

# Obligations of Prosecutors and Defense Attorneys to Prevent False Testimony

As officers of the court, attorneys are charged with the duty to ensure that evidence and testimony presented to the court are truthful. As counsel for their



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clients, attorneys are also charged with the duty to provide competent and zealous representation. These two duties conflict when a witness or a criminal defendant intends to offer false evidence or perjured testimony.

However, it is well-settled that the ethical obligation to provide competent and zealous representation cannot be relied upon to justify the use of perjured testimony or false evidence. Accordingly, attorneys have certain ethical obligations when confronted with a situation where a witness offers or intends to offer false testimony in a criminal case.

## Duty to Prevent False Evidence and Testimony

Permitting the use of evidence or testimony the attorney knows to be false, or merely turning a blind eye towards evidence or testimony the attorney believes to be false, is unethical, and cannot be justified by the duty to provide competent and zealous representation. The duty to provide competent and zealous representation is “limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth.”<sup>1</sup>

These limitations require that an attorney bear the responsibility of “preventing false or perjured testimony and calling only those witnesses whom he believes to be truthful witnesses testifying to facts as they understand them to be[.]”<sup>2</sup> An attorney must not elicit testimony from a witness that the attorney knows or believes to be false.<sup>3</sup>

Attorneys are also charged with an “active affirmative duty to protect the administration of justice from perjury and fraud, and that duty is not performed by allowing his subordinates and assistants to attempt to subvert justice and procure results for his clients based upon false and perjured testimony.”<sup>4</sup>

## Duties under Rules 3.3 and 3.4

Rule 3.4 of the New York Rules of Professional Conduct expressly prohibits attorneys from “knowingly us[ing] perjured testimony or false evidence,” and “participat[ing] in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.”<sup>5</sup> Any attorney who participates in the use or creation of false evidence or perjured testimony, including eliciting from a witness testimony that the attorney knows or believes to be false, is subject to disciplinary sanctions.

For example, if an attorney whose client is charged with possession of stolen property suggests that the client testify falsely by denying knowledge that the property was stolen, that attorney would

be subject to sanctions, such as suspension from the practice of law.<sup>6</sup>

The duty to prevent frauds upon the court also includes disclosing frauds upon the court. If the attorney discovers that evidence or testimony given by a witness is false, the attorney has a duty to disclose it to the court.<sup>7</sup> Rule 3.3(a) of the New York Rules of Professional Conduct states that attorneys “shall not knowingly...offer or use evidence that the lawyer knows to be false.”<sup>8</sup>

Rule 3.3(a) also requires that if an attorney, client, or witness offers evidence that the attorney knows to be false, or if the client intends to engage in “criminal or fraudulent conduct related to the proceeding”, the attorney “shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”<sup>9</sup> Pursuant to Rule 3.3(c), this obligation applies “even if compliance requires disclosure of information otherwise protected” as confidential under Rule 1.6.<sup>10</sup> Accordingly, the duty to prevent frauds upon the court trumps the duty of confidentiality, and, when disclosing frauds upon the court, an attorney must disclose even confidential information.

These rules apply to all attorneys, including prosecutors and defense attorneys alike.

## Prosecutors

Prosecutors are held to high standards of conduct in criminal cases, and are duty-bound to seek justice above all else. As Justice Sutherland stated in *Berger v. United States*:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>11</sup>

In keeping with the fact that the goal of prosecutors is to do justice, a prosecutor is obligated to prevent her witnesses from giving false testimony and is obligated to correct false testimony if she knows that the witness has given false testimony.<sup>12</sup>

## Criminal Defense Attorneys

Just as the law imposes limitations on the methods by which a prosecutor may prove her case, the law also imposes limitations on the methods by which criminal defense attorneys may zealously represent their clients.

The duty of a defense attorney to competently and zealously represent his client must be “circumscribed by his or her duty as an officer of the court to serve the truth-seeking function of the justice

system.”<sup>13</sup> While defense attorneys must pursue all reasonable means to represent their clients’ interests, an attorney must not go so far as to present or permit the use of evidence in court that the attorney knows or believes to be false.<sup>14</sup>

Criminal defense attorneys potentially face a unique ethical dilemma where a client with a right to testify wishes to testify falsely. Although a defendant in a criminal case has a right to testify on his own behalf,<sup>15</sup> that right does not include a right to commit perjury.<sup>16</sup>

Accordingly, the duty of attorneys to refrain from participation in a witness’s effort to commit perjury applies even if the witness is a criminal defendant. A criminal defense attorney confronted with such a situation “must contend with competing considerations - duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other.”<sup>17</sup>

## Guidance on Balancing Duties

Fortunately, the Supreme Court of the United States and the New York Court of Appeals have provided guidance on how to balance these duties without violating either. If a defense attorney is faced with a client who intends to commit perjury, the attorney is ethically obligated to take action to prevent such false evidence being presented to the court.

