Surviving the Nightmare Scenario Of the Lying Client

By Alan Van Gelder

It is the nightmare scenario. You suddenly realize your client is lying. Worse, you may be the only person who knows about it. Trial is less than a month away and you know that if you put your client on the stand the client will lie. You try to talk the client out of lying, but the client refuses. Now what? Do you have to seek a withdrawal from the case? Do you have to tell the court why you are seeking to withdraw? What about the attorney-client privilege and your ethical obligations to your clients? Unfortunately, in California there is no clear answer. In this article I will attempt to provide a brief survey of the options available for an attorney caught in the nightmare scenario.

California Rules of Professional Conduct Rule 5-200 states, "In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth; (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." Business and Professions Code § 6068 (d) states that it is the duty of an attorney to, "employ, for the purpose of maintaining the causes confided to him or her those 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." "Attorneys have long been prohibited by the attorney rules of professional conduct from participating in the presentation of perjured testimony." (*People v. Johnson* (1998) 62 Cal.App.4th 608, 619, citing *Nix v. Whiteside* (1986) 475 U.S. 157, 166.)

While the law is clear that an attorney should not knowingly aid a client in perjury, the law is not so clear as to how the attorney can avoid aiding perjury without creating an ethical conflict. One line of authority suggests that the attorney should immediately bring a motion to withdraw from the case. However, this approach is often filled with difficulties. For example, in order to withdraw from the case the court will want an explanation. How do you offer an explanation that does not betray the attorney-client privilege? Worse, the court has the power to reject the motion to withdraw either because the explanation lacks detail, because withdrawal would prejudice the client, or because withdrawing from the case does not serve the interests of justice. What then? How much information can you reveal to withdraw from representation without violating your oath to the client?

The second of line of authority holds that an attorney who is representing a client that the attorney knows is about to commit perjury should not be allowed to withdraw. Instead, the attorney should be forced to take steps to prevent/minimize the perjury or to at least take necessary action to prevent the attorney from aiding in the perjury. Of course this method is also plagued with difficulties. These actions include allowing the client to testify in the narrative or by placing limits on the testimony. The problem with this approach is that the lawyer has essentially turned informant on the client, hurting the client in the eyes of the court and maybe even the jury. The lawyer is representing the client even though the attorney is taking actions that contradict the client's express wishes and which may potentially hurt the client's chances of success. Even more troubling, there is a risk under this scenario that the client will be successful in using the perjury.

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I. WITHDRAWING FROM REPRESENTATION

As discussed above, one line of authority holds that the attorney is required to make a motion to withdraw from representation. In *People v. Brown* (1988) 203 Cal.App.3d 1335, 1339-1340, footnote 1, the court, in reliance on California ethical rules for attorneys, stated that if an attorney is unable to dissuade a client from committing perjury, "the attorney must make a motion to withdraw so as to not give implied consent to the use of perjurious testimony." The court stated, "When faced with a criminal defendant who insists on testifying perjuriously, it is clearly appropriate under California law, even necessary, for counsel to present a request to withdraw to the court." This sentiment is echoed in Rules of Professional Conduct 3-700(b) which states that an attorney is required to make a motion to withdraw if:

> (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act....

While the rules state that an attorney with a client about to commit perjury must file a motion to withdraw, there is no guarantee that the motion will actually be granted. "The determination whether to grant or deny a motion to withdraw as counsel lies within the sound discretion of the trial court." (*Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1133, citing *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340.) The law is quite clear that the court is not to act as a rubber stamp for an attorney's motion to withdraw. "The trial court still has a duty to explore the conflict, and counsel has a corresponding duty to respond, and to describe the general nature, as fully as possible but within the confines of privilege." (*Id.* at 1134.)

It is not enough for an attorney bringing a motion to withdraw to simply make a vague statement that there is a conflict of interest or ethical consideration that requires withdrawal from the case. As the withdrawing attorneys in *Manfredi & Levine* learned, the court is not required to take their word for it. In *Manfredi & Levine*, the court denied the attorney's motion to withdraw because the withdrawing attorney did not adequately explain the conflict that required him to withdraw from the case. Of course, such an explanation creates another conflict. How do you explain to the court that you need to withdraw from a case because you believe your client is about to commit perjury? Aside from violating the attorney-client privilege, accusing your client of intent to commit a crime will seriously undermine the client in front of the court and potentially hurt the client's chances in front of the jury.

So how does an attorney provide enough information to the court to permit withdrawal but not shatter the attorney-client privilege and sink the client's case? Consider first what was not enough in *Manfredi & Levine*:

Court: "What is the conflict?"

