The Devil's Advocate

A recent New York decision reminds us that there are limitations even on the broad common law privilege attached to the attorney-client relationship. On the eve of his trial for attempted murder and robbery the accused told the lawyer assigned to defend him that he (the client) intended to lie when he testified in his own defense. In other words, the client told his lawyer he intended to commit perjury.

Under Canon 4 of the Code of Professional Responsibility, the lawyer has a duty not to reveal the confidences and secrets of a client. However, under Disciplinary Rule 4-101(c)(3), an attorney "may reveal the intention of his client to commit a crime and the information necessary to prevent the crime..." Faced with a dilemma, the attorney in question immediately informed both the court and the assistant district attorney of the client's intention, but did not communicate the nature or substance of the anticipated false testimony.

The attorney also addressed a letter to the court expressing his concern over his decision to reveal his client's perjurious intention and asked for permission to withdraw from the case because his disclosure may have "destroyed totally" his effectiveness and because his continued representation of the client would deprive the latter of his right to counsel as guaranteed by the Sixth Amendment. The trial judge held that (1) the confidence that was revealed was not privileged, (2) that the attorney's proposed withdrawal from the case was inappropriate because substituted counsel might be faced with the same dilemma, and (3) there was no basis for recusing the judge to whom the confidence had been revealed.

The trial judge also intimated that the attorney had an obligation to seek to dissuade his client from going through with his stated intention of committing perjury. There was no indication, however, as to just how that might be done without impairing their relationship.

The court had no difficulty with the lawyer's duty pursuant to Disciplinary Rule 4-101(c)(3) to reveal his client's intention to commit a crime and the information necessary to prevent its commission. That rule was held to be reinforced by Disciplinary Rule 7-102(a)(4) which states that "in his representation of his client, a lawyer shall not knowingly use perjured testimony or false evidence, and by Rule 7-12(b)(1) which states that "a lawyer who receives information clearly establishing that: His client has, in the course of his representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same and if his client refuses or is unable to do so,

he shall reveal the fraud to the affected person or tribunal, except where the information is protected as a confidence or secret."

In short, the real dilemma for the lawyer in the case under discussion was what to do about the intended perjury of his client. He had to do something. As an officer of the court he may not knowingly present perjured testimony since that would be a fraud on the court. See Norman Lefstein, "The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma," 6 Hofstra L. Rev. 665 (1978).

Although the trial court concluded that the attorney's disclosure of the intended perjury to the court and the prosecutor was appropriate, the lawyer's attempted withdrawal was deemed to be inappropriate because then the problem of the anticipated perjury and resultant fraud upon the court would not be resolved. A lawyer should be permitted to withdraw only on the basis of compelling circumstances (EC2-32 of the Code). "Such substitution procedures," said the court, "would effectively cloak the problem; however, this ostrich-like approach would do little to resolve it." The client might find a lawyer with less sensitive ethical standards, or the client might be less candid with the substitute attorney.

The court admitted that its conclusion that the original counsel should not be permitted to withdraw, itself raised problems, but viewed such problems as subject to solution. "One possible solution involves a two-step process: First, as this counsel has done, the attorney should inform the court of the client's intention to commit perjury. . . . In the second step, the attorney may follow the procedure set out in section 7.7(c) of the American Bar Association Project on standards for Criminal Justice: The Defense Function (1971)." This section states:

> If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, the lawyer may not lend his aid to the perjury. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or triers of facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

The court then went on to say that under the above procedure the defendant is afforded his right to speak to the jury under oath; the

constitutional right to assistance of counsel is preserved; but the defense attorney is protected from participation in the fraud. *Sed quaere.*

The right to counsel includes the right to effective counsel. Under the above "second step" not only is the attorney under such restrictions that the client is deprived of effective representation, but unless the jury is asleep, it cannot help but be alerted to the fact that something "fishy" is going on. The liar is entrapped. It is not enough to say that it was his own doing. He still has a constitutional right to *effective* counsel and all he gets is a puppet. The proposed "second step" spares the lawyer at the expense of the client, and forfeits his constitutional right to effective counsel. The proposed "second step," therefore, should be rejected, unless it is conditioned upon the client's informed choice of such procedure.

The opinion of the court says nothing about any further duty on the part of the lawyer to inform his client that he has told the court (and prosecutor) of the intended perjury ("step one"), nor as to what the second step of the procedure will be under the suggested solution. Should there not be such an obligation? If the prevention of perjury rather than entrapment is the proper objective, there should be such a duty to disclose to the client.

The court's refusal to recuse itself from further participation in the case also creates misgivings. We are unimpressed by its arguments that the defendant is not entitled to a new attorney in order to assist him in the commission of perjury or the creation of false evidence, nor by the argument that since the burden of proof on the prosecution is proof "beyond reasonable doubt" the defendant is thereby adequately protected. Such arguments assume too much. It does not follow that since the client told his first lawyer that he intended to commit perjury, that at a later time and under different circumstances, he would hold fast to the expressed intention. Nor is it psychologically sound to assume that when the trial judge has been told that the defendant intends to commit perjury the judge will remain unprejudiced and that his attitude will not come through to the jury.

The Devil's Advocate, who is no master of dilemmas, is inclined to favor the trial lawyer's solution. Assuming that there was a fixed and unalterable intention on the part of the client to commit perjury, it was proper to inform the court, and probably the prosecutor, of the impending false testimony. But in addition, the attorney should have been permitted to withdraw from the case, regardless of any inconvenience occasioned thereby, and the trial judge should have recused himself. In our opinion, the latter two steps were necessary in order to accord a fair and impartial trial and to preserve the constitutional right of the accused to effective counsel.

The limitations on the broad privilege of confidentiality of the client here discussed apply *a fortiorari* to the doctor-patient privilege, and others, and there are comparable difficulties as to how and to whom to

disclose the threatened serious crime or fraud on a court. The opinion of the trial court we have discussed was rendered in the case of *People v. Albaracon Salquerro,* 184 New York Law Journal, No. 105, December 2, 1980, p. 7, cols. 2-6.

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