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My Client, The Cooperator Lied: Now What??

More than 40 years ago, the Chief Justice of the U.S. Supreme Court called for the disbarment of ethicist Monroe Freedman for publicly espousing the view that criminal defense lawyers should present the client's false testimony in the same manner as any other testimony.¹ In his famous "Three Hardest Questions," Freedman carefully considered the lawyer's trilemma—the duty to know everything about the case, to keep the client's confidences, and to reveal perjury to the court—and concluded that such a course was the best ethical choice once a lawyer first unsuccessfully remonstrated with the client.

The Freedman resolution was, and by many accounts, remains consistent with the beliefs and practice of the overwhelming number of criminal defense lawyers—notably for indigent clients. This is true despite the fact that the Model Rules, adopted by nearly all jurisdictions, elevated candor toward the tribunal over client confidentiality. Model Rule 3.3, and its state variations, requires that a lawyer who *knows* that his client has offered materially false testimony to take "reasonable remedial measures," even if doing so require revelation of client confidences. Despite the purported clarity of the rule, the debate about the lawyer's obligation continues. Few lawyers ever obtain the requisite "actual knowledge" of client intended or completed

¹ Warren G. Burger, Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint, 5 Am. Crim L Q. 11 (1966).

perjury that triggers the rule's obligation. When, however, that level of knowledge exists, what must, may or should a lawyer do? Is withdrawal necessary? If so, it is sufficient?

The three hardest questions became more complicated with the advent of the Federal Sentencing Guidelines in 1986. These guidelines, with the goal of national uniformity in sentencing, became a much-criticized system that vested greater powers in prosecutors and tied the hands of sentencing judges. "Cooperation" with federal prosecutors became the coin of the realm, notably in drug cases. This was because a prosecutor's acknowledgement to a court that a defendant had provided "substantial assistance" was the sole vehicle for a defendant to obtain a sentence not only below a guideline range, but below the lengthy statutory mandatory minimum sentence. The practice of law became a "race to the courthouse" with the first defendants in the door typically receiving the coveted 5K1.1 letter and the likelihood of a significantly lower sentence. Needless to say, such a culture produced a variety of distortions including, of course, defendants lying or embellishing to obtain the benefit of cooperation.²

Yet it is curious that while ethicists reinforce that ethical choices must be viewed in context, rarely are a lawyer's ethical obligations understood clearly in the context of this cooperation culture.

The criminal defense lawyer's initial obligation in this federal drug case is to establish a trusting lawyer-client relationship despite all obstacles. Time is of the essence. The cooperation system causes yet another dilemma: the obligation to learn all

² I have previously explored this issue through interviews with prosecutors in the Southern District of New York. See Ellen Yaroshfsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *Ford. L. Rev.* 917 (1999); See Ian Weinstein, *Regulating the Market for Snitches*, 47 *Buff. L. Rev.* 563 (1999).

of the facts and investigate fully versus the time-constrained obligation to be the first in line to obtain a 5 K 1.1 letter. The lawyer must explain the federal system with its mandatory minimum sentences and guideline ranges. She has an obligation to present this information while walking the tightrope of establishing trust. If the client is new to the federal criminal justice system, it is difficult enough to believe that her court appointed counsel is trustworthy and one to whom she should reveal confidences within the initial meetings, no less a suggestion that her best option is to provide information about herself and others to the agents who arrested her and the prosecutor who indicted her. The lawyer culture may term this “cooperation” or substantial assistance. In common parlance it is “snitching” or “ratting out” others. It rarely is done willingly. It is potentially life threatening, otherwise dangerous and has serious social and psychological consequences.

Many clients, knowing that cooperation is their only hope, raise the issue in the first meeting with the lawyer. The jailhouse grapevine provides clients with information about cooperation, including the fact that cooperation against the lawyer may secure significant benefits.³ The zealous advocate must have self protective instincts. The system causes such distortions and some clients will take full advantage of those to the lawyer’s detriment.

The lawyer may morally oppose a system that relies primarily on snitches, but nevertheless has an obligation to present the possibility of cooperation to the client in a

³ Aaron M. Clemens, *Removing the Markey for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QLR151 (2004) (discussing the prosecution of attorney Patrick Hallinan based on a drug conspiracy client who falsely implicated the lawyer)

“timely fashion.”⁴ Of course, the lawyer must explain the advantages and pitfalls. Not all cases provide the client with sufficient benefit for attempting to cooperate. The government may decide that the information is not sufficiently helpful, the client insufficiently truthful or is not likely to be a witness worthy of belief. The fact that the client will have to reveal all of her conduct throughout her life as a precondition of cooperation is a factor that weighs heavily.

The lawyer should consult the client as extensively as possible prior to the time she engages the government in exploring cooperation, explaining to her the necessity to provide information that the government deems truthful and complete. The lawyer engages in a dance with the prosecution in exploring the information sought from the client to get a sense that if agreement is likely. Knowing that the government is interested in the kingpin, the lawyer has an obligation to discuss this with the client, even if she suspects or believes that the client might be tempted to commit perjury if she testifies against him. Temptation is not a sin nor does it give rise to an ethics violation. The lawyer, as zealous advocate, must explain (and re explain) to the client the real world consequences of cooperation—the significant danger of falsity, misrepresentation or omission of facts in the cooperation process and in any subsequent testimony.