Counsel: "Your Honor, I cannot disclose that, and I will not disclose that conflict."

Court: "The motion is denied."

(*Id.* at 1134.)

The other problem facing the attorneys in *Manfredi & Levine* was that the court had noted a history of delaying tactics on the part of the attorneys, and that the court had lost faith in the honesty of the attorneys on this issue. As such, without more evidence from the attorneys, the court did not trust the attorneys. (*Id.* at 1131.) In upholding the trial court's decision the appellate court provided some guidance as to what may provide enough basis to grant a motion to withdraw by looking at prior cases.

> In *Aceves*, a deputy public defender ... stated that he could not, without compromising his client's confidences and breaching his ethical duty, reveal the precise nature of the conflict. The office of the public defender, however, was willing to reveal sufficient information couched in general terms. It gave the court insight into the nature of the conflict: The public defender "described the conflict as one that (1) was confined to [Aceves] and the office of the public defender, (2) did not involve threats to witnesses or third parties, (3) did not relate to other cases and (4) had resulted in a complete breakdown of the attorney-client relationship...." (*Id.* at 1133, citing *Aceves v. Superior Court, supra*, 51 Cal.App.4th 584, 592.)

While the court noted that the method of withdrawal of Aceves' counsel did not have much in the way of factual detail, it was more than what was offered by the counsel in *Manfredi*. Additionally, the good faith of the attorney seeking the withdrawal in *Aceves* was not in question. In *Manfredi* the trial court was convinced that the motion to withdraw was part of a series of delaying tactics.

Thus, it appears than an attorney seeking to withdraw from representation has the option of trying to convince the court to grant the motion by making somewhat generalized statements concerning the reasons for withdrawal. In most situations, a generalized statement seems likely to preserve the attorney-client privilege while providing the attorney a chance to obtain a withdrawal. However, the question becomes how to inform the court of the impending potential perjury without violating your ethical obligations. Unlike cases concerning potential conflicts of interest, an attorney claiming pending

perjury is in a much more delicate situation. No crime has actually occurred yet, the attorney merely believes that one is likely to occur. Furthermore, unlike a claim of a conflict of interest, this type of accusation is going to damage the client in the eyes of the court. In making such an accusation to the court, the lawyer is essentially turning against the client. There is no easy way to balance the needs of the client and the ethical obligations of refusing to assist client perjury.

Consider the following exchange at a criminal trial against an accused multiple rapist Anthony Johnson. After the prosecution had completed its case-in-chief, defense counsel requested and was granted an *in camera* hearing. The defendant was present during the in-chambers conference. Defense counsel told the court he had "an ethical conflict" with Johnson about Johnson's desire to take the stand and testify. Defense counsel explained, "I cannot disclose to the court privileged communications relating to that, but I'm in a position where I am not willing to call Mr. Johnson as a witness despite his desire to testify." The lawyer went on to say, "Judge, this is not a trial tactic issue. This is an ethical conflict. If it were just a trial tactic, you know, in other words, a decision of what's the best choice, I always defer to the client's wishes in circumstances like this."

The Court responded, "What exactly are you trying to tell me ... that you won't examine him if he takes the stand?" The attorney answered, "I think under the—based upon the information I have, I would be ethically barred from calling him as a witness under the law as I have come to know it and very specifically researched it regarding this particular issue... Yes. I just want to be clear that this isn't a judgment situation that falls in the realm of a trial tactic. It's more than that." (*People v. Johnson* (1998) 62 Cal.App.4th 608, 613.)

Arguably the defense attorney in Johnson walked the fine line drawn by cases such as *Aceves* and *Manfredi*. Although he did not actually reveal any attorney client communications and provided only very generalized information, there is arguably enough in the statement for the trial court to ascertain the idea that the attorney has a serious problem regarding the merits of the client's anticipated testimony and that this not just an issue of "trial tactics." However, would the statements made by the attorney in *Johnson* be enough to obtain an order to withdrawal? It is unclear. In fact, as the decision in *People v. Johnson* suggests, at least one appellate court does not believe that it would be appropriate to grant an attorney's motion to withdraw on the grounds of anticipated client perjury.

