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Defense Counsel and Plea Bargain Perjury

Kevin C. McMunigal*

Our hypothetical frames the issue of client perjury in a way that is both topical and troubling given the role informants have played in wrongful convictions. In the following comments I juxtapose the lawyer's response to the perjury in our hypothetical scenario, which for convenience I refer to as a "cooperating witness scenario," with perjury from a client who proposes to testify at her own trial, which I refer to as a "classic scenario." To be clear, in a cooperating witness scenario the perjurious client proposes to testify *for the government* at a criminal trial at which the client *is not a defendant*. In a classic scenario, by contrast, the perjurious client proposes to testify *for the defense* at a criminal trial in which she *is a defendant*. Use of the word "classic" here reflects no empirical assessment of the relative frequency of this scenario. Rather, use of the label "classic" is based on my estimation that readers are more likely familiar with this scenario than the one posed in our hypothetical since the classic scenario has been the focal point of much commentary, the leading Supreme Court case on client perjury,¹ and a scene from a famous film frequently used in discussing client perjury.²

A lawyer's obligations in dealing with perjury have most frequently been analyzed and discussed in the context of the classic scenario. There has been considerable debate about, and commentators, courts, and ethics authorities have staked out a variety of competing positions on, the appropriate ethical course of action for a lawyer in this situation.³ Courts and commentators have also addressed perjury with some frequency in the context of a prosecutor calling a witness to testify at trial. Here there has been little debate or variation in positions. Prosecutors are uniformly viewed as having a constitutional and ethical obligation to avoid the use of perjured testimony. One of the things I find interesting about the cooperating witness scenario posed in our hypothetical is that it presents a blend of features from the classic scenario and the scenario of a prosecutor dealing with witness perjury. As in the classic scenario, defense counsel in our

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¹ The case is *Nix v. Whiteside*, 475 U.S. 157 (1986).

² The scene, from *ANATOMY OF A MURDER* (Columbia Pictures 1959), features Jimmy Stewart as a lawyer discussing with a client his potential testimony at his upcoming murder trial.

³ See, e.g., MONROE H. FREEDMAN & ABBE SMITH, *Ch. 6: The Perjury Trilemma*, in *UNDERSTANDING LAWYERS' ETHICS* 159–94 (3d. ed. 2004) (reviewing various positions and arguments that have been advanced over the past forty years about the lawyer's obligations regarding client perjury).

hypothetical is the focal point of the ethics analysis, the source of the perjury is the defense lawyer's client, and the client is charged with a crime. But, as in the prosecutorial scenario, the perjury here is intended to be offered by the prosecutor and will be offered to support conviction rather than acquittal.

I. THE RISK OF ERROR

One key difference between the cooperating witness scenario and the classic scenario is that the perjury in the cooperating witness scenario is inculpatory, while the perjury in the classic scenario is exculpatory. Accordingly, each creates risk of a different type of error. In the classic scenario, false exculpatory testimony increases the risk of an erroneous acquittal. In the cooperating witness scenario, false inculpatory testimony increases the risk of an erroneous conviction.

As reflected most clearly in our use of the "beyond reasonable doubt" standard of proof in criminal trials, we do not and should not view an erroneous conviction and an erroneous acquittal as equal in significance. Rather, conviction of an innocent person is a much more serious error than acquittal of a guilty person, a judgment that DNA exonerations throughout the country have dramatically illustrated and reinforced. The fact that the perjury in our hypothetical creates a risk of wrongful conviction rather than wrongful acquittal makes the case for the defense lawyer adopting a regulatory⁴ approach toward his client's perjury, entailing remedial action by the lawyer, significantly stronger in our hypothetical than in the classic scenario.

II. THE CLIENT'S INTERESTS

The client's interests that might be compromised by the lawyer taking a regulatory stance also differ significantly in the cooperating witness and classic scenarios. In the classic scenario, the client is on trial in a criminal case, a position

⁴ I use the term "regulatory" here as it is used by William H. Simon in *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

[The regulatory approach's] basic maxim is that the lawyer should facilitate informed resolution of the substantive issues by the responsible officials It sees the lawyer's basic function as contributing to the enforcement of the substantive law, and it inclines toward forbidding her to use procedural rules in ways that frustrate the enforcement of substantive norms. The most important way it does so is by giving the lawyer strong responsibilities as a distiller and transmitter of information. Her basic duty is to clarify the issues in ways that contribute to a decision on the merits, not to manipulate information to serve the client's goals. The job still involves advising the client on ways to advance her interests and presenting the client's case, but *it also involves a duty to develop and disclose adverse information that would be important to the responsible official* It refuses to exempt the lawyer from responsibility for circumstances that impede enforcement merely because her conduct has not affirmatively contributed to them. In particular, it imposes affirmative duties to share information and to correct misunderstanding.