The client enters into an agreement with the prosecutor. Typically, the client talks to the prosecutor and agents pursuant to a proffer agreement, signed by lawyer and client. Once she obtains an agreement that she will be able to obtain the 5 K 1.1 letter, she meets on many occasions with the prosecution and/or agents. Her lawyer may not

⁴ *U.S. v. Fernandez* 2000 WL 534449 (S.D.N.Y. May 3, 2000); *But see* Barry Tarlow, The Moral Conundrum of Representing the Rat, *The Champion* March 2006)(arguing that the moral repugnance to the degradation of the criminal system through the use of informants is reason for lawyers ethical choice to refuse to represent informants)

attend all of those sessions. Providing false information to the government can result in a criminal charge for false statements (8 U.S.C. Sec. 1001) or obstruction of justice (8 U.S.C. Sec. 1502 *et seq*)

At some point before the kingpin's trial, the cooperating client now tells her lawyer that her testimony "will be all lies—I figured out what those prosecutors wanted me to say and I'm going say it." She amplifies. The lawyer now believes that she is telling the truth.

What Do I "Know"

Alarm bells ring, but the lawyer's "belief" is not actual knowledge that triggers an ethical obligation. This is likely not to be a case of the ethically impermissible "conscious avoidance" of the truth.⁵ The defense lawyer is probably the last to know what statements are false or whether the client intends to perjure herself.

No matter the extent of preparation for proffer sessions, defense lawyers are often surprised by some of the facts that emerge during those sessions. Contradictions abound. The lawyer may not be present during all of the proffer sessions in which case, she certainly does not know the truth about statements made, the areas explored by the prosecution or other information regarding the client's prospective testimony about the kingpin. If present, the lawyer may be the person in the room with the least amount of knowledge about whether the client's statements are false.

Even if the client says that she provided false statements to the prosecution during the proffer session, the lawyer may have no independent knowledge of the falsity. It may be untrue that she intends to testify falsely. Maybe the client wants the lawyer to believe that she is "tough" and will willingly lie for others. Maybe she wants

⁵ See e.g. *U.S. v. Benjamin*, 328 F. 2d 854 (2d Cir 1964)(conscious disregard as knowledge)

her attorney to believe that she is compelled to testify when she actually chooses to cooperate. Maybe the fear of the danger of testifying has led her to recant. Maybe she has a hidden agenda. The lawyer does not know nor in these circumstances nor is likely to obtain “actual knowledge” of falsity. Cooperators, with conflicting emotions, may seek to rationalize their cooperation with the government and engage in denial. For all the lawyer knows, the government may have knowledge that the facts are accurate even if the client tells her lawyer that these are “lies.” Thus the lawyer’s ‘belief’ that her protestations are truthful are just that— beliefs.

On the other hand, the lawyer may be wary of the client who “confesses” that she lied to the government. It is a rare occurrence that a client tells the lawyer that she intends to testify falsely, thus caution is advised as to whether the client intends to “set up” the lawyer or is having significant problems with cooperation.

However, even absent actual knowledge, the lawyer’s belief is significant for tactical and strategic reasons. The lawyer is obligated to counsel her with persuasive techniques about the minefield she walks on if she, in fact, intends to provide false testimony. She faces loss of her hoped-for 5 K 1.1 agreement, a lengthy and enhanced prison sentence, potential criminal charges for false statements, obstruction of justice and for perjury.

The ethical obligation is to be a steadfast, thoughtful, zealous advocate and counsel the client diligently and, hopefully, persuasively. The client may lack an understanding of the precarious situation she faces. She may be fearful. Maybe she believes that she will be able to testify and be perceived as truthful. Perhaps she is correct, but it is the lawyer’s obligation is to counsel her. Hopefully, the attorney comes

to understand why she has made a “confession” that she will lie. Maybe the lawyer remains guarded but hopefully not. The lawyer hopes that the client heeds her advice and provides truthful testimony.

What if I Know??

What happens, however, if in a unique case, the lawyer develops “actual knowledge” that the client has presented false information to the government, and that she does intend to testify falsely at the kingpin’s trial?

The first obligation is one of remonstrance. Hopefully persuasive technique will encourage her to correct the information that she has provided to the government. The lawyer should firmly explain the perilous consequences she faces if she does not correct the information including the withdrawal of her counsel.⁶ The lawyer may bring in a second lawyer to reinforce her advice. If the client agrees to correct her statements, the lawyer should navigate a relatively graceful correction process. Lawyers should not underestimate the ability to repair damage done during some cooperation sessions—notably because the witness is key to the government’s case.

