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TEST # 67

1 HOUR CREDIT

LEGAL ETHICS

To earn one hour of MCLE credit in the special category of Legal Ethics, read the substantive material, then download the test, answer the questions and follow the directions to submit for credit.

## **A Lawyer's Duty Of Candor** *Zealous representation can lead attorneys down a slippery slope right up to the ethical edge*

**By WENDY PATRICK MAZZARELLA**

As attorneys, we are obligated to represent our clients to the best of our ability. But is this duty absolute? Unfortunately, "zealous representation" can be a dangerous concept and a slippery slope that takes us right up to the ethical edge. How will we know when we have gone too far? This article and MCLE self-test that follows are designed to help answer that question.

Attorneys are ethically bound by a duty of candor. This duty is codified by statute, mandated by the California Rules of Professional Conduct, and reaffirmed in case law. The duty of candor covers everything from false evidence, to witness perjury, to citation of authority in court. Consider the following short hypotheticals and corresponding authorities in preparation for the MCLE self-test.

### **Hypothetical #1: The Lying Witness**

You are the prosecutor in trial on a murder case. Your sole eyewitness, Peter Percipient, witnessed a fatal stabbing from across the street at night. Peter explains that although he was close to the murder scene, he was not wearing his prescription eyeglasses at the time and thus had a hard time seeing exactly what happened.

You call Peter as your first witness. He identifies the defendant in court and recites what he saw the night of the murder. Then to your dismay, Peter explains to the jury that the reason he was able to see the murder so clearly was because he was wearing his prescription eyeglasses at the time. Horrified, you ask Peter again whether he is sure he was wearing his eyeglasses at the time of the murder. Peter affirms that he was.

You confront Peter with his testimony at the next break. He is nonchalant, avoids eye contact, and simply states that now he remembers things differently. You believe he is lying. Ethically, what should you do?

### **Hypothetical #2: Client Perjury**

Same facts as above, but now you represent the defendant. The prosecution has just rested. During a last-minute discussion with your client regarding whether he wants to testify, he throws you for a loop by declaring that he intends to take the stand and lie in order to win the case. Knowing he has the Constitutional right to testify, what do you do?

### **Hypothetical #3: Case Authority**

On the morning you are set to argue a hotly contested motion, a last-minute cite check reveals a new case that came out the day before that is relevant to the issues in your case. Although the opinion is somewhat ambiguous, one possible interpretation of the holding would contradict one of the propositions you had planned to argue. When you get to court and meet in chambers, you realize that you are the only one who has seen the new case. Given the case is so recent and its ambiguity, what do you do?

### ***CALIFORNIA RULES OF PROFESSIONAL CONDUCT***

California Rule of Professional Conduct 5-200, Trial Conduct, states in pertinent part that: in presenting a matter to a court, a member:

- (A) Shall employ . . . such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge or jury by an artifice or false statement of fact or law;
- (C) Shall not intentionally misquote authority to a court;
- (D) Shall not knowingly cite invalid authority.

Subsections (A) and (B) of Rule 5-200 apply to the first two hypotheticals while subsections (C) and (D) apply to the third. Under no circumstances can the duty to adequately represent a client take priority over the ethical duty of candor.

Regarding citation of authority, erring on the side of disclosure is usually the prudent course of action. Case law can always be distinguished, but it can never be misrepresented. The attorney's duty to his or her client does not permit him or her to misrepresent the current state of the law in court, even when others in court are operating under a misimpression of what the law is. The ethically required resolution of the hypothetical is for the attorney to bring the adverse authority to the attention of the court and explain, if possible, why it is distinguishable.

### ***CALIFORNIA BUSINESS AND PROFESSIONS CODE***

California Business and Professions Code §6068 defines the duties of an attorney. Attorneys must only counsel or maintain just actions or defenses, “except the defense of a person charged with a public offense.” (BP §6068(c)) Subsection (d) embodies the duty of candor by stating 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 . . . by an artifice or false statement of fact or law.” Lest these duties be taken lightly, California Business and Professions Code §6103 explains that a violation of a lawyer’s duties as an attorney may constitute cause for suspension or disbarment.

The California Business and Professions Code specifies other types of punishment for unethical attorneys as well. Section 6106 states that “[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension.” And §6128 imposes misdemeanor criminal liability on a lawyer who engages in or consents to any deceit or collusion “with intent to deceive the court or any party.” (BP §6128(a)) Punishment for violating this section is up to a six-month jail sentence or a fine of up to \$2,500 or both.

### ***CALIFORNIA PERJURY STATUTES***

Offering false witness testimony may have serious consequences beyond ethical violations. It may be criminal. Representation of a client may not include knowingly offering false witness testimony. (*People v. Davis* (1957) 48 Cal.2d 241, 257; *In re Branch* (1969) 70 Cal.2d 200.) Attempting to benefit a client through perjured testimony may expose the attorney to severe discipline as well as criminal prosecution under California Penal Code §127. (*Branch, supra*, 70 Cal.2d at 210-11.)

Penal Code §127, Subornation of Perjury, states that: “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.” Penal Code §126 provides the punishment for perjury as two, three or four years in state prison.

Refusal to offer client perjury is not ineffective assistance of counsel. In *Nix v. Whiteside* (1986) 475 U.S. 157, the United States Supreme Court held that an attorney does not render ineffective assistance of counsel by refusing to participate in the presentation of perjury. The defendant in *Nix*, preparing his claim of self-defense, told his attorney shortly before trial for the first time that he saw “something metallic” in the victim’s hand. (*Id.* at 160-61.) When asked about this late revelation the defendant said “[i]f I don’t say I saw a gun, I’m dead.” (*Id.* at 161.)