Id. at 1085–86 (emphasis added).

in which our laws and legal ethics rules view a client as both needing and deserving the greatest degree of protection. Her liberty and, in a capital case, her life are at stake. The client is a direct adversary of the government, with its substantial powers and resources. The defense lawyer here acts as a shield to protect against injustice resulting from the asymmetry in power and resources between the government and an individual citizen inherent in criminal cases. The constellation of constitutional and statutory rights we recognize on behalf of a defendant in a criminal trial reflects our assessment that the weight of the client's interests in this scenario is great. Accordingly, in this setting we should have great concern about a regulatory role for defense counsel compromising his client's interests.

The defense lawyer in the cooperating witness scenario, by contrast, operates in a negotiation rather than a trial setting. The client's interest here is in entering a contractual relationship with the government to exchange truthful cooperation and testimony for a reduction in sentence.⁵ Instead of seeking protection from the state, the client in our hypothetical seeks the government's favor. Rather than offsetting an asymmetry in resources between the government and an individual defendant, the lawyer and his client seek to augment the informational and evidentiary resources of the prosecution.

The client's interest in cooperating and reducing her sentence is legitimate, one that her lawyer is, and should be, ethically bound to advance. We as a society do and should encourage criminals to cooperate, a view reflected in prosecutorial bargaining and judicial sentencing practices throughout the United States. But a client's interest in obtaining a sentence reduction in return for cooperation does not and should not carry the same weight as the interests of a client on trial in a criminal case. This lesser weight is reflected in the fact that we recognize no constitutional or statutory right to such a contractual exchange. The prosecutor is free to accept or reject such an offer of cooperation.

The fact that the client's interest in seeking a sentence reduction is of lesser weight than the interests of a client who is a defendant at a criminal trial makes the argument for the defense lawyer adopting a regulatory stance regarding his client's perjury stronger in our hypothetical than in the classic scenario.

⁵ For an example of an opinion that views a guilty plea agreement through the lens of contract law, see *United States v. Hyde*, 520 U.S. 670 (1997).

If the court accepts the agreement and thus the Government's promised performance, then the contemplated agreement is complete and the defendant gets the benefit of his bargain. But if the court rejects the Government's promised performance, then the agreement is terminated and the defendant has the right to back out of his promised performance (the guilty plea), just as a binding contractual duty may be extinguished by the nonoccurrence of a condition subsequent.

Id. at 677-78 (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, *LAW OF CONTRACTS* § 11-7 (3d ed. 1987); 3A ARTHUR A. CORBIN, *CORBIN ON CONTRACTS* § 628 (1960)).

III. AN ADVERSARY SYSTEM ARGUMENT

One may frame the debate over the appropriate response for a lawyer dealing with client perjury as a choice between regulatory and libertarian⁶ models of lawyer behavior. What might a proponent of the libertarian model argue in regard to the cooperating witness scenario?

Against the defense lawyer adopting a regulatory stance and in favor of a libertarian approach one might argue that the regulatory approach is inconsistent with the duty of confidentiality and may decrease the amount and quality of information the client shares with her lawyer. This loss of information in turn may decrease the lawyer's effectiveness and deprive him of the opportunity to dissuade the client from committing perjury. Is this risk of decreased effectiveness and loss of the opportunity to dissuade worth taking if other actors in our adversarial criminal justice system handle the task of detecting and defusing the cooperating client's perjury?

During the evidentiary phase of a trial, opposing counsel works to check witness perjury through cross-examination and various techniques of extrinsic impeachment. In a cooperating witness scenario, opposing counsel will use the plea agreement to challenge the cooperating client's testimony on grounds of bias. He will also challenge the client's credibility using any prior crimes, dishonest acts, and prior inconsistent statements. The opposing lawyer also typically draws the jury's attention to testimonial weaknesses during closing argument. Jurors are the final arbiters of witness credibility in our trial system, assigned primary responsibility for identifying and ignoring perjury. In the classic scenario, with both the prosecutor (as opposing counsel) and jurors assigned the task of guarding against perjury by a criminal defendant, one can argue it is redundant to assign this task as well to defense counsel.

This sort of "adversary system argument" is stronger in the cooperating witness scenario than it is in the classic scenario. In the cooperating witness scenario, in addition to opposing counsel (the lawyer representing Kingpin, the defendant against whom the client will testify) and jurors, there is another actor who can detect and defuse potential perjury—the prosecutor who decides whether or not to call the cooperating client as a witness. The prosecutor has a constitutional and ethical obligation to avoid the knowing introduction of perjury. She also has a strategic interest in avoiding the use of perjury. The Model Rules

⁶ Again I intend to use the term "libertarian" here as it is used by William H. Simon, *supra* note 4.