Although the *Johnson* case involves an appeal of a criminal conviction based on a denial of effective assistance of counsel, the *Johnson* court was not shy in expressing its opinions about what an attorney is to do about potential client perjury. In fact, the *Johnson* court roundly criticized letting an attorney withdraw from a case because of pending client perjury. The court wrote:

> This approach, while it protects the attorney's interest in not presenting perjured testimony, does not solve the problem. The court may deny the motion to withdraw. Even if the motion to withdraw is granted, the problem remains.... [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.... A criminal defendant cannot be allowed to bring the judicial system to a halt, and endlessly avoid trial by using the simple expedient of informing defense counsel on the eve of trial that he or she intends to commit perjury at trial, thereby requiring counsel to move to withdraw, the court to grant the motion and continue the trial to allow the new counsel to prepare. If the motions to withdraw and recuse are granted, substitution of court and counsel, unaware of the possibility of perjury, may overtly facilitate, or appear to condone, a fraud upon the court. Such substitution procedures would effectively cloak the problem; however, this ostrich-like approach would do little to resolve it. (*Id.* at 623.)

II. THE NARRATIVE APPROACH

Ultimately the *Johnson* court, while affirming the conviction of Johnson, indicated that the defense attorney should have used the option known as the narrative approach. Under the narrative approach, the attorney calls the client to the witness stand but does not engage in the usual question and answer exchange. Instead, the attorney permits the client to testify in a free narrative manner. In closing arguments, the attorney does not rely on any of the client's false testimony.

Although the *Johnson* court acknowledged that the narrative approach was not perfect, it felt that the narrative approach made the best of a bad situation:

> Of the various approaches, we believe the narrative approach represents the best accommodation of the competing interests of the defendant's right to testify and the attorney's obligation not to participate in the presentation of perjured testimony since it allows the defendant to tell the jury, in his own words, his version of what occurred, a right which has been described as fundamental, and allows the attorney to play a passive role. (*Id.* at 629.)

The *Johnson* court also stated that any harm caused by the client's perjury can be mitigated by the fact that "the defendant is subject to impeachment and can be cross-examined just like any other witness. The jury is no less capable of assessing the defendant's credibility than it is of any other witness." (*Id.* at 629-30.)

There are a number of criticisms of the narrative approach. The *Johnson* court noted most of them. First the narrative approach does not prevent a fraud from being committed on the court. The witness is still allowed to offer the perjured testimony. There is a possibility that the jury will rely on the perjured testimony and reach a verdict in favor of the client. There is a strong possibility that once a judgment is entered in favor of the lying client, the issue will be treated as res judicata in later litigation, even if the

perjury is discovered after the fact. See for example *Eichman v. Fotomat Corporation* (1983) 147 Cal.App.3d 1170, 1176, in which the court held:

> Fraud by a party will not undermine the conclusiveness of a judgment unless the fraud was extrinsic, i.e., it deprived the opposing party of the opportunity to appear and present his case. The suppression of evidence is intrinsic fraud. [Citation.] Therefore, a judgment does not lose its res judicata effect because it was entered while evidence was being suppressed. [Citation.] "If the aggrieved party had a reasonable opportunity to appear and litigate his claim or defense, fraud occurring in the course of the proceeding is not a ground for equitable relief. The theory is that these matters will ordinarily be exposed during the trial by diligence of the party and his counsel, and that the occasional unfortunate results of undiscovered perjury or other intrinsic fraud must be endured in the interest of stability of final judgments." [Citation.]

A second argument against the narrative approach is that by calling the witness to the stand and allowing the testimony, the attorney is both validating the perjury and assisting in the perjury in contravention of the rules. Conversely, if the jury is observant enough, they will detect the fact that the lawyer is "telegraphing" to the jury disbelief in the client, thus turning the lawyer into an adversary against the client. Juries are extremely observant and are quite capable of detecting friction between the attorney and client, especially if the attorney refuses to use the client's testimony. Regardless of what the jury may suspect, the judge will certainly suspect a problem if the attorney begins an examination utilizing the narrative method. Regardless of how the judge decides to treat the actual testimony of the defendant, if the judge suspects perjury on the part of the defendant the court can, in theory, impose a number penalties on the client, including evidentiary sanctions or post-verdict motions for new trials. While the court may have every right to impose such sanctions or orders, if the basis for doing so is the use of the narrative approach by the attorney, the ethical conflicts created by the narrative approach are magnified rather than reduced. Additionally, the narrative approach fails to address a fundamental problem: If it turns out that the client indeed has no basis for the asserted claims and instead is choosing to lie about them under oath, any argument by the attorney to the contrary (regardless of whether the attorney relies on the perjured testimony) is in theory advancing an action or defense that is without merit.

