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OUTSIDE COUNSEL

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Must You Believe Your Client's Testimony?

To even raise this question (albeit in a legal publication that the lay public will never see), that is, whether a lawyer can legally and ethically offer testimony by his client that the lawyer simply does not believe, may give weight to the public's perception of the legal profession as impervious to truth.

The masses would probably even be appalled at the lawyer considering such testimony where the client has done nothing to hint to his counsel that the client's version is untruthful—such as a wink, a nod or constantly changing the recollection. (We deal in this piece with a lawyer's plain disbelief based on available countervailing evidence or the senselessness of the story.)

Put differently: Are lawyers simply agnostic regarding truth? Should they be? May they flatly ignore their own personal perception of the "truth," that is, unless, for example, the client has absolutely communicated that, "I want you to pursue my case by presenting my facts, including my testimony, as such and such, even though I have all but confided to you that the facts are otherwise"?[1]

Clearly, when the criminal client tells the lawyer that he acted with the requisite mental state charged or, in the civil context, when the client's facts flatly do not support the version he will attest to, the lawyer cannot allow the client to present, or aid the client in presenting, testimony that is inconsistent with what the client has privately admitted. To do so would not only violate ethical precepts. It may constitute a crime: subornation of perjury.[2]

Often, it's not like that at all. The criminal client doesn't directly tell his lawyer, "I'm guilty," and the civil client doesn't say that the cause of action (or defense) that he proposes to swear to is false. Typically, the client in a confidential interchange with his lawyer will tell the same story he proposes to testify to at trial—one that is more or less defensible.

A lawyer sometimes "knows," if only from a "sixth sense," that a client is in the wrong. Are the hands of that lawyer tied in terms of…the "truth" that the lawyer "knows" only from experience and third-party witnesses with more credible accounts?

The Lawyer's Instinct

Still, the lawyer sometimes "knows," if only from a "sixth sense," that the client is in the wrong, and that he would acknowledge it to counsel if, in fact, he were a truthteller. Are that lawyer's hands tied in terms of letting his client tell a story to the jury that is at odds with, for one, the prosecutor's story, and, more importantly, the "truth" that the lawyer "knows" only from the mother's milk of old-fashioned experience and third-party witnesses with much more credible accounts?

Indeed, the lay public—be it rational, idealistic, or simply naive—prefers to think a lawyer is ethically hamstrung in not allowing a client to testify in conflict with the lawyer's "honest beliefs" about the facts, even when he hasn't actually been told anything by the client that shows the story to be false. Note the striking contrast between the seemingly lily-white ideals of the anonymous majority opinion and that of a typical client, who could care less whether he has engaged an ethical lawyer. You never hear a client or former client brag that his lawyer is very ethical. Clients seek lawyers who will win.

How does this play out in a practical setting? Suppose your client is accused of robbing a Duane Reade in midtown Manhattan and arrested two days later at his home in Brooklyn. When questioned upon arrest, he denies the crime and maintains that he was home in bed (regrettably, without any amorous alibi witness) at the exact moment of the incident. The police, however, have statements from no fewer than five eyewitnesses who each finger your client—Mayor Michael Bloomberg, Nelson Mandela, Justice Stephen Breyer, Derek Jeter and, surely not least, the pope (your client, by the way, is an observant Roman Catholic).

The client's story sounds ridiculous to you, and you are persuaded by the five seemingly truthful accounts by unimpeachable witnesses (though, you can't help but wonder why the pope would be picking up his own drug prescriptions…). But that's your client's story and "he's stickin' to it," never vacillating from his claim of innocence. He doesn't even falter when confronted with fuzzy surveillance video that depicts the perpetrator, who looks very much like him, and remains supremely confident in explaining that his fingerprint was on the pharmacy's countertop because "I considered buying aftershave lotion earlier that day," (although nobody seems to remember him there).

Trial approaches, and your client insists that you challenge the five compelling witnesses (whom you believe to be truthful), and that

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he testify—even though you "know," as surely as you know anything, that his testimony will be false.

The strategy of letting a client testify to these facts is not for the faint of heart. But here, we talk about ethics, not strategy. Can a lawyer "ethically" prepare this defendant to testify, put him on the stand, and take him through that testimony (as opposed to simply calling him to the stand and asking, as was ethically defensible in one New York case:[3] "Tell the jury in your own words, what happened."), when counsel absolutely believes the story is false?

The Rules

In New York,[4] the Disciplinary Rules are strangely unilluminating on a lawyer's duties when he believes, but does not know, that his client intends to testify falsely, merely because the client has not confessed the wrongdoing to him. But the Model Rules of Professional Conduct do provide more guidance. According to Rule 3.3(b), "…[a] lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false." Indeed, Comment 8 to that rule adds, "although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, a lawyer cannot ignore an obvious falsehood."[5]

Interestingly, a lawyer with a reasonable belief that testimony will be untruthful may refuse on ethical grounds to offer testimony, for example, by alibi witnesses in a criminal case, or the litigant and his supporting witnesses in a civil case—even where he doesn't "know" that their testimony would be untruthful. However, it is clear that he may not refuse to put the defendant on the stand merely because he "reasonably believes" such testimony would be false, without "knowing" it to be untrue.