If, however, the client refuses to correct the prior statements, the client continues to meet with the government in preparation for her testimony, and the lawyer continues to counsel the client, the lawyer may run afoul of Rule 1.2 (d) (assisting an ongoing crime or fraud) if she does not withdraw. She may also be a necessary witness in any future criminal prosecution of her client as a result of her participation in the proffer sessions. Rule 3.7. The necessary and most prudent course of action is to seek

⁶ See *infra*, p.9 on withdrawal as an option

withdrawal from representation. Perhaps another lawyer will more successfully assist the client in avoiding catastrophic consequences. Withdrawal is likely to be required under R 1.16(b) (2) (client persists in a course of criminal conduct involving the lawyer's services).

Must the lawyer take other measures? Rule 3.3 (b), which arguably applies, does not adequately address this circumstance. That rule provides:

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

The letter of the rule requires such action only “in an” adjudicative proceeding. Arguably, because the lawyer represents the client in a different proceeding from the one in which the lawyer knows that her client has offered false information and will offer false testimony, she has no ethical obligation to act in the kingpin's trial. She is now a lawyer for a witness in a case with little control over that process. She is neither offering her testimony to a court nor assisting her in preparing the testimony. The client is now the agent of the prosecution and the government bears responsibility for insuring that the testimony is truthful.

Nor does the rule clearly impose a current obligation on the lawyer to the tribunal that will take the guilty plea in her client's case. It is not clear that the client will engage in a crime or fraud related to that proceeding.

Second, the rule does not specify the timing of such remedial measures. Even if the rule were applicable to the kingpin's trial, any such measure may be premature. The kingpin may plead guilty, thereby avoiding a trial. The cooperator may not be called to

testify. Or, if the case continues, the client may change her mind the moment before testifying or as she takes the stand. Although concern for the integrity of the criminal justice system argues for revelation of the intended perjury as soon as known by the lawyer,⁷ the unique context of cooperation suggests that no remedial action be contemplated until the testimony is reasonably certain.

However, the lawyer, consistent with a more expansive reading of R 3.3 and the strategic best practice, may choose, after client consultation, to take the remedial measure of telling the prosecution that the “client should not enter into a cooperation agreement” without specifying details. The message to the government is clear. However, few clients would continue to trust a lawyer who has revealed this or any further information to a court or prosecutor without consent. This consequence of breakdown in the lawyer client relationship demonstrates why withdrawal—without additional remedial measures--may be a better option for resolution of these intractable issues.

While withdrawal has been criticized as an option that only defers the problem to the next lawyer and does not protect the integrity of the criminal justice system, it is the one that best preserves the delicate balance between client confidentiality and a lawyer’s duty to the system.⁸

Nevertheless, the ethics rules require reasonable remedial measures—presumably not withdrawal. The contours of such measures include “making such

⁷ Geoffrey C. Hazard Jr, W. William Hodes , *The Law of Lawyering*, (3rd ed)

⁸ Ethicists have, and will continue, to differ on this point. See Hall, *Handling Client Perjury After Nix v. Whiteside: A Criminal Defense Lawyer’s View*, 42 *Mercer L. Rev.* 769 (1991)(advocating withdrawal); Monroe Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 *U Pa L Rev.* 1913 (1988)(arguing that withdrawal merely passes the buck); (Hazard and Hodes) *Law of Lawyering* (3rd ed) Sec 29.16 withdrawal does the least damage of competing policies)

disclosure to the tribunal as is reasonably necessary to remedy the situation including information that is otherwise protected “as confidential information.”⁹ However, no court has yet determined that revelation of client confidences is consistent with the client’s Fifth Amendment right against self incrimination.¹⁰ Consequently, a lawyer who withdraws but does not provide further information to the court or the government has a reasoned argument that this position is consistent with the client’s Fifth Amendment against self-incrimination.¹¹ The indigent defender version of the “noisy withdrawal” ought to be sufficient for the integrity of the criminal justice system.¹²

The prevalent use of informants and cooperating witnesses and the culture of cooperation have led to a profound discomfort among many criminal defense lawyers about their role as zealous advocates for the client. The ethical choices are often difficult for the criminal defense lawyer and can only properly be discussed in tandem with the issue of the prosecutor’s obligation to “do justice” in the context where there are so few guidelines for their discretion.¹³ This problem focuses upon the criminal defense lawyer’s ethical responsibilities, but ultimately the issue is one for prosecutors as well. Ethics rules and laws should focus upon the proper use of such informants, seeking to insure that the police and prosecution present truthful testimony from cooperators.

⁹ Rule 3.3 cmt 10.

¹⁰ See Monroe H. Freedman, *supra.* ; But See Hazard and Hodes, *Law of Lawyering*, Sec. 29.20 (arguing that the Fifth Amendment argument is “unpersuasive”).

¹¹ Monroe F. Freedman, *Getting Honest About Client Perjury*, 21 *Geo. J. Legal Ethics* 133 (2008)

¹² In prior versions of Rule 1.6 commentary, “noisy withdrawal” (without disaffirmance) in the corporate context was understood to be an acknowledgement of fraudulent conduct.

¹³ Bruce A. Green, *Why Should Prosecutor’s Seek Justice?* 26 *Fordham Urban L. J* 6-07, 608 (1999).

