WHAT TO DO WHEN YOUR CLIENT PLANS TO LIE ON THE STAND

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Criminal defense attorneys often struggle with the idea of putting their client on the witness stand, especially if he/she has a criminal record, is not particularly well-spoken or doesn't have a plausible version of events that refutes or casts reasonable doubt upon the charges against him/her. Attorneys also know that juries want to hear the defendant's side of the story (never mind the "no adverse inference if he/she doesn't testify" rule), but if he/she does testify, he/she will be subject to cross examination which may not go well for the accused even if his/her story is the God's honest truth.

But what if the client makes it known to counsel that he intends to give false testimony (e.g. that he shot the victim in self defense when he already told you that he shot the victim as pay-back for ripping him/her off and didn't see any weapon in his possession or otherwise perceive any threat of harm). What's a lawyer to do?

The New York State Rules of Professional Conduct (NYRPC) and the American Bar Association (ABA) Rules of Professional Responsibility recognize that while criminal defense attorneys (like any other lawyer) cannot assert a frivolous defense (i.e. one not supported by the facts or law of the case), they are expected to defend their clients zealously and put the People through their paces, for example, by vigorous cross examination and meritorious arguments, to ensure that if the client is convicted, it is upon evidence that establishes every element of the crime charged beyond a reasonable doubt. (See NYRPC 3.1). This is because criminal defendants have a constitutional right to put on a defense, including testifying in their own behalf and to receive effective assistance of counsel. (see Rock v Arkansas 483 US 44 [1987], 466 US 668 [1984], People v Benevento 91 NY2d 708 [1998]).

While counsel cannot stop a defendant from testifying, he/she cannot make him/herself an accessory to the presentation of testimony (or other evidence) that he/she knows to false.

Rule 3.3 (a)(3) states that a lawyer shall not knowingly offer or use evidence the he/she knows to be false.

So, if counsel learns of his client's mendacious intentions before he takes the stand, counsel should, first, advise him/her not to give false testimony if for no other reason that it could lead to a prosecution for perjury (See PL 210.15-giving false sworn material testimony, a class D felony). More to the point, counsel has an ethical obligation never to try and put one over on the court which can not only kill counsel's reputation, but land him/her in boiling water with the Grievance Committee.

If the client is unpersuaded to abandon his/her plan to give false testimony, counsel should then consider advising the court of his/her predicament and request to be removed as the attorney of record. If the client is truly hell-bent on lying, however, it probably doesn't matter who his/her

lawyer is. So, the odds are that counsel won't be let off the hook unless the relationship with the client has deteriorated to the point that counsel can longer provide meaningful representation.

Assuming counsel remains in the picture, he/she may consider asking the judge to address the defendant (obviously outside the presence of the jury) and remind him/her of the potential consequences of lying under oath. (If the defendant is facing up to life in prison, however, the prospect of another two to seven years may pale). One option may be for the court to declare a mistrial rather than allow the defendant to sully the proceedings with false testimony. This is tantamount to kicking the can down the road only to risk tripping over it later when the same problem presents itself again.

Under the New York ethics rules, counsel is allowed to call the defendant to the stand and question him/her on direct examination with respect to those facts that counsel believes to be true. Then, when he/she reaches the point where the client's testimony is expected to diverge from the truth, counsel may ask: "what if anything else do wish to say, "and allow the defendant to give his answer. Counsel may not comment on this part of the testimony at all during summation.

This is not a particularly satisfying remedy since the jury will likely notice that counsel has distanced him/herself from the client and tacitly disavowed at least part of his testimony. Additionally, the prosecutor will undoubtedly take full advantage of the situation by portraying the defendant's testimony as unworthy of belief, (even by his own attorney). In this scenario, the jury charge on "falsus in uno falsus in sum" could be especially devastating.

Unlike civil attorneys who may or may not elicit testimony that they reasonably believe (but can't say for sure) is false, criminal defense counsel must give his/her client the benefit of the doubt and not refuse to elicit his/her testimony that may or may not be false. Of course, if the testimony is known to be false, counsel cannot, as noted above, play an active role in presenting it. (See Rule 1.0[k]: knowledge may be inferred from circumstances). As for any witness other than the defendant, counsel may or may not refuse to offer evidence that he/she reasonably believes is false.

The obligation to avoid the knowing use of false testimony includes the duty to take remedial measures to retract and repair any material falsehood that counsel learns of at the time or after the witness testifies. If on the spot, counsel could seek to have the witness correct his/her testimony (perhaps by impeachment, if allowed), and, if after the fact, counsel could confront the witness and put him/her back on the stand to correct the record.

In all likelihood, counsel would probably require court permission to recall the witness. If the witness refuses to cooperate, whether on Fifth Amendment grounds (in which case, he/she might need a lawyer), or for unjustifiable reasons, counsel may have to advise the court and opposing counsel and move to have the false testimony stricken from the record.

The decision whether or not to call the defendant as a witness is seldom an easy one, even when he/she is inclined to testify truthfully. It is all the more complicated when the client deems him/herself unconstrained by the oath to tell the truth, whole truth and nothing but. Hopefully, dilemmas of this nature are few and far between but if/when they occur, counsel will not be caught unaware. The truth may not set the defendant free, but counsel can take comfort in knowing that he/she did his/her part to represent him/her zealously and honorably within the rules governing the ethical practice of the law.