First, the attorney bears the initial responsibility to attempt to dissuade the client from pursuing the unlawful course of action.<sup>18</sup> In *Nix v. Whiteside*, the Supreme Court held that the defense attorney acted appropriately by admonishing his client that he would seek to withdraw from representation and disclose his perjury to the court if he testified falsely.<sup>19</sup>

If the client insists on giving perjurious testimony, despite such an admonishment, the attorney may seek to withdraw from the case.<sup>20</sup> However, the Court of Appeals has noted that a substitution of counsel may do nothing to resolve the problem of receiving perjurious testimony, and could even facilitate the fraud that the defendant wishes to perpetrate upon the court.<sup>21</sup>

The Court of Appeals has held that if the attorney cannot dissuade the defendant from giving perjurious testimony, the attorney - who still has a duty to honor the defendant’s right to testify on his own behalf - “should refrain from eliciting the testimony in traditional question-and-answer form and permit defendant to present his testimony in narrative form.”<sup>22</sup> To satisfy the duty to prevent and disclose frauds upon the court, the attorney should also inform the court of the defendant’s perjury.<sup>23</sup>

Furthermore, the attorney must refrain from using the perjurious testimony in making arguments to the court or to a jury.<sup>24</sup>

## Cases from the Court of Appeals

Two cases from the Court of Appeals illustrate how defense attorneys can properly balance their duties when confronted with a client who intends to

commit perjury. In *People v. DePallo*, the Court of Appeals held that a defense attorney properly balanced these duties by notifying the court that his client had offered perjured testimony and refusing to use that testimony in his closing argument to the jury.<sup>25</sup> Similarly, in *People v. Andrades*, the Court of Appeals held that a defense attorney acted properly when he disclosed to the court that his client’s intent to testify at a pre-trial suppression hearing created an ethical problem, from which the court inferred that the defendant intended to testify perjurally.<sup>26</sup>

In reaching its holding, the *Andrades* court noted that a client’s intent to commit a crime - such as perjury - is not a protected confidence or secret.<sup>27</sup> In both cases, the Court of Appeals held that the defendants were not deprived of their rights to effective assistance of counsel, and that the defense attorneys did not violate client confidentiality by disclosing the defendants’ perjurious intentions to the court.<sup>28</sup> Accordingly, a defense attorney whose client intends to commit perjury should follow this course of action, to ensure that he does not violate his obligations to his client or to the court.

In criminal cases, prosecutors and defense attorneys alike must act lawfully and ethically, and must respect the fundamental principle of justice that a trial is a search for the truth. When confronted with a difficult situation where a witness for the prosecution or the defense intends to offer false evidence or testimony, including the uniquely challenging situation created when a criminally-charged client intends to testify perjurally, the law demands that all attorneys honor the duties owed to the court and the justice system.

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- Nix v. Whiteside*, 475 U.S. 157, 166 (1986).
- In re Schapiro*, 144 A.D. 1, 9 (1st Dep’t. 1911).
- People v. Salguero*, 107 Misc. 2d 155, 156 (Sup. Ct. N.Y. County 1980).
- In re Robinson*, 136 N.Y.S. 548, 551 (1st Dep’t. 1912).
- 22 NYCRR 1200, Rule 3.4(a)(4)-(5).
- In re Alderman*, 80 A.D.2d 184 (2d Dep’t. 1981).
- People v. DePallo*, 96 N.Y.2d at 441, citing *Nix*, 475 U.S. at 168-170.
- 22 NYCRR 1200, Rule 3.3(a)(3).
- 22 NYCRR 1200, Rule 3.3(a)(3) - (b).
- 22 NYCRR 1200, Rule 3.3(c).
- Berger v. United States*, 295 U.S. 78, 88 (1935).
- People v. Steadman*, 82 N.Y.2d 1, 8 (1993).
- People v. DePallo*, 96 N.Y.2d 437, 441 (2001).
- Nix, supra*; *People v. Andrades*, 4 N.Y.3d 355 (2005); *In re Malone*, 105 A.D.2d 455, 458 (3d Dep’t. 1984).
- Rock v. Arkansas*, 483 U.S. 44 (1987).
- United States v. Dunnigan*, 507 U.S. 87, 96 (1993); *Harris v. New York*, 401 U.S. 222, 225 (1971).
- DePallo*, 96 N.Y.2d at 440.
- Nix*, 475 U.S. at 169-170; *Andrades*, 4 N.Y.3d at 360; *DePallo*, 96 N.Y.2d at 441.
- Nix*, 475 U.S. at 171.
- Andrades*, 4 N.Y.3d at 360.
- DePallo*, 96 N.Y.2d at 442, citing *Salguero*, 107 Misc. 2d at 157-158.
- Andrades*, 4 N.Y.3d at 360.
- DePallo*, 96 N.Y.2d at 441, citing *Nix*, 475 U.S. at 168-170.
- Andrades*, 4 N.Y.3d at 360.
- DePallo*, 96 N.Y.2d at 437.
- Andrades*, 4 N.Y.3d 355.
- Id.* at 361-362 (2005) (citations omitted).
- Id.* at 360; *DePallo*, 96 N.Y.2d at 442.