III. THE UNCERTAIN STATUS OF THE NARRATIVE APPROACH

While there are certainly valid criticisms of the narrative approach articulated by the *Johnson* court, a more fundamental question remains: Is a lawyer, if forced to employ the narrative approach, ethically and legally allowed to do so? The situation is unclear, although a strong argument can be made that the narrative approach poses legal and ethical problems for the attorney. Essentially the attorney calls the client to the stand knowing that the client is going to lie and proceeds to let the client lie to the court and the jury.

First, of course, there is Rule of Professional Conduct 3-700(b) which requires

the attorney to seek a motion to withdraw when faced with the situation of the lying client. Logically, this should be the attorney's first course of action when faced with the nightmare scenario. However, if the court denies the motion, what then? Is the attorney free to employ the narrative approach without fear of legal consequence? The California Supreme Court case of *People v. Riel* (2000) 22 Cal.4th 1153, casts doubt on that thought.

In *Riel*, after the defendant had been convicted, defense counsel was contacted by a witness who claimed to have information that would clear the defendant. Such information would support a basis for a motion for new trial. After interviewing the witness, defense counsel became convinced that the witness was lying and refused to present the evidence from the witness to the court. On appeal the defendant argued he was denied effective assistance of counsel. In addressing the issue, the California Supreme Court discussed the presentation of perjured testimony by attorneys to the court. The issue focused on presenting evidence that an attorney knows is false vs. evidence that the attorney suspects is false. The Court wrote:

> "We start with the proposition that "an attorney owes no duty to offer on his client's behalf testimony which is untrue." (*In re Branch* (1969) 70 Cal.2d 200, 210; see Bus. & Prof. Code, § 6068, subd. (d).) Stated slightly differently, an attorney, including a criminal defense attorney, has a "special duty ... to prevent and disclose frauds upon the court...." (*Nix v. Whiteside* (1986) 475 U.S. 157, 168-169.) Defendant recognizes this duty but argues that it extends only to a duty not to "cooperate with *planned* perjury" (*id.* at p. 173, italics added); it does not apply if the attorney merely suspects but does not *know* the evidence is false. The distinction is valid. A "'lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.' ... [C]ounsel's belief in their client's guilt certainly cannot create an ethical bar against introduction of exculpatory evidence." [Citation.] "It is the role of the judge or jury to determine the facts, not that of the attorney." [Citation.] (*People v. Riel* (2000) 22 Cal.4th 1153, 1217.)

Tellingly, in drawing the line between what evidence an attorney may and may not present, the California Supreme Court wrote:

> 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. Criminal defense attorneys sometimes have to present evidence that is incredible and that, not being naive, they might personally disbelieve. 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. Riel* (2000) 22 Cal.4th 1153, 1217.)

The *Riel* court's citation to *In re Branch* (1969) 70 Cal.2d 200 is especially noteworthy. In *Branch* the California Supreme Court wrote:

> [A]n attorney may not "knowingly allow a witness to testify falsely" ... of course a person can only be said to "allow" that which he has the power to prevent .... An attorney who attempts to benefit his client through the use of perjured testimony may be subject to criminal prosecution (Pen. Code, § 127) as well as severe disciplinary action." (*Id.* at 210.)

What the Supreme Court's discussion in *Riel* does to the narrative approach is unclear, as the conflict between *Riel* and *Johnson* has not been explicitly addressed. Although *Johnson* has not been overruled, it remains to be seen what the court's reaction will be to an attorney who allows a client to provide narrative testimony on the stand even though the attorney knows the client is lying.

IV. CONCLUSION

Although the *Johnson* court advocates the narrative approach to resolve the situation of the lying client, the difficulties and the uncertainties surrounding it make it an approach that should be viewed with extreme caution. An attorney is best served by convincing the client not to commit perjury or by seeking to withdraw from the case pursuant to Rules of Professional Conduct 3-700(b) before seeking to utilize such an approach. Unfortunately, there is no guarantee that making a motion to withdraw based on an ethical conflict concerning the client's testimony will be granted, especially if such a motion would ultimately prejudice the client in other ways or delay a previously delayed trial. As such, if you find yourself stuck in the nightmare scenario and are unable to withdraw from the case, the narrative approach, even with its flaws may be your last resort.

In the end, when the client refuses to tell the truth under oath, it puts the attorney in the unenviable position of choosing between a duty to the client and a duty to honor ethical obligations. Unfortunately, there is no easy way to resolve such a situation, as the difficulties involved with a motion to withdraw and the narrative approach demonstrate. In the best case scenario, if caught in such a situation you should try to convince the client not to commit perjury, otherwise you may be facing a long and uncertain road ahead. ■