Putting aside the Clintonian epistemology of "when does someone know something" (as opposed, perhaps, in his case, to "when does someone 'know' someone else"), one could theoretically argue that a lawyer never knows that a client 's story is false, until the client says precisely, "I am lying about it to you and will lie when I testify"—and, theoretically, maybe not even then. It is hard, though, to imagine that lawyers should not be precluded from permitting such a defense.

'Nix v. Whiteside'

In the leading case, *Nix v. Whiteside*,[6] the Supreme Court affirmed a trial lawyer's refusal to call to the stand a murder defendant who claimed self-defense, but had radically changed his story on the eve of trial and told his attorney that he had just read about another case and "If I don't say I saw a gun, I'm dead."[7]

Nix may be an easy case and obvious ruling, though many scholars challenge its rationale and underbelly—"easy," because the defendant consistently omitted "the gun" from his story until just before trial and basically told his lawyer that he had determined that he would have to lie to be acquitted.

New York law is sparse on the subject, though in *People v. DePallo*,[8] the Court of Appeals affirmed a defendant's conviction where his lawyer held an in camera and ex parte conversation with the judge without the client's knowledge, telling the judge that he expected that his client would lie (even though he couldn't put his finger on precisely why), and thus presented the client's testimony in a one-question narrative form, without preparing the client.

'U.S. v. Midgett'

A worthwhile decision to consider is the North Carolina District Court decision in *U.S. v. Midgett*.[9] There, the victim, while eating lunch in his van, was approached by a man with a cup of gasoline who threw it in his face, demanding his billfold. The perpetrator ignited the gasoline causing horribly disfiguring injuries. Mr. Midgett and Theresa Russell were charged with this crime and another on the same day that used the same technique. Ms. Russell agreed to cooperate with the government, but Mr. Midgett chose trial.

Mr. Midgett was unhappy with his lawyer's unwillingness to pursue certain issues, including his proposed "third person" defense—steadfastly maintaining that a friend of Ms. Russell's committed the offense while Mr. Midgett lay in a drug-induced sleep in the back of the vehicle. Mr. Midgett was prepared to offer this testimony on the stand, but his lawyer would not allow it since he didn't believe that version of events. When the lawyer sought to withdraw, the court offered, alternatively, that Mr. Midgett proceed pro se. Mr. Midgett rejected the offer, kept his lawyer, didn't testify and was convicted.

The U.S. Court of Appeals for the Fourth Circuit reversed the conviction, placing great reliance on the fact that Mr. Midgett never wavered in his account to his lawyer. True, the "mystery man did it" defense lacked corroboration, the victim identified Mr. Midgett, and Ms. Russell testified that there was no one else in the car. Still, the court found that "[d]efense counsel's *mere belief*, albeit a strong one supported by other evidence, was an insufficient basis to refuse Midgett's need for assistance in presenting his own testimony." Neither the role of an attorney as zealous advocate nor as officer of the court "would countenance disclosure to the Court of counsel's private conjectures about the guilt or innocence of his client," no matter how "far fetched" Mr. Midgett's story might sound to a jury.[10]

Clearly, Mr. Midgett's attorney had less to go on in concluding that his client's story was false than in the drug store thief example above, but the principle remains the same. You may think that you're not free to call him, but in our case, you may still be impermissibly relying on your "private conjectures" about the guilt or innocence of the client.

Honest Recollections

And even when your client's story varies over time in describing to you what occurred, it may be worthwhile to recall Justice John Paul Stevens' concurring opinion in *Nix* in which, while voting to affirm the conviction where the attorney had refused to let his client tell a perjured story, he noted the following:

> Justice Holmes taught us that a word is but the skin of a living thought. A 'fact' may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel…. A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury…should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believes he recalls) details that he previously overlooked.[11]

Hardly the words of a shyster in search of just another payday. That's right. Justice Stevens!

1. See generally, *Nix v. Whiteside*, 475 US 157 (1986); DR 7-102(a)(4) ("In the representation of a client, a lawyer shall not…[k]nowingly use perjured testimony or false evidence.")
2. N.Y. Penal Law, Article 210; Title 18 USC §1622.
3. *People v. DePallo*, 96 NY2d 437 (2001).
4. See generally EC 7-6 ("In many cases a lawyer may not be certain as to the state of mind of the client, and in those situations the lawyer should resolve reasonable doubts in favor of the client.")
5. Model Rules of Professional Conduct, Rule 3.3(b), Comment 8.
6. See n. 1, supra.
7. Id. at 161.
8. See n. 3, supra.
9. 342 F.3d 321 (4th Cir. 2003).
10. Id. at 326, (emphasis added). See *U.S. ex rel Wilcox v. Johnson*, 555 F2d 115 (3d Cir. 1977). Courts have used different standards for a lawyer's level of confidence that the client will lie: "good case to believe," "compelling support," "knowledge beyond a reasonable doubt," "firm factual basis," "good faith determination," and "actual knowledge." See also *Doe v. Federal Grievance Committee*, 847 F2d 57 (2d Cir. 1988).
11. *Nix v. Whiteside*, supra, at 190-191 (Stevens, J., concurring.).