[The libertarian approach's] basic maxim is that the lawyer is obliged—or at least authorized—to pursue any goal of the client through any arguably legal course of action and to assert any nonfrivolous legal claim. In this approach, the only ethical duty distinctive to the lawyer's role is loyalty to the client. Legal ethics impose no direct responsibilities to third parties or the public other than those the system imposes on citizens generally.

Id. at 1085.

give her discretion not to introduce testimony suspected to be false.⁷ Thus, the prosecutor may screen out the cooperating client's perjury by refusing the offer of cooperation and not calling the client as a witness. In sum, while there are two potential intervening actors—opposing counsel and the jury—who will evaluate the client's testimony and may thwart the client's perjury in the classic scenario, there are three such actors in our hypothetical—the prosecutor, defense counsel for Kingpin, and the jury. For this reason, an adversary system argument against requiring the defense lawyer to adopt a regulatory role is stronger, at least on a theoretical level, than an adversary system argument against requiring the defense lawyer to adopt a regulatory stance in the classic scenario.

In light of what DNA exonerations have revealed in recent years about the sources of wrongful convictions, such a theoretical adversary system argument is likely to prompt an empirical response. Although a number of participants in our adversary system are responsible for detecting perjury in a cooperating witness scenario, DNA exonerations and subsequent investigations have shown that those participants have failed to prevent informant perjury from corrupting verdicts in a shocking number of cases. False testimony from cooperating witnesses seeking reduced prison sentences, such as the client in our hypothetical, has repeatedly been identified as contributing to wrongful convictions, suggesting that prosecutors and police have failed to detect such perjury, defense counsel have failed to expose such perjury through cross-examination and other impeachment techniques, and jurors have failed to identify and ignore such perjury.

IV. WHAT SHOULD THE ETHICS RULES ALLOW AND REQUIRE OUR LAWYER TO DO?

Of the competing arguments reviewed above, I find most persuasive the ones in favor of a regulatory approach for defense counsel in our hypothetical scenario. In particular, the fact that the testimony is intended to support conviction rather than acquittal convinces me that the defense lawyer's ethical obligations in the cooperating witness scenario should be seen as more analogous to the obligations of a prosecutor dealing with witness perjury than the obligations of a defense lawyer dealing with client perjury in the classic scenario.

So what, in my view, should the ethics rules allow and require the lawyer to do? They should require him first to try to dissuade his client from offering the perjury as part of a plea agreement by emphasizing that such perjury is immoral, illegal, and against the client's self-interest. The potential negative impact on the client of being caught committing perjury, or even suspected of having committed perjury by either the prosecutor or the judge who eventually sentences the client, is substantial. Perjury is a crime. Making false statements to the prosecutor and the police officers likely to interview the client to assess her viability as a witness may

⁷ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) ("A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.").

also be a criminal offense.⁸ Even if the client were neither charged nor convicted of perjury or making false statements to a government official, the commission of such crimes or even strong suspicion of commission of such crimes could easily prompt the prosecutor to retract the plea agreement along with its benefits and move both the prosecutor and the sentencing judge to adopt a more punitive posture toward the client at sentencing. In short, the client's perjured testimony scheme may well result in a lengthier rather than a shorter sentence.

Our hypothetical suggests the cooperating client is unable to provide much if anything in the way of corroboration of her testimony. If so, a competent defense lawyer should stand a strong chance of dissuading the client from offering the perjured testimony as part of a guilty plea offer. If the lawyer fails in dissuading the client on grounds of immorality, illegality, and self-interest, the ethics rules should allow him then to threaten to reveal the client's perjury to the prosecutor as a last resort in his dissuasion effort.

If the client insists on making the offer of perjured testimony, the lawyer should be allowed to reveal the perjury to the prosecutor, but given discretion about when to make that revelation. The prosecutor and police may find the client unconvincing and unlikely to be an effective witness at trial, especially if there is little or no corroboration of her testimony. For these reasons, the prosecutor may decide not to enter a cooperation agreement with the client. If that happens, revelation of the intended perjury would be unnecessary.

If the prosecutor, though, decides to enter the cooperation agreement and call the client as a witness, the ethics rules should require the lawyer to "take remedial measures," including revelation if that is the only route available to defuse the perjury.

⁸ *See, e.g.*, 18 U.S.C. § 1001 (2010) ("whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined . . . [or] imprisoned not more than 5 years . . . or both."); *United States v. Rodgers*, 466 U.S. 475, 477 (1984) ("[t]he statutory language [of 18 U.S.C. § 1001] clearly encompasses criminal investigations conducted by the FBI and the Secret Service, and nothing in the legislative history indicates that Congress intended a more restricted reach for the statute.").