The defense attorney advised his client that if he planned to perjure himself, he would tell the court and seek to withdraw as counsel. (*Id.*) The defendant took the stand and testified truthfully, not mentioning the “metallic object,” and was convicted. (*Id.* at 161-62.) The defendant argued that he was denied a fair trial because he was admonished not to offer

the testimony that he saw a gun or “something metallic.” (*Id.* at 162.) The court reviewed *Strickland v. Washington*, (1984) 466 U.S. 668, for the rule that to establish a claim of Sixth Amendment ineffective assistance of counsel, “the movant must establish both serious attorney error and prejudice.” (*Id.* at 164.)

After a thorough analysis under *Strickland*, the court stated that the defense attorney’s handling of his client’s anticipated perjury “falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*.” (*Id.* at 171.)

The *Nix* court discussed the viability of several different responses to a client’s anticipated perjury. When faced with this situation, an attorney’s first duty is to try to talk the client out of it. (*Id.* at 169.) Other acceptable courses of conduct include disclosure to the court after a client had given perjured testimony, and withdrawal when a client threatens to offer such testimony. (*Id.* at 170.) The court recognized, however, that withdrawal may raise issues regarding mistrial and potential double jeopardy claims. (*Id.*)

The court recognized that a constitutional right to testify “does not extend to testifying falsely.” (*Id.* at 173.) Also, “the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.” (*Id.*)

The attorney’s best ethical option under Hypothetical #2 is to permit his or her client to give unguided narrative testimony. In *People v. Johnson* (1998) 62 Cal.App.4th 608, the trial judge did not allow the defendant to testify after his attorney stated that he had an “ethical conflict” calling the defendant to the stand. The appellate court found this to be error, and said the defendant should have been permitted to testify through a narrative approach, “which would have best accommodated the conflicting interests of Johnson and his defense counsel.” (*Id.* at 634.)

The court cited *Nix v. Whiteside* for the proposition that attorneys cannot ethically present perjured testimony. (*Id.* at 619 [citing *Nix v. Whiteside*, *supra*, 475 U.S. at 166].) The court cited California Rules of Professional Conduct 5-200, California Business and Professions Code §6068, and ABA Model Rule 3.3 in support of an attorney’s duty of candor. (*Id.* at 619-20.) The court then discussed the various approaches available to a lawyer who has a client who wishes to perjure himself. (*Id.* at 620.) These approaches include full cooperation, persuading the client to tell the truth, “free narrative” testimony, disclosure to the court, moving to withdraw, and refusing to permit the client’s testimony. (*Id.*) The court concluded that the free 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.” (*Id.* at 629.)

■ This article does not constitute legal advice. Please shepardize all case law before using.

■ *Wendy Patrick Mazarella is a San Diego County Deputy District Attorney and chair of the San Diego County Bar Association Legal Ethics Committee. She is a member of the State Bar Criminal Law Section Executive Committee, and lectures on ethics throughout California, nationally and internationally. She would like to thank Danny Eaton for his editorial work and contribution to this piece. The views expressed in this article are her own.*

**Test — Legal Ethics**  
**1 Hour MCLE Credit**

This test will earn one hour of MCLE credit in Legal Ethics.

- 1.** The attorney's duty of candor is governed by statute but does not appear in the California Rules of Professional Conduct.
- 2.** The duty of candor about statements of fact and law applies to statements an attorney makes to a jury as well as to a judicial officer.
- 3.** The attorney's duty to his or her client requires him or her to avoid addressing authority that is adverse to a client's position.
- 4.** Violating the Rule of Professional Conduct prohibiting false statements of law and fact will not subject an attorney to discipline in light of the attorney's countervailing duty to his or her client.
- 5.** Under the California Business and Professions Code, violation of an ethical duty may subject an attorney to disbarment or other discipline.
- 6.** The client obtains no potential benefit from an attorney bringing controlling authority to the attention of the court of which neither the court nor opposing counsel is aware.
- 7.** Attempting to offer a client's perjured testimony may subject an attorney both to discipline and criminal prosecution.
- 8.** If an attorney knows his or her witness has lied on the stand and tries unsuccessfully to clear up the false testimony through impeachment and further questioning, the attorney is excused from having to bring it to the attention of the court.
- 9.** While procuring perjured testimony subjects an attorney to prosecution, it does not subject an attorney to punishment by incarceration in the state prison.
- 10.** Refusal to present the perjured testimony of a client who wishes to exercise his or her right to testify constitutes ineffective assistance of counsel.
- 11.** An attorney need not disclose his or her client's intention to present perjured testimony if the attorney successfully convinces the client to testify truthfully and the client does testify truthfully.
- 12.** If a client proceeds with plans to present perjured testimony, his or her attorney may not ethically threaten to withdraw as counsel.

- 13.** An attorney may make a disclosure to the court of his or her client's perjured testimony after such testimony is presented.
- 14.** It is ethically appropriate for an attorney faced with a client seeking to testify falsely in his or her own behalf to allow the client to present that testimony by an unguided narrative.
- 15.** A lawyer has no chance of being disciplined if everything he or she tells the judge is technically accurate, although it might be misleading in context.
- 16.** The duty to counsel or maintain only those actions or defenses that appear to be legal or just applies equally to all attorneys.
- 17.** A lawyer has to be absolutely sure that a witness is going to testify falsely before he or she tells the judge.
- 18.** A lawyer who argues invalid authority is automatically guilty of violating the California Rules of Professional Conduct.
- 19.** It is not necessary for a lawyer to disclose a witness' false testimony if the witness has already been thoroughly destroyed through cross-examination.
- 20.** A lawyer may face criminal charges for intentionally misquoting authority in violation of California Rules of Professional Conduct 5-200(C).

### **Certification**

- This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of ethics.
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