion seems to suggest that an attorney might reasonably conclude under the circumstances of Scenario #3 that withdrawal is not required. Yet the cited factors and analysis (and the opinion cited in footnote 16) seem to point consistently to mandatory withdrawal. These mixed signals are confusing. Given that an attorney in Scenario #3 may have to decide on a course of action quickly, a clearer recitation of the appropriate analytical steps—and, possibly, the appropriate outcome of the analysis under the circumstances set forth in Scenario #3—is advisable.

Second, we suggest addressing other, similar scenarios that, while perhaps not involving “witness perjury” per se, raise similar issues: (a) Scenario #4, in which a witness testifies in good faith but later discloses to the attorney that the testimony was unwittingly false; (b) Scenario #5, in which a witness believes at all times that he/she has testified truthfully but the attorney knows (based on, for example, a review of contemporaneous documents) that the testimony is false; and (c) Scenario #6, in which an attorney learns after the trial concludes (and perhaps after entry of judgment) that a witness gave perjured testimony. The Opinion contains legal citations and analysis from which a reader may be able to determine the answers, but it would be helpful to address these scenarios directly.

Thank you for your consideration.

Santa Clara County Bar Association, Professionalism Committee

McCurdy, Lauren

From: Richard Zitrin [mailto:richard@zitrinlawoffice.com]
Sent: Friday, July 05, 2019 8:31 PM
To: McCurdy, Lauren
Subject: RE: Public Comment Sought on Revised Draft Ethics Opinion 14-0004 (Witness Perjury)

Hi. I'd like to pass this on to the Committee. Warmest personal regards.

I'm concerned that on page 7, I read this as conflating "confidence" and "secret." If in fact, as the facts state and as reiterated further down on page 7 or 8, the client is responsible for telling the attorney of the perjury, then the attorney learns of the perjury through a confidential communication, and knowledge of the perjury becomes the result of that communication and not a "mere" secret. I think you should reconsider this language and the import of this before going forward with this scenario. Obviously, if this is a result of a client communication, and not something merely learned through the representation, we are talking about privilege as well as 6068, and the analysis should reflect that.

Good luck!

Richard

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